

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

ITA No.2410/Kol/2019
Assessment Year: 2016-17

Income Tax Officer, Wd-26(4), Kolkata	Vs.	Ashok Kumar Mishra (PAN: AGVPM4086B)
Appellant		Respondent
Date of Hearing (virtual)		14.10.2020
Date of Pronouncement		21.10.2020
For the Appellant		Smt. Ranu Biswas, Addl. CIT
For the Respondent		S/Shri Saurabh Bagaria & Ritesh Goel, ARs

ORDER

Per A. T. Varkey, JM:

This appeal preferred by the revenue is against the order of Ld. CIT(A)-7, Kolkata dated 13-09-2019 for assessment year 2016-17.

2. The sole issue is in respect of Rs.1,51,86,871/-, which assessee claims to be reimbursement of expenses it incurred on behalf of its clients which was not agreed by the AO. However, the Ld. CIT(A) accepted the claim of assessee. The relevant Grounds of appeal raised by the revenue on this issue are as under:

1. *That on the facts and circumstances of the case, the Ld. CIT(A)-7, Kolkata has erred in allowing relief of Rs.1,51,86,871/- to the assessee merely based on the narration of events made by the assessee without verifying the actual expenditure made for which so called reimbursement was received.*
2. *That on the facts and circumstances of the case, the Ld. CIT(A)-7, Kolkata erred on facts by erroneously stating that the clients of the assessee have accepted the assessee's claim that the payments aggregating to Rs.1,51,86,871/- were in the nature of reimbursements and not in the nature of payment for services rendered.*
3. *That the powers of Ld. CIT(A) are coterminous with that of the AO and he, therefore, erred in not exercising such powers and even failed to reconcile the transaction details provided by M/s. M+R Logistics India Ltd. Inasmuch as it reported total transaction at Rs.1,15,77,377/- as against income of Rs.19,39,331/- offered by the assessee thereby leaving a difference of*

Rs.96,39,046/- (as per page 3 of assessment order) as against difference of only Rs.88,99,705/- explained by the assessee (refer page 2 of assessment order)."

3. Brief facts of the case are that the assessee filed his return of income on 14.10.2016 for AY 2016-17 declaring an income of Rs.8,17,130/-. The case was selected for scrutiny under CASS to verify "*whether contract receipts/fees have been correctly offered to tax*". The assessee is engaged in the business of providing services in the nature of Clearing & Forwarding Agent Services, Cargo Handling Services and Goods Transport Agency Services. The assessee conducts his business through a sole proprietary concern M/s. Satyam Services. The assessee brought to the notice of the AO that he did not have certificate/license for custom house clearing agency service. So, he entered into a MOU dated 01.03.2015 with Mr. S. N. Mullick and Mr. SomnathSirkar of M/s. Mullick Clearing Agency and of M/s. A. K. Sirkar & Sons respectively and as per the terms of MOU, the assessee used their license/certificate for custom house clearing service for providing the aforesaid services to clients. The AO found mismatch between 26AS and gross receipt declared by the assessee in the P&L Account, so the AO asked the assessee to explain. According to AO, he was not satisfied with the reply of assessee, so the difference of gross receipt/turnover to the tune of Rs.1,51,86,871/- which the assessee has not accounted for was added to the total income of assessee. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who noted that the difference of R.1,51,86,871/- is the amount of reimbursement of expenses given by the five parties as under:

Party wise details of difference on account of reimbursement of expenses

i)	JAK Maritimne& Logistics India Pvt. Ltd.	Rs. 54,87,647/-
ii)	R. K. Retail Trade Pvt. Ltd.	Rs. 4,97,310/-
iii)	M+R Logistics (India) Pvt. Ltd.	Rs. 88,99,705/-
iv)	Jamshedpur Minerals & Chemicals	Rs. 2,02,059/-
v)	Lotus Integrated Logistics Pvt. Ltd.	<u>Rs. 1,00,150/-</u>
		Rs.1,51,86,871/-

And gave relief to the assessee. Aggrieved, the revenue is before us.

4. We have heard rival submissions and gone through the facts and circumstances of the case. We note that the assessee is engaged in the business of providing services such as clearing and forwarding agents, cargo handling services and goods transport agency services. The assessee conducts his business through his sole proprietary concern M/s.

Satyam Services. Since M/s. Satyam Services did not have its own license/certificate for custom house clearing agency, he entered into a MOU dated 01.03.2015 with Mr. S. N. Mullick and Mr. Somnath Sirkar of M/s. Mullick Clearing Agency and of M/s. A. K. Sirkar & Sons for providing the aforesaid services to clients. According to the assessee, during the course of such service of providing clearing and forwarding agents, the assessee had to incur various expenses on behalf of exporters/importers/forwarders like rental charges, Container Freight Stations (CFS), container survey charges, entry fee, insurance charges, handling charges, transportation of containers, removal charges and various other custom expenses and such expenditures were reimbursed by the concerned parties. According to the assessee, he raised separate bills for (i) reimbursement of expenses and (ii) commission for services rendered. It was brought to our notice that some of the parties while making the payments to assessee erroneously deducted tax at source on the reimbursement expenses also. According to the assessee, since the reimbursement of expenses is not an income of assessee and since the parties have erroneously deducted tax at source on the reimbursement expenses, the same is reflected/appearing in Form 26AS which event caused the mismatch. According to Ld AR, some parties to whom assessee provided services (C&F Agency) had while making the payment to assessee not only deducted tax at source on commission for his services but also for the reimbursement expenses which the assessee had incurred on behalf of the clients, for which tax should not have been deducted at source because the reimbursement of expenses was not income in the hands of assessee. However, according to Ld. AR, the AO while passing the assessment order made an addition of Rs.1,51,86,871/- on account of difference between income of Rs.3,99,83,727/- appearing in form 26AS and income of Rs.2,47,96,856/- credited in the P&L Account, even though during the course of assessment proceeding it was brought to the notice of the AO that difference was on account of erroneous tax deduction at source of the reimbursement expenses and that the difference/ excess amount of Rs.1,51,86,871/- represent the reimbursement expenses. According to the assessee, the reconciliation statement and bills for reimbursement were duly filed and the AO had issued notices u/s. 133(6) of the Act to various parties, pursuant to which the AO received some replies. In the assessment order, the AO notes that the parties who responded to his notice has confirmed the payments made to the assessee and, therefore, the AO made the addition. According to the assessee, the AO did not take into account the fact that the confirmation of payment made to the assessee by

the parties includes the reimbursement of expenses which are not routed through the P&L Account. It was brought to our notice that the AO did not confront the assessee with the replies given by the parties u/s. 133(6) notice. This omission on the part of AO, according to the Ld. AR, was in violation of Natural Justice and when the assessee brought to the notice of the Ld. CIT(A) all the aforesaid facts, the Ld. CIT(A) has given the following findings:

1. That the assessee has to incur various expenditures like rental charges to Container Freight Stations (CFS), container survey charges, entry fee, insurance charges, handling charges, transportation of containers, removal charges and various other custom expenses on behalf of exporters/importers/ forwarders and such expenditures are reimbursed by the concerned parties (supra).
2. That the reimbursement of expenses is not an income of assessee but the same is appearing in form 26AS only for the reason that TDS was made by the parties. Merely that amount is appearing in form 26AS does not mean that the same is income of assessee. It is very pertinent to note that assessee has not claimed any such expenditure in his profit & loss account which has been reimbursed as claimed.
3. That the reconciliation statement and bills for reimbursement were duly filed and admitted as evident from the assessment order itself. Bill wise details along with copies of the bills pertaining to reimbursements were filed with the AO with the explanation that such reimbursements did not attract the TDS provisions of the Act.
4. That the AO issued notices u/s 133(6) to the concerned parties who confirmed that payments were made to the assessee but the AO failed to appreciate that these payments included payments on account of reimbursement of expenses and these expenses were never debited in the P&L A/c.
5. That the replies received from the concerned parties u/s 133(6), which were used by the AO in making the impugned addition, were never communicated to the assessee for any feedback explanation thus violating the principles of Natural Justice.
6. That confirmatory letters of the said parties like M/s JAK Maritime & Logistics India (P) Ltd. and M/s M+R Logistics India (P) Ltd. are on record confirming that amounts paid to the assessee were on account of reimbursement.
7. That the current Auditors of the assessee have also certified that the impugned amount of ₹1,51,86,871/- was on account of reimbursement and that the same was not credited nor debited to the P&L A/c. (copy of Auditor's Certificate on record).
8. That by sheer mistake of TDS being effected by the payer on account of reimbursement made to the payee, adverse action could not be taken against the payee in the absence of any explanation elicited from the payee by the AO in the matter. This point is akin to point no. 5 above.
9. That the case of the assessee on similar facts is covered by various judicial decisions (supra) in favour of the assessee. (See the case laws as contained in the written submission of the AR of the appellant as per para 4.1. supra)

5. The Ld. AR of the assessee drew our attention to the point no. 3 (supra) of Ld. CIT(A), which shows that the assessee had filed the reconciliation statement and bills for reimbursement before the AO along with bills, details along with copies of the bills pertaining to reimbursement with the explanation that such reimbursement made by the parties did not attract the TDS provision of the Act. From point no. 4 (supra), it is noted that the AO failed to appreciate from the replies given by the parties to his notice u/s. 133(6) of the Act that even though those parties have confirmed payments, it included reimbursement of expenses also. It was brought to our notice that on perusal of point no. 6 reveals that the confirmatory letters from M/s. JAK Maritime & Logistics India (P) Ltd. which has reimbursed Rs.54,87,647/- to the assessee and M/s. M+R Logistic India (P) Ltd. which reimbursed Rs.88,99,705/- were on record confirming that amounts paid to the assessee were on account reimbursement. This finding of fact by the Ld. CIT(A) has not been challenged by the revenue as a question of fact. So, out of Rs.1,51,86,871/- confirmation of reimbursement of expenses to the tune of Rs.54,87,647/- + Rs.88,99,705/- = Rs.1,43,87,352/- was already filed before the authorities below and that has been taken into account by the Ld. CIT(A) to accept the contention of the assessee, which finding of fact has not been assailed before us, so this finding crystallises. In such a scenario, the decision of the Ld. CIT(A) relying on the decision of the Hon'ble Delhi High Court in CIT Vs. Lear Automotive India Ltd., ITA No. 110/2010 order dated 05.02.2010 was correctly relied upon, wherein it was held by Hon'ble High Court as under:

“This appeal relates to the assessment year 2001-2002 and arises out of the Tribunal's order dated 19.06.2009. the issue was with regard to the allowance of credit for TDS mistakenly deducted by Mahindra and Mahindra Limited while making the payment to the assessee amounting to Rs.25,57,500/-. The Tribunal has examined the matter in detail and has affirmed the views taken by the Commissioner of Income Tax (Appeals). The Tribunal held as under:-

5. Having heard the Ld. DR and having perused the material on record, we find that there is no error in the order of the Id. CIT(A). Undisputedly, the assessee company earned income of Rs. 4,65,00,000/- only by way of Engineering fees. Another amount of Rs.4,65,00,000/- had been received as tooling advance. This latter amount was to be paid to the vendors of M/s. Mahindra and Mahindra Ltd. This payment was a reimbursement. That being so, it could not be considered as the income of the assessee company. It was by sheer mistake that M/s. Mahindra and Mahindra Ltd. has deducted TDS on the whole amount of Rs. 9,30,00,000/-. The TDS amount was thus in excess of the assessable tax on the payment made by M/s. Mahindra and Mahindra Ltd. to the assessee company. This had to be refunded, as held by the Hon'ble Supreme Court in the case of Sandvik India Ltd. v. CIT 280 ITR 643(SC). This position has duly been considered and rightly so, by the Id. CIT(A) in the impugned

order. If wrong tax has been paid, it is of necessity to be returned, lest the department be charged of unjust enrichment.”

6. We note that the Ld. CIT(A) has taken note of other judicial precedents also wherein it was held that reimbursement of expenses by the clients which assessee spent on behalf of them, cannot partake the character of an income in the hands of assessee and it is also settled that no addition can be made only on the basis of mismatch found in Form 26AS. Since some of the parties/clients have mistakenly deducted TDS on the reimbursement expenses given to the assessee got reflected in the TDS of assessee, and thus there was mismatch in the Form 26 AS and the income the assessee received got distorted and it cannot be the sole ground to AO to add the difference as income of assessee. Since the assessee has filed the reconciliation which has been taken into account by the Ld. CIT(A) to give relief to the assessee and the revenue has not challenged the reconciliation filed before the Ld. CIT(A) and the finding of fact by the Ld. CIT(A) that Rs.1,51,86,871/- was reimbursement of expenses, there is no infirmity in the order of the Ld. CIT(A) and, therefore, we confirm the same and dismiss the appeal of the revenue.

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

Order is pronounced in the open court on 21st October, 2020

Sd/-
P. M. Jagtap)
Vice President

Sd/-
(Aby. T. Varkey)
Judicial Member

Dated : 21st October, 2020

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant –ITO, Ward-26(4), Kolkata.
2. Respondent –Shri Ashok Kumar Mishra, 20, NetajiSubhas Road, Block-A, Kolkata-700 001.
3. CIT(A)-7, Kolkata. (sent through e-mail)
4. CIT- , Kolkata
5. DR, ITAT, Kolkata. (sent through e-mail)

/True Copy,

By order,

Assistant Registrar
ITAT, Kolkata.