

IN THE INCOME TAX APPELLATE TRIBUNAL “B” BENCH : KOLKATA

[Before Hon’ble Shri S.S. Godara, JM & Shri M.Balaganesh, AM ]

I.T.A No. 60/Kol/2017

Assessment Year : 2012-13

ACIT, Circle-32, Kolkata

-vs-

M/s CISC-CMAT(JV)

[PAN: AAAAC 4696 B ]

(Appellant)

(Respondent)

For the Appellant : Shri S. Dasgupta, Addl. CIT DR

For the Respondent : Shri Saurabh Gupta, Advocate

Date of Hearing : 23.07.2018

Date of Pronouncement : 01.08.2018

**ORDER**

**Per M.Balaganesh, AM**

1. This appeal by the Revenue arises out of the order of the Learned Commissioner of Income Tax(Appeals)-9, Kolkata [in short the Id CIT(A)] in Appeal No. 54/CIT(A)-9/Cir-32/2015-16/Kol dated 27.10.2016 against the order passed by the ACIT, Circle-32, Kolkata [ in short the Id AO] under section 143(3) of the Income Tax Act, 1961 (in short “the Act”) dated 18.03.2015 for the Assessment Year 2012-13.

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in deleting the disallowance made towards transportation charges in the sum of Rs. 57,16,859/-, in the facts and circumstances of the case.

3. The brief facts of this issue is that the assessee is an association of persons engaged in the business of mining works contract. The original return of income was filed by the assessee on 29.09.2012. The revised return was filed on 07.03.2014 declaring total income of Rs. 3,47,940/-. The assessee is a joint venture (JV) comprising of two firms- M/s Calcutta Industrial Supply Corporation (CISC) and M/s Coal Mines Associated Traders (CMAT). The JV was constituted by an instrument executed on 19.10.2006 solely and exclusively for the purpose of excavation and transportation of soil, rocks and coal for and on behalf of Eastern Coal Fields Ltd. (ECL) at its Nakrakonda Mines, Bankola, Dist. Burdwan, West Bengal. During the year, the JV carried out the work by sub-contracting the entire work to M/s Ambey Mining Pvt. Ltd. (AMPL). On going through the records and documents submitted, the Id AO observed that the entire contract from M/s ECL has been sub-contracted to M/s Ambey Mining Pvt. Ltd. (AMPL) and the difference in rates as per contract with M/s ECL & M/s AMPL is very meager. The rates quoted to ECL includes all overheads, incidental expenses and profit of the organization (as per page no.62 of the agreement with ECL, point no. 7). A comparison of the rate received from M/s ECL and rate being paid to M/s AMPL is as under:

Nature of Work	Rate received from ECL	Rate paid to AMPL	Difference
Soil Excavation & Transportation	Rs. 39.00	Rs. 38.20	Rs. 0.80
Rock Excavation and Transportation (0-1) km	Rs. 51.83	Rs. 50.85	Rs. 0.98
Rock Excavation and Transportation (1-2) km	Rs. 59.86	Rs. 58.65	Rs. 1.21
Soil Excavation and Transportation	Rs. 32.00	Rs. 31.35	Rs. 0.65

3.1. As per the details filed by the assessee, the Id. AO observed that the assessee had incurred transportation expenses of Rs. 57,16,859/-. This amount has been paid to M/s Coal Mining Traders Pvt. Ltd. (CMTPL) in the sum of Rs. 27,16,859/- and to M/s

Ambey Mining Pvt. Ltd. in the sum of Rs. 30,00,000/-. He observed from the details filed by the assessee that these expenses were incurred only for transportation of coal. He observed that the agreement with M/s Eastern Coalfields Ltd. is for excavation and transportation alone. He observed that the assessee does not have any contract with M/s CMTPL and M/s AMPL for any such services to be provided. He observed that since the entire work has been sub-contracted to M/s AMPL, thus, the charges of Rs. 57,16,859/- paid to the two parties is included in the charges being paid to M/s AMPL and accordingly disallowed the transportation charges of Rs. 57,16,859/- in the assessment.

4. The ld. AO also directed the assessee to file the details of TDS on transportation charges of Rs. 57,16,859/- and correlate the same with Form 26Q filed by the assessee. In response thereto, the assessee stated that no tax was deducted at source on these payments as per section 194C(6) of the Act. The assessee filed copies of revised form 26Q vide letter dated 13.03.2015 before the ld. AO. The ld. AO observed that no documentary evidences to substantiate that, M/s AMPL and CMTPL were in the business of 'plying, hiring or leasing goods carriages', so as to fall within the ambit of 194C(6) of the Act, were filed by the assessee. Accordingly, he stated that the subject mentioned expenditure would be disallowable even u/s 40(a)(ia) of the Act. The ld. AO further observed that even if the assessee is not obliged to deduct tax at source in terms of Section 194C(6) of the Act, still the disallowance is to be made inasmuch as the assessee had not made compliance as mandated in 194C(7) of the Act by furnishing the requisite documents before the competent authority. Accordingly, he held that the disallowance is to be made in the sum of Rs. 57,16,859/- both on merits as well as u/s 40(a)(ia) of the Act.

5. Before the ld. CIT(A), the assessee submitted as under:

“3.3 During the relevant previous year the assessee AOP paid the transportation charges of Rs. 57,16,859/- to the following two parties for transportation of Coal/OB for re-handling of the Coal.

Coal Mines Associated Traders Pvt. Ltd.	Rs. 27,16,859/-
Ambey Mining Pvt. Ltd.	Rs. 30,00,000/-

The aforesaid expenses have been disallowed by the Assessing Officer on the alleged ground that when the assessee AOP had sub-contracted the activities to Ambey Mining Pvt. Ltd., the said expenses were not to be borne by the assessee AOP and that there is no agreement in this regard. The assessee AOP however had explained the Assessing Officer that these payments were made for re-handling of coal/OB (overburdened) and that the work order/agreement with Ambey Mining Pvt. Ltd. specifically provided that the order/agreement with Ambey Mining Pvt. Ltd. specifically provided charges for re-handling of Coal/OB has to be paid separately by the assessee JV. A copy of the supplementary work order dated 17<sup>th</sup> May, 2011 which evidenced the said fact is enclosed with this written submissions. The Assessing Officer however disregarded the explanation of the Assessee on irrelevant considerations and baseless contentions. Even in the Assessment order passed for the subsequent assessment year 2013-14, a copy of which is enclosed in the paper book at pages 72-76, no such disallowance has been made.

3.3.1. The Assessing Officer further held and observed that the aforesaid expenses further needs to be disallowed since the Assessee AOP failed to deduct tax at source under section 194C of the Act on these payments. However, the Assessee AOP submitted before the Assessing Officer that the Appellant was not responsible for such deduction of TDS in accordance with the provisions contained in sec. 194C(6) of the Act.

3.3.2. Although the Assessing Officer accepted that the Assessee was not required to deduct TDS as per the provisions of sec. 194C(6) of the Act, yet the amount is disallowable since the Appellant AOP did not submit Form No.26Q with the respective authority within the time allowed under section 194C(7) read with Rule 31A 'of the Rules. However, the requisite return was duly filed by the Assessee AOP. The said returns filed by the assessee JV has been enclosed at pages 11 to 31 of the Paper-Book. Even otherwise, assuming but not admitting that the said returns had not been filed, yet such disallowance cannot be made under section 40(a)(ia) for only such non filing, details to income tax authority in prescribed format within the prescribed time. Any default in any such requirement would not make the Assessee liable to deduct TDS which was otherwise not deductible in as much as the conditions of section 194C were satisfied. Reliance in this connection is placed on the decision of the Hon'ble Gujarat High Court rendered in the case of CIT v. ValibhaiKhanbhai Mankad (2012) 28 taxmann.com 119 (Guj) (Pages 15 to 20 of case law PB) wherein the court has observed as under:

*"In our view, therefore, the conditions of further proviso of section 194C(3) are satisfied, the liability of the payee to deduct tax at source would cease. The requirement*

*of such payee to furnish details to the income tax authority in the prescribed form within prescribed time would arise later and any infraction in such a requirement would not make the requirement of deduction at source applicable under sub-section (2) of section 194C of the Act. In our view, therefore, the Tribunal was perfectly justified in taking the view in the impugned judgment. It may be that failure to comply such requirement by the payee may result into some other adverse consequences ~r so provided under tile Act. However, fulfillment of such requirement cannot be linked to the declaration of tax at source. Any such failure therefore cannot be visualized by adverse consequences provided under section 40(a)(ia) of the Act.*

*10. When on the basis of the record it is not disputed that the requirements of further proviso were fulfilled, the assessee was not required to make any deduction at source on the payments made to the sub-contractors. If that be our conclusion, application of section 40(a)(ia) would not arise since, as already noticed, section 40(a)(ia) would apply when there is a requirement of deduction of tax at source and such requirement is either not fulfilled or having deducted tax at source is not deposited within prescribed time."*

The Id. CIT(A) appreciated the aforesaid contentions and deleted the disallowance made by the Id. AO on merits as well as u/s 40(a)(ia) of the Act. Aggrieved the revenue is in appeal before us.

6. We have heard rival submissions. We find from the facts narrated above and from the submissions being taken due cognizance by the Id. CIT(A) which is not disputed before us by the revenue, the assessee had paid 30,00,000/- to sub-contractor M/s AMPL for re-handling for coal as per agreement with the sub-contractor. We find that Rs. 27,16,859/- was paid to another sub-contractor M/s CMTPL is allowable as deduction. It is not in dispute that the assessee had obtained PAN from these two parties as mandated in section 194C(6) of the Act and had filed revised form 26Q before the competent authority. Hence, the assessee had also complied with section 194C(7) of the Act. Even otherwise the decision of Hon'ble Gujarat High Court in the case of CIT v. ValibhaiKhanbhai Mankad (2012) 28 taxmann.com 119 (Guj) would support the case of the assessee wherein it was held as under:

*"In our view, therefore, the conditions of further proviso of section 194C(3) are satisfied, the liability of the payee to deduct tax at source would cease. The requirement of such payee to furnish details to the income tax authority in the prescribed form*

*within prescribed time would arise later and any infraction in such a requirement would not make the requirement of deduction at source applicable under sub-section (2) of section 194C of the Act. In our view, therefore, the Tribunal was perfectly justified in taking the view in the impugned judgment. It may be that failure to comply such requirement by the payee may result into some other adverse consequences ~r so provided under tile Act. However, fulfillment of such requirement cannot be linked to the declaration of tax at source. Any such failure therefore cannot be visualized by adverse consequences provided under section 40(a)(ia) of the Act.*

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We also find that the assessee had placed on record a certificate of Chartered Accountant under first proviso to section 201(1) of the Act to prove that the aforesaid payees have duly reflected the subject mentioned receipts from the assessee JV in their return of income and had paid taxes thereon. Hence we held that there cannot be any disallowance u/s 40(a)(ia) of the Act in respect of above mentioned payments. The assessee had also placed on record supplementary work order dated 17.05.2011 issued by the assessee JV to M/s AMPL which is treated as part of the original terms and conditions and would be effective from the date of original work order. The terms agreed thereon are as under:

*"As per the terms and conditions agreed, we hereby undertake to borne the expenditure incurred on re-handling of Coal/Overburdened. It is hereby agreed that charges will be payable on mutual consent of the both parties, if any, for re-handling of Coal/Overburdened and the same will be over and above the consideration fixed in the original work contract dated 25.03.2011. The other terms & conditions remain same as per earlier/original work order No. CISC-CMAT(JV)/AMPL/W.O./2011/05 dated 25.03.2011."*

We also find that the assessment was framed u/s 143(3) of the Act dated 07.09.2015 in the case of assessee JV for the assessment year 2013-14 wherein no disallowance in this regard has been made by the Id. AO even though the similar types of payments were

