आयकर अपीलीय अधीकरण, न्यायपीठ – "A" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH: KOLKATA
(समक्ष)श्री पी. एम.जगताप, उपाध्यक्ष **एवं** श्री ए.टी. वर्की,न्यायिक सदस्य)
[Before Shri P.M. Jagtap, Vice President & Shri A. T. Varkey, JM]

I.T.A. No. 1095/Kol/2016
Assessment Year: 2011-12

Income-tax Officer, Wd. 1(2), Burdwan	Vs.	M/s. Cemco Marketing (PAN: AADFC0235E)
Applicant		Respondent

Date of Hearing	07.01.2019
Date of Pronouncement	23.01.2019
For the Applicant	Shri C. J. Singh, Addl. CIT, Sr. DR
For the Respondent	Shri Bisweswar Ghosh, Advocate

ORDER

Per Shri A.T.Varkey, JM

This appeal has been filed by the Revenue against the order of Ld. CIT(A), Burdwan dated 09.02.2016 for AY 2011-12.

2. Ground nos. 1 and 2 of Revenue's appeal is against the order of Ld. CIT(A) in deleting the disallowance of Rs.1,63,09,574/- made u/s. 40(a)(ia) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") representing 'Secondary Freight Charges' expenses which was incurred on transportation of cement to the dealers premises as per agreement between assessee , C&F agent and principal cement companies and also against the action of Ld. CIT(A) in holding that the assessee was not required to deduct tax at source u/s. 194C of the Act by observing that the payments were not made to any contractor or sub-contractor.

3. Briefly stated facts are that the assessee is C & F agent of M/s. Ultratech Cement LTD., which is a cement manufacturer. During the assessment proceedings, the AO observed that the assessee claimed secondary freight charges in the P&L Account amounting to Rs.1,63,09,574/- and at the time of assessment proceedings the assessee was asked to provide an explanation as to why his claim of expenditure should not be

disallowed u/s 40(a)(ia) of the Act for not complying with the provisions of section 194C of the Act. To this query/explanation sought, the assessee responded that the said expenditure was re-imbursement expenditure and the payments were not made to any contractor or sub contractor and that the expenses were not in pursuance of the assessee's business but that the assessee only acted as a C&F Agent and facilitated such payments on behalf of the cement company. The AO did not agree and was of the opinion that section 194C spoke of tax deduction by the person making payment and when the payments were made under some contract and so disallowed the same and was added to the total income of the assessee. Aggrieved, assessee preferred an appeal before Ld. CIT(A), who allowed the assessee's ground of appeal by observing as under:

> *"I have carefully considered the entire material on record. The identical issue in relation to secondary freight charges has been adjudicated upon by me for the same appellant for the AY 2010-11 in my order upon appeal no. 145/CIT(A)/ASL/Wd-1(2)/BWN/13-14 in which I have allowed the appeal of the appellant after examination of all the facts, the remand report, its rejoinder, the various case laws relied upon by the appellant as well as the Hon'ble ITAT's order and that of the Ld CIT(A) XXXI, Kolkata in the appellant's own case. Since the issues with respect to this ground are identical, this ground is being allowed for the same reasons cited in my aforementioned order. This ground of the appellant is therefore allowed."*

Aggrieved, revenue is in appeal before us.

4. We have heard rival submissions and carefully gone through the facts and circumstances of the case. Facts are not reiterated for the sake of brevity. We note that this issue is squarely covered by the decision of this Tribunal in favour of the assessee in assessee's own case for AY 2010-11 and 2012-13 in ITA Nos. 1056 & 1418/Kol/2016 dated 13.06.2018 wherein the Tribunal has held as under:

> *"4. Next comes the Revenue's latter substantive ground that CIT(A) has erred in law as well as on facts in deleting secondary freight charges disallowance of ₹95,05,125/- with the following discussion: The facts for the sake of ground -wise completion are being briefly stated again:*
>
> 1. *The appellant is a C&F Agent of the agent of Ultratech Cement Ltd who is manufacturer of cement. The assessee handles the cement from the railway rake point till it reaches the dealer's godown. So the assessee unloads the cement from the railway siding and forward the same by truck to the godown and the expense incurred for this activity is called the Primary Transportation and/ or Freight and such amount is reimbursed by the principal company. Then the assessee arranges delivery of the cement bags from the godown to the various dealers point by truck and the expense incurred for it is called the Secondary*

Freight Charges and this amount is reimbursed by the company as well and all such reimbursements are made in actual basis as per the prefixed rates. In the case of Secondary Freight Charges, the dealers pay to the truck drivers and then raise the bill and the assessee reimburses such money to the dealers on actual basis on behalf of the company as the principal company pays such reimbursement and the job of the assessee is only to facilitate such payment.

During the assessment proceedings, the AO observed that the appellant claimed Secondary Freight Charges in the profit a loss account amounting to 95,05,125.00 and during the hearing stage the assessee was asked to provide explanation as to why the claim of expenditure should not be disallowed to which the assessee responded vide letter dated 11/03/2013 contending that the said expenditure is reimbursement expenditure and the payments were not made to any contractor or sub contractor and the expenses are not in pursuance of the assessee's business but the assessee only acts as a C&F Agent and facilitated such payments on behalf of the company. The AO contended that section 194C speak of tax deduction by the person making payment and also the payments were made under some contract and added them to the total income of the assessee.

Before me the appellant has submitted that the AO failed to consider the facts of the case.

He stated that the deduction of tax at source U/s 194C on Secondary Freight Charges is not necessary. This is because such Secondary Freight Charges paid to the tune of Rs. 95,05,125.001 - are reimbursement of expenses and it is not any expenses of the assessee but it is the expenses of the company for which the assessee firm acts as a C&F agent. That the assessee is a C&F agent of Ultratech Cement Ltd who is manufacturer of cement. The assessee handles the cement from the railway rake point till it reaches the dealer's godown. The assessee arranges delivery of the cement bags from the godown to the various dealers point by truck and the expense incurred for it is called the Secondary Freight and this amount is reimbursed by the company as well and all such reimbursements are made in actual basis as per the prefixed rates. In the case of Secondary Freight Charges, the dealers pay to the truck drivers and then raise the bill and the assessee reimburses such money to the dealers on actual basis on behalf of the company as the principal company pays such reimbursement and the job of the assessee is only to facilitate such payment.

The assessee also placed reliance on the ratio of the assessee's own case before the CIT(Appeals) - XXXII, Kolkata and ITAT, Kolkata C Bench for the A/Y 2008-09, where the assessee got relief based on the facts that liability to deduct tax at source u/s 194C would only arise when the payment is made under a contract, which is not true in this instant case as there is no finding by the AO that the impugned payments were made to a contractor or sub-contractor under some contract. Rather the facts of the case suggest that the impugned payments are made to the dealers of the company and not to any transporters.

There is nothing on record to suggest the existence of any contract between the assessee and the recipient of the impugned payment and such is denied by the assessee as well.

I have carefully examined the issues at hand as well all the relevant material as listed above. The issue has been discussed at length in the preceding paragraphs. The fact is that it has been established that the appellant was under contractual obligation with the principal company to ensure the handling and delivery of cement to the dealers and the principals would reimburse the entire expenses on actual terms to the C&F agent - the appellant. The secondary freight and transport charges which were incurred were similarly reimbursed by the principals on actuals. In fact these figures have appeared in the P&L account of the appellant and not contested by the AO. The payments have been reimbursed by the principals as is evident from the Profit & Loss Account for the year under consideration, where the appellant has paid Rs.95,0:5.125.74 whereas it has received Rs. 95,04,703.55. The fact that at first the dealers paid for the freight and had it reimbursed by the appellant in turn to be reimbursed by the principals makes no difference to the fact that ultimately the reimbursement came from the principals and the proposition that if the appellant had been making payments on behalf of the principals - as it has been established they were - then there was no obligation on the appellant to deduct tax at source. In view of the discussions above, the said disallowance is therefore not upheld."

We notice herein as well that the amount in question is a reimbursement on principal to principal basis as per assessee's profit and loss account. The same has also gone unrebutted from Revenue's side during the course of hearing wherein it has failed to dispute that assessee had first paid the dealers concerned followed by its reimbursement from the concerned principal. We thus decline Revenue's instant substantive ground as well as its former appeal ITA No.1056/Kol/2016.

5. These leaves us with the Revenue's latter appeal ITA 1418/Kol/2016 for assessment year 2012-13 raising sole substantive issue of section 40(a)(ia) disallowance ₹1,47,59,499/- pertaining to secondary freight charges. Both learned representatives are very fair in informing us the issue is covered by our discussion in preceding assessment year upholding the CIT(A) similar findings. We thus reject Revenue's instant latter appeal as well."

5. Since Ld. DR could not point out any change in facts or law, so the aforesaid finding of the Tribunal could not be controverted by the department, and so the issue is squarely covered by the decision cited supra and the Ld. CIT(A) has allowed the assessee's ground of appeal by following the order of the Tribunal. So, we do not find any infirmity in his order in allowing the assessee's ground of appeal and we uphold the same. Therefore, this ground of appeal of revenue is dismissed.

6. Ground no. 3 of revenue's appeal is against the action of Ld. CIT(A) in deleting the addition of Rs.26,79,579 u/s. 69C of the Act on account of secondary freight charges expenditure.

7. Brief facts are that the AO found that the assessee had incurred a total expenditure to the tune of Rs.1,89,89,153/- but only debited Rs.1,63,09,574/- in the P&L Account. Accordingly, assessee was asked to explain the discrepancy in figures of second freight

charges and also to explain as to why the difference should not be treated as unexplained expenditure u/s 69C of the Act. In response the assessee furnished explanation vide letter dated 21.03.2014 which is reproduced hereinbelow:

> *"Please note that the assessee firm has quoted the figure of Rs.1,63,09,574/- while as per the register your goodself have discovered Rs.1,89,89,153/-. Now this figure is related to Secondary Freight Charges and the assessee disburses the money only when they get reimbursed. So the difference amount of Rs.26,79,579/- has been paid in the next year and that is why not taken into account in the Profit & Loss A/c for the relevant year. Moreover this amount is actually the expense of the company and not of the assessee, hence it is not directly related to the activities of the company. Hence section 194C of the Income tax Act, 1961 can only be invoked to those where the expenditure is related directly to the activities of the business, which is not the case here.*

8. Thereafter, the AO did not agree with the explanation given by the assessee and while disallowing the amount observed as under: –

> *"Submissions of the assessee have carefully been considered. The assessee is C&F agent of the Principal M/s Ultratech Cement Ltd. and M/s. Grasim Inds. Ltd. The assessee follows Mercantile system of accounting. The receipts from the Principal are credited to the P&L account. Similarly, expenses are debited to the P&L account. Although the expenditure pertains to the Principal company, but it has been taken into account by the assessee. The assessee has made payment to the various parties and subsequently claimed re-imbursement of expenses. Total expenditure incurred during the year is Rs. 1,89, 89,153/- as reflected in the register furnished by the assessee, being part of assessee's books of accounts. The assessee has debited the P&L account by Rs.l,63,09,574/- only. This means that the excess of expenditure has actually been incurred but not reflected in the P&L account. This also means that the excess expenditure has been incurred out of books from unexplained sources. The assessee has not been able to explain the discrepancy. Therefore, the sum of Rs.26,79,579/- is treated as unexplained expenditure under the provisions of section 69C of the Act and added to the total income ."*

9. Aggrieved, assessee preferred an appeal before the Ld. CIT(A), who deleted the addition by observing as under:

> *"I have examined the issue in its entirety and perused the submissions of the appellant. It has already been established that the appellant had an arrangement with the principals that the expenditures on secondary freight would be reimbursed on actuals. It is not denied that this expenditure is of the said nature covered by the agreement between the principals and the appellant. In these circumstances, then the only way that such expenditure could still be treated as expenditure covered by section69C is if the appellant had made actual payments to the parties from undisclosed sources and not received the reimbursements by then. But the AO has not contested the appellant's plea that he did not make actual payments to the parties until he had received the reimbursements from the principals. Now, if this fact is uncontested, then it becomes difficult to see how there can be any applicability of section 69C of the Act, since no expenditure has actually been incurred ad whatever has been incurred on accrual basis has been incurred on behalf of the principals, and suitable reimbursements are made by the principals. In view of the above, I cannot find merit in the AOs findings and the addition is therefore deleted."*

Aggrieved, revenue is in appeal before us.

8. We have heard rival submissions and gone through the facts and circumstances of the case. We note that assessee which is the C&F agent of Ultratech Cement, reimburses the dealers of cement, who pays to the truck drivers the transportation expenses from the godown to their destination. Since the assessee reimburses this payment to dealers after receiving it from the principal (Ultratech Cement) and since the assessee has not paid the amount of Rs.26,79,579/- to the dealers, question of making addition u/s. 69C does not arise. So, we do not find any infirmity in the order passed by the Ld. CIT(A) and, therefore, the same is hereby upheld. This ground of appeal of revenue is dismissed.

9. In the result, the appeal of revenue is dismissed.

Order is pronounced in the open court on 23rd January, 2018.

Sd/- Sd/-
(P. M. Jagtap) (Aby. T. Varkey)
Vice President Judicial Member

Dated : 23rd January, 2019

Jd.(Sr.P.S.)
Copy of the order forwarded to:

1. Appellant – ITO, Ward-1(2), Burdwan
2 Respondent – M/s. Cemco Marketing, Vhanga Kuthi, G. T. Road, Burdwan-713101.
3. CIT(A), Burdwan (sent through e-mail)
4. CIT- , Kolkata.
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy, By order,

Assistant Registrar