

IN THE INCOME TAX APPELLATE TRIBUNAL "SMC" BENCH,
MUMBAI

BEFORE SHRI R. C. SHARMA, AM AND SHRI AMARJIT SINGH, JM

आयकर अपील सं/ I.T.A. No.4938/Mum/2017
(निर्धारण वर्ष / Assessment Year: 2007-08)

Devisingh Manana G-15, Moriya Estate, Oshiwara Link Road, Andheri (W), Mumbai-400053.	<u>बनाम/</u> Vs.	ACIT 32(1) Dy Commissioner of Income Tax, Bandra-Kurla Complex, Bandra (E), Mumbai- 400051.
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABPM4248D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)
Revenue by:	Shri Chaitanya Anjaria (AR)	
Assessee by:	Shri Vimal Punmiya	

सुनवाई की तारीख / Date of Hearing: 03.08.2018
घोषणा की तारीख /Date of Pronouncement: 29.08.2018

आदेश / O R D E R

PER AMARJIT SINGH, JM:

The assessee has filed the present appeal against the order dated 10.03.2017 passed by the Commissioner of Income Tax (Appeals)-44 Mumbai [hereinafter referred to as the "CIT(A)"] relevant to the AY. 2007-08.

2. The assessee has raised the following grounds: -

- “1. *The Ld. CIT(A) has grossly erred in confirming the reopening of the assessment u/s 147 r.w.s. 148 of the Act by the AO whereas the appellant has disclosed all the facts*

- of the case together with all information required by the AO at the time of original assessment u/s 143(3).*
2. *The Ld. CIT(A) has grossly erred in confirming the addition of Rs.160350/- non-deduction on account of tax at source on transport charges paid by the appellant u/s40A(ia) of the Act and also erred not accepting the submission of the appellant that provision of section 194C(1) was not applicable for the A.Y.2007-08.*
 - 3.(a) *The CIT(A) has grossly erred in confirming the addition of Rs.234430/- being payments made to the contractor for the previous year relevant to A.Y.2006-07 on which the TDS has been deducted in the year of expenses claimed u/s 40(A)(3A) of the Act.*
 - (b) *Without prejudices the Ld. CIT(A) has also grossly erred in not restricting disallowance u/s 40A(3A) to 20% of the amount of Rs.2,344,30/-.*
 4. *The appellant craves right to amend, alter or add any ground of appeal before the hearing.”*

3. The brief facts of the case are that the assessee filed his return of income on 27.10.2007 declaring total income to the tune of Rs.20,19,890/-. Thereafter, the assessment was completed u/s 143(3) of the Act on 30.10.2009 assessing the total income at Rs.21,61,630/-. The assessee is an individual and is the proprietor of M/s. National Marble Arts, engaged in the business of Civil Contractor. The case of the assessee was reopened by issuance of notice u/s 148 of the Act dtd. 25.03.2013 after obtaining the necessary approval of the CIT-25, Mumbai. The case was reopened for the reasons recorded as under: -

"In this case the assessee firm filed its return of income for A.Y. 2007-08 declaring total income at Rs. 20,19,890/-. However, on verification it is found that the assessee is a contractor under taking Civil Work, the receipts of which are subject to TDS. The assessee claimed credit for Rs 4,34,054/- on account of TDS. During the course of assessment proceedings, the assessee has furnished list of Saler parties. Not all the TDS claimed was appearing in the AST-TDS module. The AO neither called for the TDS certificates during assessment proceedings nor cross

verified with the sale parties for the amounts paid by them. The assessee filed the TDS certificates along with the application u/s. 154 after completion of assessment proceedings. It is seen from the TDS certificates filed that in a few cases, the amounts mentioned as paid are in excess of the amounts offered to tax by the assessee. The total difference amounting to Rs.8,11,448/- cannot be on account of the sale being Net of Works Contract Tax as the assessee has debited Works Contract Tax separately in his P & L a/c. This is nothing but the suppressed sales of the assessee.

Thus there is an under assessment of income of the assessee to the tune of Rs.8,11,448/- on which the tax effect comes to the tune of Rs.8,11,448/- on which the tax effect comes to Rs..3,63,260/-.

Moreover, since the assessee is a Contractor under taking Civil Work, the receipt of which are subject to TDS, any contractual payments made by the assessee would be in the nature of 'Sub Contract' and subject to TDS u/s. 194C(2) of the Act.

It is seen from the details filed (Labour charges exceeding Rs.50,000 paid) that the assessee has paid an amount of Rs.59,41,404/- during the year as labour charges. The assessee has also filed confirmation of two labour parties Le. Plasto Paint (Rs. 32,70 lacs) and Shri Shankar Lal Kumawat {Rs. 2.51 lacs) It can be seen from the said confirmation that no TDS has been deducted on any payments made during the year. Thus it is clear that the TDS has been deducted on labour charges paid as required under the provisions of section 194C(2) of the Act. Consequently, the expenses claimed on account of labour charges paid amounting to Rs,59,41,404/- should have been disallowed as per the provisions of section 40(a)(ia) of the Act, Similarly, the assessee has paid transport charges amounting to fls.2,62,562/- to the parties on which, no TDS appears to have been deducted. Hence as per the provisions of sec. 40A(ia) the said amount had to have been from the expenses claimed.

Thus there is an under assessment of income of the assessee to the tune of Rs.62,03,966/- on which the tax effect comes to Rs.27,77,375/-.

Further, on going through the bank statement it is seen that the assessee has made payment of Rs.2,34,430/- by way of bearer cheque and not by way of account payee cheque as required under the provisions of sec.40A(3). In such cases, 20% amounting to Rs.46,886/- should have been disallowed.

Thus there is an under assessment of income of the assessee to the tune of Rs.46,886/- on which the tax effect comes to Rs.27,77,375/-.

Therefore, I have reasons to believe that income to the tune of Rs.70,62,300/- has escaped assessment for the A.Y.2007-08 in view of the provisions of section 147 of the I.T. Act, 1961."

4. In response to the notice, the assessee filed his return of income which he had filed earlier on 08.11.2007, thereafter, the assessment of the assessee was completed by assessing the income to the tune of Rs.25,56,410/-. Feeling aggrieved, the assessee filed an appeal before the CIT(A) who also dismissed the appeal of Assessee, therefore, the assessee has filed the present appeal before us.

ISSUE NO.1:-

5. At the time of argument, this issue has not been pressed by the assessee, therefore, this issue is being decided in favour of the revenue being not pressed.

ISSUE NO.2:-

6. Under this issue the assessee has challenged the confirmation of disallowance made u/s 40A(ia) of the Act to the tune of Rs.2,34,430/-. At the very outset, the Ld. Representative of the assessee has argued that the assessee has paid the earlier outstanding amount in the A.Y.2007-08 in view of the provision of sub-section 3 u/s 40A of the Act which was not applicable because the same was applicable in the A.Y.2008-09, therefore, in the said circumstances no disallowance is liable to be made retrospectively. The Ld. Representative of the assessee has argued that without any prejudice the assessee accepts to the extent of 20% of the disallowance of the claim, therefore, the claim of the assessee is liable to be

accepted to that extent. The total disallowance of the assessee is to the tune of Rs.2,34,430/- u/s 40A(ia) of the Act. Without going into the merits of the issue, we agreed to the extent of disallowance to the extent of 20% of the claim as accepted by the assessee, therefore, the claim of the assessee is hereby accepted to that extent of the assessee and accordingly we decide this issue in favour of the assessee against the revenue.

ISSUE NO.3:-

7. Under this issue the assessee has challenged the addition of Rs.1,60,350/- on account of non-deduction of transport charges, the contention of the Assessee is that the payment of the assessee is less than 20,000/-, therefore, there was no need to deduct the TDS. The contention of the assessee is that the assessee made the payment of Rs.1,60,350/- to M/s.Standard Transport Company. Therefore, the provision u/s 40A(ia) of the Act was not applicable. Now, the Assessing Officer disallowed the same on the ground of that the assessee failed to deduct the TDS. The nature of payment seems different. The assessee made the payment to the transporter towards carriage inwards and carriage onwards and claimed deduction of the same. This fact needs to verify at the end of the AO because the facts can only reveal about the applicability of provision of Section 40A(ia) Rule 194C (k) of the Act. In the said circumstances, we set aside the finding of the CIT(A) on this issue and restored the issue before the AO to re-verify of the facts of the case and to decide the

matter of controversy in accordance with law after giving an opportunity of being heard to the assessee. Accordingly, this issue is decided in favour of the assessee against the revenue.

8. In the result, the appeal filed by the assessee is hereby ordered to be partly allowed.

Order pronounced in the open court on 29.08.2018.

Sd/-

(R. C. SHARMA)

लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 29.08.2018.

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

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//

Sr. Private Secretary

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai