

**IN THE INCOME TAX APPELLATE TRIBUNAL  
MUMBAI BENCH "G" MUMBAI**

**BEFORE SHRI SAKTIJIT DEY (JUDICIAL MEMBER) AND  
SHRI N.K. PRADHAN (ACCOUNTANT MEMBER)**

**ITA No. 4500/MUM/2016  
Assessment Year: 2010-11**

**&**

**ITA No. 4501/MUM/2016  
Assessment Year: 2011-12**

M/s S. Kumars Ltd.,  
99 Niranjana, Ground floor,  
Marine Drive, Mumbai-  
400002.

Income Tax Officer-4(3)(4),  
Vs. Aayakar Bhavan, Mumbai-400002

**PAN No. AAACS0728A  
Appellant**

**Respondent**

Assessee by : Mr. Ashok J. Patil, AR  
Revenue by : Mr. Nitin Waghmode, DR

Date of Hearing : 07/08/2019  
Date of pronouncement : 28/10/2019

**ORDER**

**PER N.K. PRADHAN, AM**

The captioned appeals filed by the assessee are directed against the order of the Commissioner of Income Tax (Appeals)-9, Mumbai [in short 'CIT(A)'] and arise out of the assessment completed u/s 143 of the Income Tax Act 1961 (the 'Act'). As common issues are involved, we are proceeding to dispose them off through a consolidated order for the sake of convenience.

**ITA No. 4500/MUM/2016**  
**Assessment Year: 2010-11**

2. The 1<sup>st</sup> ground of appeal

The CIT(A) has erred in confirming the disallowance made by Assessing Officer(AO) of the facility fees to the extent of Rs.64,34,560/- by alleging short deduction of TDS and wrongly invoking the provisions of Section 40(a)(ia) of the Act for such short deduction. In this regard, it is submitted that the appellant company has deducted TDS on such facility fees u/s. 194C (i.e. @2%) of the Act, while as per the AO, TDS ought to have been deducted u/s. 194I (i.e. @10%) of the Act. Accordingly, the facility fees has been disallowed wrongly invoking the provisions of Section 40(a)(ia) of the Act by the AO.

3. Briefly stated, the facts of the case are that the assessee filed its return of income for the assessment year (AY) 2010-11 on 15.10.2010 declaring total income of *Rs.Nil* after setting off brought forward business loss of Rs.4,91,03,204/-. Further, the assessee disclosed book profit of Rs.4,29,84,450/- u/s 115JB of the Act.

During the course of assessment proceedings, the AO observed that the following expenses claimed by the assessee were found to have attracted the provisions of section 40(a)(ia) of the Act :

- Payment of facility fees of Rs.64,34,560/-
- Commission to foreign agents of Rs.9,17,999/-
- Labour charges of Rs.2,67,803/-

In respect of facility fees, the AO noted that the assessee has debited Rs.79,41,600/- in the P&L account in connection with M/s

Avadh Reality Services Pvt. Ltd. (ARSPL). These expenses debited are pursuant to a Memorandum of Understanding (MoU) dated 01.04.2009 with ARSPL, which is mentioned as a division of M/s Shree Ram Urban Infrastructure Ltd. (SRUIL). In response to query raised by the AO to explain the reasons for making the TDS u/s 194C instead of section 194I and why the provisions of section 40(a)(ia) should not be applied, the assessee filed a reply stating that the provisions of section 40(a)(ia) do not apply to a case of short deduction of tax at source and since the assessee had already deducted tax u/s 194C, it was not a case of non-deduction of tax. The assessee further replied that if there is a shortfall due to difference of opinion as to which provision would apply, the assessee may be treated as a defaulter u/s 201 but no disallowance can be made u/s 40(a)(ia) of the Act. In this regard, reliance was placed by the assessee on the order of the Tribunal in the case of *DCIT v. S.K. Tekriwal, Chandabhoy and Jassobhoy*.

However, the AO was not convinced with the above explanation of the assessee and held that a proportionate working is required to be made in order to arrive at the amount which is disallowable. As per the provisions of section 194I, the applicable rate of tax deduction is 10% which works out to Rs.7,94,160/- on the expense of Rs.79,41,600/-. The tax deducted by the assessee is Rs.1,50,704/-. Therefore, the AO held that the balance amount of tax not deducted of Rs.6,43,456/- represented proportionate gross amount of Rs.64,34,560/-. Accordingly, he made a disallowance of Rs.64,34,560/- u/s 40(a)(ia) of the Act.

In appeal, the Ld. CIT(A) agreed with the above disallowance made by the AO.

4. Before us, the Ld. counsel for the assessee submits that the appellant had entered into MoU with ARSPL. The assessee paid facility fees of Rs.79,41,600/- and deducted tax at source @ 2% as per provisions of section 194C. It is argued that the AO wrongly held that the fees tantamount to payment of rent and therefore, the assessee ought to have deducted tax at source @ 10% as per provisions of section 194I of the Act. It is further submitted by him that no disallowance can be made for short deduction of tax in view of the decision in *CIT v. S.K. Tekriwal* 361 ITR 432 (Cal), *Dish TV India Pvt. v. ACIT* 190TTJ 537 (Mum), *DCIT v. Chandabhoy & Jassobhoy* 49 SOT 448 (Mum), *ACIT v. Hindustan Thompson* 1206/M/2018, *DCIT v. Beekaylon Syn. P. Ltd.* (ITA No. 6506/M/2008).

On the other hand the Ld. Departmental Representative (DR) supports the order passed by the Ld. CIT(A).

5. We have heard the rival submissions and perused the relevant materials on record. In *S.K. Tekriwal* (supra), the assessee deducted tax u/s 194C(2) from payments made to sub-contractors. According to the revenue, the payments were in the nature of machinery hire charges falling under the head "rent" and the provisions of section 194I were applicable. On the ground that the assessee had deducted tax at 1% u/s 194C(2) as against the actual deduction to be made at 10% u/s 194C(2) as against the actual deduction to be made at 10% u/s 194I, the payments were disallowed proportionately invoking the provisions of

section 40(a)(ia). The Tribunal held that where tax was deducted by the assessee, though under a bonafide wrong impression under wrong provisions, the provisions of section 40(a)(ia) could not be invoked and that if there was any shortfall due to any difference of opinion as to the taxability of any item or the nature of payments falling under various tax deduction at source provisions, the assessee could be declared to be an assessee in default u/s 201 but no disallowance could be made invoking the provisions of section 40(a)(ia) of the Act. On appeal, the Hon'ble High Court held that no substantial question of law arose from the said order of the Tribunal.

In view of the above position of law, we delete the disallowance of Rs.64,34,560/- made by the AO u/s 40(a)(ia) and allow the 1<sup>st</sup> ground of appeal.

6. The 2<sup>nd</sup> ground of appeal

The CIT(A) erred in confirming the disallowance made by the AO of Commission paid to foreign parties to the extent of Rs.9,17,999/- on account of non-deduction of TDS by wrongly invoking the provisions of Section 40(a)(i) of the Act (however in the assessment order, the same has been mentioned as 40(a)(ia) of the Act). In this regard, it is submitted that the appellant company has paid commission to certain foreign parties for procuring sales in their respective countries and no TDS has been deducted on such payments as such income was not deemed to accrue or arise in India and accordingly not taxable in India.

7. During the course of assessment proceedings, the AO observed the following details of payment made to foreign commission agents :

Sr.	Name	Located in	Proposed date of remittance	Reasons for non deduction of tax u/s 195 as per CA's certificate	Amount in Rs./-
1	Almuheet Trading - Mohammed Younous Saleem	Saudi Arabia	06/06/2011	Circular No. 786	36673
2	Vetco International LLC	UAE	20/07/2010	Circular No. 786	363347
3	Anilyeri Velandy Premamohanan	Kuwait	20/07/2010	Circular No. 786	110861
4	Gulbani Raju	UAE	20/07/2010	Circular No. 786	332848
5	Jaintex	Lebanon	21/05/2010	Circular No. 786	74270
TOTAL					917999

The AO held that in the present case, the provisions of section 195 are applicable to the assessee as well as the payees and consequently, since there was no TDS made u/s 195, provisions of section 40(a)(ia) are attracted. Accordingly, he made a disallowance of Rs.9,17,999/-.

In appeal, the Ld. CIT(A) confirmed the above disallowance made by the AO.

8. Before us, the Ld. counsel submits that it is not the Department's contentions that the payments were made to non-residents and the income had no connection with services rendered in India. In this regard reliance is placed by him on the decision in *GE India Technology Centre (P.) Ltd. v. CIT* 327 ITR 456 SC, *ACIT v. NGC Network (I) Pvt. Ltd.* 1382/M/2014 and *Channel Guide India Pvt. Ltd. v. ACIT* 153 TTJ (Mum) 432.

On the other hand, the Ld. DR relies on the order passed by the Ld. CIT(A).

9. We have heard the rival contentions and perused the relevant materials on record. In the case of *GE India Technology Centre (P.) Ltd.* (supra), it is held that a person paying interest or any other sum to a non-resident is liable to deduct tax u/s 195 only if such sum is chargeable to tax in India and not otherwise.

In the instant case, following the above decision we delete the disallowance of Rs.9,17,999/- made by the AO and allow the 2<sup>nd</sup> ground of appeal.

10. 3<sup>rd</sup> ground of appeal

The CIT(A) erred in confirming the disallowance made by the AO of the labour charges to the extent of Rs.2,67,803/- on account of non- deduction of TDS by invoking the provisions of Section 40(a)(ia) of the Act.

Without prejudice, CIT(A) erred in confirming the addition made by the AO of labour charges of Rs.2,32,872/- (which has been capitalized by the appellant company to the fixed assets) and which has not been claimed by the appellant company in the computation of total income. In addition, the AO has erred in disallowing the depreciation claimed to the extent of Rs.34,931/- on such addition. Resultantly, the aggregate amount of addition to Rs.2,67,803/-, has been made by the AO, as tabulated as under:

Addition (Rs.)	Depreciation @ 15%	Total (Rs.)
1,93,500	29,025	2,22,525
39,372	5,906	45,278
2,32,872	34,931	2,67,803

In view of the above, it is submitted that the additions to fixed assets can never, by any stretch of imagination, be added to the total income as the same has not been claimed in the computation of total income.

11. In the assessment proceedings, the AO found that in respect of labour charges, the assessee has deducted tax u/s 194C on a payment of Rs.61,000/- only. Further, he found that on the balance amount of Rs.1,93,500/-, tax has not been deducted u/s 194C.

Similarly, the assessee has deducted tax u/s 194C on a payment of Rs.4,48,357/-. Further he found that on the balance amount of Rs.39,372/-, tax has not been deducted us 194C.

Thus the AO made a total disallowance of Rs.2,67,803/-.

In appeal, the Ld. CIT(A) confirmed the above disallowance made by the AO.

12. Before us, the Ld. counsel for the assessee submits that the expenses are not debited to the P&L account ; the expenses are capitalized. Further, it is stated by him that short deduction of TDS expenses cannot be disallowed.

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

13. We have heard the rival contentions and perused the relevant materials on record. We find that the expenses disallowed by the AO are not debited to the P&L account. In fact these expenses are capitalized.

Further, as held by the Hon'ble Calcutta High Court in case of *S.K. Terkriwal* (supra), if there was any shortfall due to any difference of

opinion as to the taxability of any item or the nature of payments falling under various tax deduction at source provisions, the assessee could be declared to be in default u/s 201 but no disallowance could be made invoking the provisions of section 40(a)(ia) of the Act.

In view of the above position of law, we delete the disallowance of Rs.2,67,803/- made by the AO and allow the 3<sup>rd</sup> ground of appeal.

14. The 4<sup>th</sup> ground of appeal

a. The CIT(A) erred in confirming the disallowance of loss on sale of returned goods of Rs,12,94,653/- made by the AO without understanding the facts of case. In this regard, it is submitted that the appellant company has debited to the Profit & Loss Account, the amount of profit element involved in the materials supplied during the year under consideration to the Director General & Inspector General of Police, Karnataka which was returned by the said party and hence no such profits can be held to be taxable for the year under consideration. Therefore, it is prayed that such addition should be deleted.

b. The CIT(A) erred in confirming the calculation of the Book Profit as per Section 115JB of the Act as calculated by the AO, and erred in making addition of loss on sale of returned goods to the extent of Rs.12,94,653/- by considering the same as unascertained liability. The said loss can never, by any stretch of imagination, be construed as unascertained liability and accordingly cannot be added said loss to the Book Profit for the year under consideration.

15. In a nutshell, the facts are that during the AY 2010-11, the assessee had sold goods to the Karnataka Police in February 2010 for Rs.192,95,306/-. However, the said consignment was rejected by the

client *vide* letter dated 01.03.2010, though the goods were returned in the subsequent year. The assessee claimed the loss pertaining to the sale in the financial year 2009-10 relevant to the assessment year 2010-11. The working of the loss of goods returned was Rs.12,94,653/- (sale price Rs.1,92,95,306/- minus Rs.1,80,00,653/-). The AO made a disallowance of the above sum of Rs.12,94,653/- which was confirmed by the Ld. CIT(A).

16. Before us, the Ld. counsel of the assessee submits that the loss should be assessed in the subsequent year, when the goods have been returned and not considered in subsequent year.

On the other hand, the Ld. DR relies on the order of the Ld. CIT(A).

17. We have heard the rival submissions and perused the relevant materials on record. The fact remains that during the AY 2010-11, the assessee had sold goods to the Karnataka Police in February 2010 for Rs.192,95,306/-. However, the said consignment was rejected by the client *vide* letter dated 01.03.2010. As the assessee is following the mercantile system of accounting, the AO has rightly made a disallowance of Rs.12,94,653/- on account of loss on sale of goods returned in AY 2010-11. Thus the 4<sup>th</sup> ground of appeal is dismissed.

However, we direct the AO to allow it in AY 2011-12.

18. The 5<sup>th</sup> ground of appeal

The CIT(A) erred in confirming the disallowance of the foreign travelling expenses of Rs.7,03,559/- by treating such expenses as not being incurred

wholly and exclusively for the purpose of the business. It is submitted that such disallowance is made without considering the facts and circumstances of the case and therefore, such addition should be deleted.

19. The AO found that as per the details filed, the assessee had incurred foreign travel expenditure in the following cases:

- Shri Shambhukumar S. Kasliwal- to Switzerland (cost –Rs.3,50,905/-)
- Smt. Rajkumri Kasliwal –to Switzerland (cost – Rs.2,82,593/-)
- Shri Ajay Dhariwal – to Dubai, Jeddah and Kuwait (cost Rs.2,26,726/-)

The AO observed that the assessee had paid commission to foreign agents and none of them were in Switzerland, but were based in UAE, Kuwait, Saudi Arabia and Lebanon. In response to query raised by the AO, the assessee submitted that Smt. Rajkumari Kasliwal is the wife of Shri Shambhukumar S. Kasliwal, who is a Director of the assessee-company. During the course of assessment proceedings, the assessee submitted that Shambhukumar S. Kasliwal has travelled to visit Klopman International for purchase of Spinning Machinery and that the deal was finalized in FY 2010-11 relevant to the AY 2011-12. However, the assessee failed to file any evidence that it was due to Shri Shambhukumar S. Kasliwal's visit to Switzerland along with his wife to finalize a deal for purchase of Spinning Machinery from M/s Klopman International.

As the assessee failed to explain the business exigency in undertaking a foreign visits, the AO made a disallowance of Rs.7,03,559/-.

In appeal, the Ld. CIT(A) confirmed the above disallowance made by the AO.

20. Before us, the Ld. counsel for the assessee submits that the company has started export in only the last couple of years. It is stated that it is not necessary that every country a person visits, one gets orders; many a times the assessee gets contacts from which it gets orders from other countries. It is further explained that the assessee has made exports to countries, where none from the company have travelled to like Germany and Lebanon. It is also stated that for AY 2012-13 the same expenses have been allowed.

On the other hand, the Ld. DR supports the order passed by the Ld. CIT(A).

21. We have heard the rival submissions and perused the relevant materials on record. In the instant case, the assessee failed to file any evidence that it was due to Shri Shambhukumar S. Kasliwal's visit to Switzerland along with his wife to finalize a deal for purchase of Spinning Machinery from M/s Klopman International. Further, we find that during the year under consideration the assessee had paid commission to foreign agents and none of them were in Switzerland but were based in UAE, Kuwait, Saudi Arabia and Lebanon. As the assessee failed to justify the business exigency of the foreign travel, the AO has rightly made a disallowance of Rs.7,03,559/- and we confirm it. Thus the 5<sup>th</sup> ground of appeal is dismissed.

The assessee has not pressed the 6<sup>th</sup> ground of appeal. Accordingly, the 6<sup>th</sup> ground of appeal is dismissed as not pressed.

22. Facts being identical, our decision for the AY 2010-11 applies *mutatis mutandis* to AY 2011-12. As we have confirmed the disallowance of Rs.12,94,653/- in respect of loss on sale of returned goods in AY 2010-11, we direct the AO to allow it in AY 2011-12.

23. In the result, the appeals are partly allowed.

**Order pronounced in the open Court on 28.10.2019**

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

Sd/-  
(N.K. PRADHAN)  
ACCOUNTANT MEMBER

Mumbai;

Dated: 28/10/2019

*S. Samanta, P.S (On tour).*

**Copy of the Order forwarded to :**

1. The Appellant
2. The Respondent.
3. The CIT(A)-
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Assistant Registrar)  
**ITAT, Mumbai**