IN THE INCOME TAX APPELLATE TRIBUNAL "B", BENCH KOLKATA

BEFORE SHRI J. SUDHAKAR REDDY, AM & S. S. GODARA, JM

आयकर अपीलसं./I.T.A No.1097/Kol/2018

(निर्धारण वर्ष / Assessment Year: 2013-14)

Shree Krishna Goswami C/o Subash Agarwal & Associates, Siddha Gibson, 1, Gibson Lane, 2nd Floor, Suite213, Kolkata – 700069.	**Vs.**	**Pr. CIT -2, Kolkata**
स्थायीलेखासं./जीआइआरसं./PAN/GIR No.: **AEOPG4309Q**		
(Appellant)	**..**	**(Respondent)**

Appellant by : Shri Subash Agarwal, Advocate
Respondent by : Shri A. K. Nayak, CIT(DR)

सुनवाईकीतारीख/ **Date of Hearing** **: 03/12/2019**

घोषणाकीतारीख/**Date of Pronouncement** **: 31/12/2019**

आदेश / O R D E R

Per Shri S. S. Godara:

This assessee's appeal for assessment year 2013-14 arises against the Principal Commissioner of Income Tax, Kolkata's order dated 24.03.2018 involving proceedings u/s 263 of the Income Tax Act, 1961 (in short 'the Act').

Heard both the parties. Case file perused.

2. This assessee is an individual engaged in export, import and trading business. He filed his return on 29.09.13 declaring income of Rs.41,33,780/-. The Assessing Officer completed the regular assessment in question on 30.03.2016. Case file indicates that the PCIT thereafter initiated the impugned revision proceeding by terming the above regular assessment as erroneous causing prejudice to interest of the Revenue. He issued section 263 show-cause notice dated 18.01.18 on two counts i.e. the assessee had paid clearing and forwarding expenses in profit and loss account amounting to Rs.23,08,808/- to M/s Parbati International Company and Kuehne & Nagel Pvt. Ltd. for freight charges without

deducting any TDS at source. His latter issue was that TDS was deductible on payment of freight charges u/s 194C of the Act and non-deduction thereby accepting the said expenses rendered the impugned assessment erroneous causing prejudice to interest of the Revenue.

3. The assessee put his appearance before the CIT(A) and filed his reply dated 07.02.18 reading as under:

Dated: 07-02-2018

To,
Pr. Commissioner of Income Tax
– 11, Kolkata

Sub: Notice no. 6842 dated 18.01.2018

This has reference to your above said notice which was issued subsequent to show cause notice u/s 263 issued by Pr CIT – 11 in case of assessment for AY – 2013-14,

At the outset, we like to state you that I, Shree Krishna Goswami PAN: AEOPG4309Q is proprietor of M/s S Krishna & Co, through which I have made certain export shipment during the FY – 2012-13 relevant to AY – 2013-14.

During the AY – 2013-14 expenditure incurred on air freight charge and forwarding for Rs. 2308808/- which includes payment made to Parbati International Co. and Kuehne & Nagel Pvt Ltd for Rs. 1087866/- and Rs. 198745/- respectively. In this connection pl note that during the year we have made total 25 nos export shipment and out of that 22 shipments was handled by Parbati International Co and balance 3 nos consignment was routed through Kuehne & Nagel Pvt Ltd

a. **Parbati International Co** - Parbati International Co was engaged to airlift the material for export shipment. The company was working as an agent to foreign airlines. During the year Parbati International Co collected Air Freight on behalf of Airlines and raised bill for air freight only. We are enclosing copy of all bills raised by Parbati International CO and corresponding Air Way Bill issued by Foreign Airlines for your doing the needful (as annexure –A). We further like to state you that freight was paid to **Airline** through their agent Parbati International Co. and since foreign airlines is not resident Indian, section 40a(ia) is not applicable.

b. **Kuehne & Nagel Pvt Ltd** - Kuehne & Nagel Pvt Ltd was engaged to airlift and clear the material for export shipment. The company was working as an agent to foreign airlines. During the year Kuehne & Nagel Pvt Ltd collected Air Freight Rs. 192422/- on behalf of Airlines and Rs. 6323/- towards other charges for clearing & forwarding of goods and raised combined bill for air freight and charges only. We are enclosing copy of all bills raised by Kuehne & Nagel Pvt Ltd and corresponding Air Way Bill issued by Airlines for your doing the needful (as annexure – B). We further like to state you that we had wrongly deducted TDS on 1st Bill of Rs. 785/- as it was paid to Airline who is not Indian resident. Hence, we have not deducted TDS on subsequent bill. Furthermore, we like to state you that charges paid to party was only Rs. 6323/- which is much lesser then threshold limit, provision of TDS is not applicable. However, Air Freight paid to foreign airlines (Non Resident) through their agent, section 40a(ia) is also not applicable.

For S. KRISHNA & CO.

RECEIVED 20 FEB 2018

We further like to draw your attention on the recent verdicts of ITAT – Kolkata in case of "Taj Leather Works v. Assistant Commissioner of Income-tax (ITAT Kolkata) – IT APPEAL NOs. 1686 AND 1687 (KOL.) OF 2011, Dated- 31.05.2012" – where it was held that the air freight payment is thus made to the foreign airlines, though through the agents. Therefore, the payments cannot be said to have been made to a resident company. Accordingly, the provisions of section 194C do not come into play. Therefore, the assessee did not have any obligation to deduct tax at source either u/s 194C or 195 from payment made to foreign airlines. In this view of the matter, impugned disallowance u/s 40a(ia) are devoid of any merit and were liable to be deleted.

We hope that you will find the above in order.

Thanking you

3. The PCIT has rejected the assessee's foregoing explanation as follows:

"5. The power of revision by the CIT u/s 263 of the Act is very wide and it is in the nature of supervisory jurisdiction. The power u/s 263 can be exercised even in cases where the issue is debatable and such power is not comparable with the power of rectification of mistake u/s 154 of the Income Tax Act. It is well settled that incorrectassumption of facts or incorrect application of law satisfies the requirement of law i.e.order being erroneous & prejudicial to the interest of revenue. The order passed by theA.O. without application of mind or order showing apparent error of reasoning or theorder where the A.O. simply accepts what the assessee stated in his return of incomeand fails to make the enquiries which are called for in the facts and circumstances ofthe case will also call for intervention action of Revision u/s 263 of the Act by the Pr.CIT. It is a trite law that the disclosure of facts by the assessee in the return of incomeand /or in the course of assessment proceedings cannot give immunity from revisionaljurisdiction of the CIT/Pr. CIT u/s 263 and the same has been reiterated by the Hon'bleSupreme Court in various decisions including that of :-

i) Rampyari Devi Saraogi Vs. CIT (1968) 67 ITR 84 (SC),

ii) Tara Devi Agarwal vs. CIT(1973) 88 ITR 323 (SC).

iii) Malabar Industries Co. Ltd vs. CIT (2000) 243 ITR 83 (SC)

6. I have considered the order of the AO, submissions of the assessee and I have also examined the assessment records. It is seen that the AO has failed to make thedisallowance u/s 40(a)(ia) for non-deduction of TDS as provided u/s 194C. It is alsoseen that the assessee has unsecured loans of Rs.1,34,44,451/- and huge currentliabilities of Rs.22,23,17,465/- including the sundry creditors of Rs. 9,70,06,961/- which has not been properly examined by the A.O during the course of assessment proceedings u/s 143(3).

7. After considering all the facts and circumstances of the case, I am satisfied that this is a fit case for revision u/s 263(1) as the assessment order passed by the A.O. is found to be erroneous and prejudicial to the interest of revenue as the AO failed to make proper inquiry or verification regarding the claim of the assessee within the meaning of Explanation 2 of section 263(1) as discussed above and hence the assessment made by the A.O. is set aside in full and the A.O. is accordingly directed to make a fresh assessment after making proper enquiry and verification in accordance with law.

8. The AO is directed to take up the fresh assessment on a priority basis and also provide adequate opportunity to the assessee during the course of fresh assessment proceedings."

4. Mr. Agarwal vehemently submits during the course of hearing that the PCIT erred in law and on facts in exercising his section 263 revision jurisdiction whilst holding the above regular assessment dated 30.03.2016 as erroneous causing prejudice to interest of the Revenue. He reiterates the assessee's pleadings that no TDS was deductible on assessee's freight payments since the same had been paid to overseas foreign entities' agents not required any such compliance. It is further contended in view of the Assessing Officer's scrutiny notices issued u/s 142(1) r.w. section 143(2) of the Act that he had examined all the issues including that of non-deduction of TDS during the course of assessment and the mere fact of the same being not expressly mentioned in the assessment order does not render the assessment erroneous causing prejudice to interest of the Revenue as held in hon'ble Bombay high court's judgment in CIT vs. Gabriel India Ltd. (1993) 203 ITR 108 (Bom). Mr. Agarwal lastly submits that the impugned expenditure is by way of reimbursement only which does not require TDS deduction. His further case is that there is no contractual relationship between the assessee and either of the two companies which can attract section 194C of the Act. Case law Malabar Industries Co. Ltd. vs. CIT 243 ITR 83 and CIT vs. Max India 295 ITR 258(SC) is also quoted in support that an assessment cannot be made subject matter of revision jurisdiction in case the same is not erroneous as well as causing prejudice to interest of the revenue; simultaneously.

5. The Revenue placed a strong reliance on PCIT's revision directions issued to the Assessing Officer on account of his failure in examining the entire issue of non-deduction of TDS in light of the explanation 2 of section 263(1) applicable w.e.f. 01.06.15. Learned CIT-DR submits that the Assessing Officer had nowhere examined the above TDS deduction issue and therefore, the same has triggered the impugned revision mechanism into motion.

6. We have given our thoughtful consideration to rival contentions. We make it clear that there is no dispute about the assessee having paid the impugned freight

charges to M/s Parbati International Company and Kuehne & Nagel Pvt. Ltd. The PCIT has reversed the Assessing Officer's assessment not disallowing the above freight payment on account of non-deduction of TDS. Case file comprising of the assessee's ledger account regarding the two paying entities as well as books indicate that the impugned payments are in the nature of air freight expenses paid to overseas airlines agents only. These clinching facts have neither been dealt with nor rebutted in PCIT's detailed discussion despite the assessee having submitted a lengthy explanation in its reply dated 18.01.18 (supra).We notice in this backdrop that the relevant case law (supra) already supports the assessee's case that payment made to overseas foreign airlines through their agents do not attract TDS deduction as follows:

> *"4. The issue in appeal lies in a narrow compass of material facts. The assessee is a manufacturer and exporter of leather products and the assessee has incurred expenditure on air freight, in exporting its products abroad, paid to various airlines. These payments for airfreight are made to two entities, namely PDP International Limited (PDP, in short) and DHL DanzasLemuir Ltd (DHL, in short), in their capacity as agents of the se airlines. In the course of assessment proceedings, the Assessing Officer required the assessee to show cause as to why disallowance under section 40(a)(ia) not be made as the assessee has not deducted tax at source under section 194 C from these payments. The stand of the assessee was that these payments are made to non -resident airlines, and, therefore, following the rationale of circular no. 723 which lays down that no taxes are required to be deducted at source under section 194C from payments to agents of foreign shipping companies, no taxes under section 194 C are required to be deducted from the same. The Assessing Office, however, rejected this stand of the assessee on the grounds that (a) circular no. 723 specifically applicable only to foreign shipping companies and the benefit of the same cannot, therefore, extend to the foreign airlines; (b) PDP and DHL were resident companies, they may utilize services of any airlines for transportation but they were providing services to the assessee, and, therefore, the assessee was obliged to deduct tax at source under section 194 C; and (c) even if it is assumed that the payments were made to the agents of the foreign companies, the assessee was under an obligation to move an application under section 195(2) requiring the Assessing Officer to determine whether tax was deductible from such foreign remittance. The Assessing Officer thus held that the assessee was obliged to deduct tax at source from these payments, and since he has failed to do so, these payments cannot be allowed as deduction in computation of business income. Aggrieved, assessee carried the matter in appeal before the CIT(A) but without any success. Learned CIT(A) discussed and elaborated upon the stand of the Assessing Officer and upheld the same. The assessee is not satisfied and is in further appeal before us.*
>
> *5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.*
>
> *6. It is an admitted position that so far as the airfreight is concerned, it is paid to the agents on the actual basis and that the bills and airfreight documents have been directly issued to the foreign airlines. PDP and DHL, while accepting payments for airfreight components, have acted merely as agents of the respective airlines and have not received the airfreight payments in their own right. In copies of airway bills, which have been filed*

before us in the paperbook, the name of these agents is shown as "Issuing carrier's agent and the city" as also the agent's code is given as "Agent's IATA code". There is thus enough material to demonstrate that the persons having received money for the airfreight have received the same in their capacity as "issuing carrier's agent" i.e. agent of the airline concerned. The airfreight payment is thus made to the foreign airlines, namely SIA, Emirates, British Airway s and Lufthansa - though through the agent, i.e. PDP and DHL etc.

7. In view of the above discussions, in our considered view, the payments cannot be said to have been made to a resident company, and, accordingly, the provisions of Section 194 C , which apply only on the resident recipients, do not come into play.

8. As for the stand that the assessee should have moved the application under section 195(2) in case of payments to non-residents and assessee's failure to do so is to be visited with consequences for non-deduction at source, the law is now settled by Hon'ble Supreme Court in the case of GE India Technology Centre Pvt. Ltd Vs CIT (327 ITR 456) wherein Their Lordships have categorically held that, " where a person responsible for deduction is fairly certain, then he can make his own determination as to whether the tax was deductible at source and, if so, what should be the amount thereof ". The plea of the revenue authorities to the effect that where the assessee does not move an application under section 195(2) and makes the remittance without deduction of tax at source, the assessee should be visited with consequences for non deduction of tax at source, which was accepted by Hon'ble Karnataka High Court in the case of CIT Vs Samsung Electronic Co Ltd (320 ITR 209), was categorically rejected by Their Lordships, and Their Lordships observed as follows:

In our view, section 195(2) is based on the "principle of proportionality". The said sub - section gets attracted only in cases where the payment ma de is a composite payment in which a certain proportion of payment has an element of "income" chargeable to tax in India. It is in this context that the Supreme Court stated, "If no such application is filed, income -tax on such sum is to be deducted and it is the statutory obligation of the person responsible for paying such 'sum' to deduct tax thereon before making payment. He has to discharge the obligation to TDS". If one reads the observation of the Supreme Court, the words "such sum" clearly indicate that the observation refers to a case of composite payment where the payer has a doubt regarding the inclusion of an amount in such payment which is eligible to tax in India. In our view, the above observations of this Court in Transmission Corpn. of A.P. Ltd.'s case (supra) which is put in italics has been completely, with respect, misunderstood by the Karnataka High Court to mean that it is not open for the payer to contend that if the amount paid by him to the non-resident is not at all "chargeable to tax in India", then no TAS is required to be deducted from such payment. This interpretation of the High Court completely loses sight of the plain words of section 195(1) which in clear terms lays down that tax at source is deductible only from "sums chargeable" under the provisions of the Income -tax Act, i.e., chargeable under sections 4, 5 and 9 of the Income -tax Act.

9. We have also noted that it is not even the revenue's case that the amounts paid to foreign airlines, on account of airfreight payments, are taxable in India, and quite rightly so, because, as the provisions of all the respective tax treaties clearly provide , the profits from operations of ships and aircrafts in the international traffic are taxable only in the state in which the respective enterprise are fiscally domiciled and not in the source state. This rule, howsoever devoid of paradigm justification as it may appear to many of us, is one of the fundamental rules followed in almost all the tax treaties and our tax treaties with UK, UAE, Singapore and Germany are no exception to this general rule. It is only elementary that a tax deduction at source under section 195 is only a vicarious liability inasmuch as when recipient s of income, i.e. the airlines concerned, have no primary

liability to pay tax, there cannot be any vicarious liability to deduct tax from payments in which such income is embedded.

10. In view of the above discussions as also bearing in mind entirety of the case, we are of the considered view that the assessee did not have any obligations to deduct tax at source - whether under section 194 C or under section 195 - from payments made to the foreign airlines for airfreight. In this view of the matter, the impugned disallowances under section 40(a)(ia) are devoid of any merits, nor can these disallowances be made under section 40(a)(i) either - as alternatively suggested by the authorities below. We, accordingly, direct the Assessing Officer to delete the impugned disallowances. The assessee gets the relief accordingly."

7. All this sufficiently indicates that the impugned regular assessment framed on 30.03.2016 not disallowing the assessee's freight payments to foreign airlines' agents on account non-deduction of TDS; in our considered opinion, is not an instance of being an erroneous one as causing prejudice to interest of the revenue since TDS was not deductible. That being the case, we hold that the Assessing Officer had rightly allowed the assessee's freight payment expanses. Hon'ble apex court's decision (supra) has already settled the law that the above twin conditions must exist simultaneously before the PCIT or the CIT; assumes his revision jurisdiction vested u/s 263 of the Act. We therefore reverse the PCIT's revision order under challenge. The impugned regular assessment dated 30.03.2016 is restored.

8. This assessee's appeal is allowed.

Order is pronounced in the open court on 31.12.2019.

Sd/-	**Sd/-**
(J. Sudhakar Reddy)	**(S. S. Godara)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

कोलकाता /Kolkata;
दिनांक/ Date:31/12/2019
(RS, Sr.PS)

<u>आदेशकीप्रतिलिपिअग्रेषित</u>/Copy of the Order forwarded <u>to</u> :

1. The Appellant - Shree Krishna Goswami
2. The Respondent- Pr. CIT -2, Kolkata
3. आयकरआयुक्त(अपील) / The CIT(A), Kolkata [sent through email]
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, **कोलकाता**/ DR, ITAT, Kolkata [sent through email]
6. गार्डफाईल / Guard file.

सत्यापितप्रति

True Copy

By Order

Assistant Registrar,
I.T.A.T, Kolkata Benches,
Kolkata.