

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'B' NEW DELHI**

**BEFORE SHRI N. K. BILLAIYA, ACCOUNTANT MEMBER
AND
MS SUCHITRA KAMBLE, JUDICIAL MEMBER**

I.T.A. No. 2805/DEL/2014 (A.Y 2009-10)

CSN Estates Pvt. Ltd. Shop No. 1 and 4 Local Shopping Centre, Pushp Vihar, Madangir New Delhi AACCC6181B (APPELLANT)	Vs	ACIT Circle-3(1) New Delhi (RESPONDENT)
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Appellant by	Sh. T. R. Talwar, Adv
Respondent by	Ms. Ashima Neb, Sr. DR

Date of Hearing	07.01.2019
Date of Pronouncement	20 .02.2019

ORDER

PER SUCHITRA KAMBLE, JM

This appeal is filed by the assessee against the order dated 28/02/2014 passed by CIT(A)-VI, New Delhi for Assessment Year 2009-10.

2. The grounds of appeal are as under:-

1. *“(a) The Ld. CIT (A) has erred in both law and on facts in confirming addition of Rs. 2,58,00,000/- on account of the liabilities of consolidation charges outstanding as on 31.03.2009 for non compliance of provision of section 194H r.w.s. 40(a)(ia) of the IT Act.*

(b) On the facts and in the circumstance of case, the finding of the Ld. CIT(A) in para 5.2.5 of the impugned order that there was a agency arrangement between the consolidators and the appellant assessee and

therefore the appellant was held liable to deduct TDS u/s 194H r.w.s.40(a)(ia) of IT Act. and justifying the disallowance of Rs. 2,58,00,000/- on that account.

2. The Ld. CIT(A) has erred both on facts in law in sustaining the disallowance of Rs. 43,93,291/- to the extent of 20% of the "Salary and Wages" of Rs. 2,19,86,456/- debited to the P&L Account.

3 The authorities below have acted arbitrarily and without any reasonable in holding

the credit of Rs. 48,00,000/- as part repayment of the advance given earlier to the business associate as unexplained cash credit as per the provisions of section 68 of the IT Act.

4. The authorities below have acted arbitrarily and without any reasonable in holding the payment of Rs. 50,00,000/- made for facilitating possession of land as part of the business activity as the payment made in contravention of the provisions of section 194H r.w.s. 40(a)(ia) of the IT Act.

5. The authorities below have acted arbitrarily and without any reasonable in holding the payment of Rs. 50,00,000/- as consideration of the various movables and structure on the land purchase as part of business activity as the payment made in contravention of the provisions of section 194H r.w.s. 40 (a)(ia) of the IT Act."

3. The assessee is a private limited company and has been engaged in the business of real estate and its business activities inter alia include rendering services for buying land for other parties and also providing consolidation services of the land purchased to make it suitable for development of project thereon. The assessee company had declared an income of Rs. 2,62,90,100/- as per the return of income e-filed on 13.10.2009 for the A.Y. 2009-10. The Assessing Officer computed the income of the assessee at Rs. 9,92,48,930/- after making various additions and disallowances.

4. Being aggrieved by the assessment order, the assessee filed appeal before the CIT(A). The CIT(A) partly allowed the appeal of the assessee.

5. As regards Ground No.1, relating to disallowance of Rs.2.58 crores for want of TDS u/s 194H r.w.s.40 (a)(ia), the Ld. AR submitted that the Assessing Officer has made the disallowance u/s 40(a)(ia) for want of non-deduction of TDS u/s 194 H mainly by holding that the consolidators of land were agents of the Assessee company and hence the assessee company was required to deduct tax at source on the consideration given to the consolidators. The Ld. AR submitted that the whole issue hinges upon the interpretation of the MOU between the consolidators and the assessee company from which it has to be considered whether the contract between the consolidators and the assessee company is a 'contract of sale' or a 'contract of agency'. In the MOU, 'consolidation charges' have been defined as difference between the agreed price and sale price for surrender of rights or otherwise consideration for arrangement of land from Land Owners. 'Consideration' has been defined as the overall difference between sales price and agreed price, which is payable by the first party (the assessee company) to the second party (the consolidator) irrespective of any amount of differences. It will be calculated according to the number of acre land procured. The Ld. AR made reference to the Rights and Obligations of the first party particularly clause 6 and Rights and Obligations of second party particularly clause 3. The Ld. AR further submitted that the reading of the MOU as a whole makes it clear that the consolidators were interacting independently with the Land Owners (farmers) for a profit motive and not doing any service to the assessee company by acquiring their land by means of an Agreement to sell (ATS) at a certain sales price, which they subsequently sold to the assessee company at an agreed price (the difference not exceeding a certain amount) with a guarantee of satisfaction over a period of 3 years and 6 months, so that there should not be any deficiency in the purchase of land by the Assessee company. The MOU thus makes it clear that the relationship between the consolidators and the assessee company qua the sale

of land is on principal to principal basis and the consideration received by the consolidators is sale simpliciter and that there is no relationship of principal and agent between them. Looking at the transactions being of sale /purchase and relationship being on principal to principal basis the consideration paid to the consolidators does not amount to commission/brokerage in terms of section 194H as the same is not applicable to these transactions. The MOU also makes it clear that the contract between the consolidators and the assessee company is in the nature of 'contract of sale' with a guarantee period and not a 'contract of agency' and the difference between the agreed price and sale price for surrender of rights was an incentive /compensation /profit for offer of sale with guarantee which cannot be called a commission or a brokerage for invoking the provisions of section 194 H as the contract between the consolidators and the assessee company was a contract of a principal with a principal. The principal-agent relationship which is a sine qua non for invoking provisions of section 194 H is missing in this case. It was a contract of sale with a guarantee period. The Ld. AR relied upon the following case laws:-

1. Ahmedabad Stamp Vendors Association Vs. Union of India (2002) 257 ITR 202 (Guj.)
2. CIT Vs. Jai Drinks Pvt. Ltd.(2011) 336 ITR 383 (Delhi)
3. National Panasonic India Pvt. Ltd. Vs. DCIT 94 TTJ 899 (ITAT Delhi)
4. CIT vs. Mother Dairy India Ltd. 358 ITR 218 (Del.)
5. Efftronics Systems (P) Ltd. Vs. Asstt. CIT (2016) 161 ITD 688 (Vishakha.)
6. Dy. CIT Vs. Laqshya Media P. Ltd. (2016) 160 ITD 35 (Mum.)
7. NMDC Ltd. Vs. ACIT (TDS) (2011) 7 ITR (Trib) 690 (Vishakha.)

6. The Ld. DR submitted that the Assessing Officer was right in confirming the addition of Rs. 2,58,00,000/-on account of the liabilities of Consolidation Charges outstanding as on 31/3/2009 for non compliance provision of Section 194H read with Section 40(a)(ia) Income Tax Act, 1961. The Ld. DR submitted that there was agency agreement between the consolidators and the

assessee and, therefore, the assessee is liable to deduct tax at source (TDS) u/s 194H read with Section 40(a)(ia) of the Act. As regards Ground No.2, the Ld. DR submitted that the Assessing Officer was right in disallowing Rs.43,93,291/- to the extent of 20% of the salary and wages debited to the +profit and loss account. The Ld. DR relied upon the order of the CIT(A) and the assessment order of the CIT(A) and the assessment order.

7. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that the MOU makes it clear that the contract between the consolidators and the assessee company is in the nature of 'contract of sale' with a guarantee period and not a 'contract of agency' and the difference between the agreed price and sale price for surrender of rights was an incentive /compensation /profit (whatever one may call) for offer of sale with guarantee which cannot be called a commission or a brokerage for invoking the provisions of section 194H as the contract between the consolidators and the assessee company was a contract of a principal with a principal. The principal-agent relationship which is a sine qua non for invoking provisions of section 194H is missing in this case. It was a contract of sale with a guarantee period. The Hon'ble Delhi High Court in case of CIT vs. Mother Dairy India Ltd. 358 ITR 218 (Del.) held that amount received for undertaking procurement and marketing of milk and milk products through concessionaires is a case of purchase of milk outright and not agency sales. The Hon'ble High Court further held that amount paid for the purchases and the amount charged at maximum retail price does not constitute brokerage or commission, so as to require tax deduction at source. Thus, the ratio of the Hon'ble Delhi High Court in case of Mother Dairy India Ltd. (supra) is applicable in the present case. Hence, Ground No. 1 is allowed.

8. As regards to Ground No. 2 relating to Disallowance out of salary and wages Rs.43,93,291/-, the Ld. AR submitted that the adhoc addition made by the Assessing Officer at 80% of the salary and wages claimed has been reduced

by the CIT(A) to 20% of such salary and wages on the ground that it is excessive in nature. Keeping in view the nature of the assessee's business and its turnover of Rs.44,90,28,125/- and the ratio of salary and wages vis-a-vis turnover being 4.89% this year as against 4.69% on a turnover of Rs. 13,57,15,688/- last year, which has been accepted by the Revenue. The Ld. AR submitted that ad-hoc addition at 20% is arbitrary and excessive and may kindly be considered.

9. The Ld. DR relied upon the order of the CIT and the Assessment Order.

10. We have heard both the parties and perused all the relevant material available on record. The adhoc addition made by the Assessing Officer at 80% of the salary and wages claimed has been reduced by the CIT(A) to 20% of such salary and wages on the basis that it is excessive in nature. The CIT(A) has taken proper consideration of the nature of the assessee's business and its turnover in consonance with the ratio of salary and wages vis-a-vis turnover. Thus, there is no need to interfere with the findings of the CIT(A). Ground No. 2 is dismissed.

11. As regards to Ground No.3 relating to Cash credit of Surjeet Singh Rs. 48 lacs, the Ld. AR submitted that the addition of Rs. 48 lacs u/s 68 of the IT Act has been confirmed by the CIT(A) in the absence of non-production of the cash creditor, Shri Surjeet Singh before the Assessing Officer during the course of assessment proceedings and also non-furnishing of income tax particulars and other details before the Assessing Officer. The cash creditor was being given various advances aggregating to Rs.87.08 lacs in connection with aggregation and consolidation of the lands out of which he returned Rs.48 lacs out of the advance of Rs.50 lacs which he received on his agreement to sell of his lands. The Ld. AR submitted that it is not correct to say on the basis of facts on record that the assessee has not filed his confirmation with his income tax particulars. The Assessing Officer noted Surjeet Singh's confirmation. The Ld.

AR submitted that however, he could not be produced before the Assessing Officer as the time given was short towards the end of the assessment proceedings. The Ld. AR submitted that he can be produced if so directed by the Tribunal.

12. The Ld. DR submitted that the credit of Rs.48,00,000/- as part of repayment of the advance given earlier to the business associate is rightly held as unexplained cash credit as per the provisions of Section 68 of the Act by the Assessing Officer as no explanation was given by the assessee during the assessment proceedings.

13. We have heard both the parties and perused all the relevant material available on record. The Assessing Officer noted Surjeet Singh's confirmation. Yet, the person himself could not be produced before the Assessing Officer as the time given was short towards the end of the assessment proceedings. The Ld. AR submitted that he can be produced if so directed by the Tribunal. Therefore, we are of the opinion that it will be appropriate to remand back this issue to the file of the Assessing Officer to decide the same afresh after verifying all the details about the cash credits including presence of Shri Surjeet Singh before the Assessing Officer and his confirmation. Needless to say, the assessee be given the opportunity of hearing by following principles of natural justice. Ground No. 3 is partly allowed for statistical purpose.

14. As regards to Ground No. 4 relating to addition of Rs. 50 lacs in respect of Shri Mange Ram, the Ld. AR submitted that the Assessing Officer disallowed the payment of Rs. 50 lacs given to Shri Mange Ram by cheque for giving possession/vacation of the land which was purchased by the assessee company from Mange Ram and others for Rs. 10 crores for want of address of the payee and also on the ground that no TDS has been deducted on the aforesaid payment. The CIT(A) has, however, taken the payment to be in nature of commission as paid for extraneous grounds for certain services for which TDS

should have been effected by the assessee u/s 194H of the Act. The Ld. AR submitted that the identity and the address of Shri Mange Ram was available to the Assessing Officer for verification by way of registry of the lands and receipt of Rs.50 lacs by Shri Mange Ram. His saying of non-furnishing of address of the payee is, therefore, not correct on the basis of facts on record. As regards treating the payment for giving possession/vacation of the land as in the nature of commission for extraneous grounds for certain services, as held by the CIT(A), no cogent reason and material /evidence has been given to treat this as commission in order to invoke the provision of sec 40(a)(ia) r.w.s. 194H . The Ld. AR therefore submitted that this addition deserves to be deleted.

15. The Ld. DR, as regards Ground No.4, submitted that the payment of Rs. 50,00,000/- made for facilitating possession of land as part of the business activity as the payment made contravention of the provisions of Section 194H read with Section 40(a)(ia) of the Act was rightly down by the Assessing Officer.

16. We have heard both the parties and perused all the relevant material available on record. It is pertinent to note that some of the evidences were not before the Assessing Officer and Assessing Officer has also not verified the whereabouts of Shri Mange Ram. Therefore, it will be appropriate to remand back this issue this issue to the file of the Assessing Officer to decide the same afresh after verifying all the details about the said transaction. Needless to say, the assessee be given the opportunity of hearing by following principles of natural justice. Ground No. 4 is partly allowed for statistical purpose.

17. As regards to Ground No.5 relating to addition of Rs.42,84,325/- payment to Dharm Raj, the Ld. AR submitted that the ground of appeal may kindly be amended to read Rs.42,84,375/- instead of payment of Rs.50,00,000/-, inadvertently/ mistakenly mentioned in the ground of appeal.

The Ld. AR submitted that the Assessing Officer disallowed the payment of Rs.42,84,325/- to one Shri Dharm Raj debited to the consolidation and other charges for want of address and IT particulars to cross verify the claim of the assessee. The Assessing Officer also invoked the provision of 40(a)(ia) r.w.s.194H. The CIT(A) sustained the addition on account of the payment made to Shri Dharm Raj for paying him separate consideration of Rs.42,84,375/- for built up structure, tube well, standing crops, poultry farm etc. in addition to the sale consideration of land sold by him for Rs.1,28,12,500/- vide registered sale deed alongwith the co seller Mrs. Chand Kaur his mother. The Assessing Officer treated this payment by way of commission on extraneous grounds for certain services i.e. for obtaining possession of the land for by invoking section 40(a)(ia) r.w.s. 194H. The Ld. AR submitted that the evidence of identity & address of Shri Dharm Raj & the receipt of payment of Rs.42,84,375/- by him for Makan, Tubewell, fasal, Pad-poudha, Murgi farm had been filed for verification alongwith sale deed of the land. As regards treating the separate additional payment to Shri Dharm Raj as mentioned above as in the nature of commission for extraneous grounds for certain services, as held by the CIT(A), no cogent reason and material /evidence has been given to treat this as commission in order to invoke the provision of sec 40(a)(ia) r.w.s. 194H despite of the evidence given by the assessee.

18. As regards Ground No. 5, the Ld. DR submitted that the Assessing Officer while holding that the payment of Rs. 50 lacs as consideration of various land and structures on the land purchased was part of the business activity and is in contravention of the provisions of Section 194H read with Section 40(a)(ia) of the Act.

19. We have heard both the parties and perused the material available on record. It is pertinent to note that the evidence of identity & address of Shri Dharm Raj & the receipt of payment of Rs.42,84,375/- by him for Makan, Tubewell, fasal, Pad-poudha, Murgi farm had been filed for verification

alongwith sale deed of the land which was not at all considered by the revenue authorities. As regards treating the separate additional payment to Shri Dharm Raj as in the nature of commission for extraneous grounds for certain services, while deciding this issue also the Assessing Officer as well as CIT(A) failed to looked into the material /evidence given by the Assessee before treating this as commission in order to invoke the provision of sec 40(a)(ia) r.w.s. 194H of the Act. Therefore, we are of the opinion that it will be appropriate to remand back this issue this issue to the file of the Assessing Officer to decide the same afresh after verifying all the details about the said transaction. Needless to say, the assessee be given the opportunity of hearing by following principles of natural justice. Ground No. 5 is partly allowed for statistical purpose.

20. In result, appeal of the assessee is partly allowed for statistical purpose.

Order pronounced in the Open Court on 20th February, 2019.

Sd/-

(N. K. BILLAIYA)
ACCOUNTANT MEMBER

Dated: 20/02/2019
*R. Naheed **

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

Sd/-

(SUCHITRA KAMBLE)
JUDICIAL MEMBER

ASSISTANT REGISTRAR

ITAT NEW DELHI

Date of dictation	18.01.2019
Date on which the typed draft is placed before the dictating Member	18..01.2019
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	20.02.2019
Date on which the final order is uploaded on the website of ITAT	20.02.2019
Date on which the file goes to the Bench Clerk	20.02.2019
Date on which the file goes to the Head Clerk	