

**IN THE INCOME TAX APPELLATE TRIBUNAL
LUCKNOW BENCH 'A', LUCKNOW**

**BEFORE SHRI A. D. JAIN, VICE PRESIDENT AND
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER**

I.T.A. No.220/Lkw/2020
Assessment Year:2015-16

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| M/s Wire One, D-10, Industrial Area, Talkatora, Lucknow. PAN:AABFW1759R (Appellant) | Vs. | Income Tax Officer (TDS)-1, Lucknow. (Respondent) |
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| Appellant by | Shri Rakesh Garg, Advocate |
| Respondent by | Shri Ajay Kumar, D.R. |
| Date of hearing | 03/11/2020 |
| Date of pronouncement | 16/12/2020 |

ORDER

PER T.S. KAPOOR:A.M.

This is an appeal filed by the assessee against the order of learned CIT(A)-2, Lucknow dated 06/06/2020 pertaining to assessment year 2015-2016.

2. Learned counsel for the assessee, at the outset, submitted that the case of the assessee is duly covered in favour of the assessee by the order of Lucknow Bench of the Tribunal in the case of Lala Bharat Lal & Sons vs. Income Tax Officer (TDS)-1 in I.T.A. Nos. 14 to 16/Lkw/2019 dated 19/02/2020 wherein the Tribunal has held that TCS is not applicable to a trader. It was submitted that assessee is a partnership firm trading in ferrous and non-ferrous metals and the total turnover of the assessee

included trading of scrap as well as manufactured goods. The authorities below held that the item sold by the assessee was scrap therefore, section 206C was applicable. It was further submitted that before the authorities below it was explained that section 206C was applicable only when the goods sold were scrap and scrap has been defined to include scrap which has been generated from manufacture or mechanical working of materials which is not usable as such because of breakage, cutting up, wear and other reasons. It was submitted that as per this definition, the scrap must be from the manufacture or mechanical working of materials whereas in the present case the turnover was primarily due to trading goods and to support his contention that the major sales made by the assessee was on account of trading goods only, our attention was invited to trading and profit & loss account, placed at page 113 of the paper book where a copy of trading and profit & loss account was placed and where the sale on account of trading and on account of manufacturing was separately mentioned. It was further brought to our notice that in the VAT assessment also the assessee declared the sales primarily due to trading and which has been accepted by the Department also. To further support his arguments, Learned counsel for the assessee took us to copy of audit report wherein in quantitative details in tax audit report, the main items of sales were due to trading only. Therefore, it was submitted that the judgment of Lucknow Bench of the Tribunal in Lala Bharat Lal & Sons is squarely applicable to the assessee.

3. Learned D. R., on the other hand, submitted that in Lala Bharat Lal & Sons the assessee was not a manufacturer whereas in the present case the assessee is a manufacturer which is apparent from the order passed u/s 206C itself. In this respect our attention was invited to the order dated 29/03/2019 passed u/s 206C of the Act. Therefore, it was prayed that the

judgment relied on by Learned counsel for the assessee is not applicable and therefore, the appeal filed by the assessee be dismissed.

4. We have heard the rival parties and have gone through the material placed on record. We find that though it is a fact that the assessee is engaged in the business of manufacturing of copper wire but the main part of the turnover of the assessee is due to trading in scrap which is evident from the copy of profit & loss account, placed at page 113 of the paper book wherein the sale from trading has been noted at Rs.7,73,99,687/- and sale from manufacturing has been noted at Rs.1,18,41,997/-. The sale figure matches with the figure noted by the Assessing Officer but the A.O. instead of mentioning the sale due to trading mentioned this sale to be on account of scrap. The sales on account of trading and on account of manufacturing is further corroborated from the copy of tax audit report which shows the sale and purchase of scrap on account of trading activities. We further find that in the same tax audit report, the consumption of raw material has been declared to 24,800 kgs. against which the yield has been declared at 99.30% which means that the scrap out of manufacturing activities was only 0.7% of the consumption. These two documents of profit & loss account and tax audit report clearly establish that the assessee had primarily dealt into trading activities and there is very little scrap which was obtained during the course of manufacturing. The Lucknow Bench of the Tribunal in the case of Lala Bharat Lal & Sons (supra) has held that the TCS u/s 206C is applicable only if the scrap is obtained during the course of manufacturing. The relevant finding of the Tribunal is reproduced below:

"4. We have heard the rival parties and have gone through the material placed on record. We find that it is an undisputed fact that the assessee is not a manufacturer and is only a dealer in scrap. During the years under consideration, as noted in the assessment orders, the assessee had sold scrap, which

included unburned transformer coils from various distribution companies of UPPCL. We find that whether a trader in scrap is liable to be fastened with liability to collect TCS under section 206C came up for consideration of the ITAT Ahmedabad 'B' Bench in the case of 'Navine Fluorine International Ltd. vs. ACIT(TDS)' [supra], wherein, the ITAT held that to fall under the definition of scrap as given in the Explanation to section 206C of the Act, the term 'waste' and 'scrap' are one and which should arise from manufacture and if the scrap is not coming out of manufacture, then the items do not fall under the definition of scrap and thus not liable to TCS. The findings of the ITAT Ahmedabad Bench, as contained in paras 12 and 13, are reproduced below:

"12. The explanation to section 206 C of the IT Act provides the meaning of scrap means "waste and scrap" from manufacture or mechanical working of material which is definitely not usable as such because of breakage, cutting up, wear and other reasons. In the above definition the important words used in the definition of scrap are "waste and scrap" - "from manufacture" and "which is". The word "waste and scrap" are one item. Thereafter, the word used is "from" the manufacture or mechanical working of material. It would mean that the waste and scrap being one item should arise from the manufacture or mechanical working of material. It is, therefore, necessary to read the words waste and scrap together which are generated out of manufacturing process of the assessee. The words waste and scrap should have nexus with the manufacturing or mechanical working of material. Thereafter, the word used is "which is" definitely not usable. The word "is" as used in this definition of the scrap meant for singular item i.e. "waste and scrap". The word waste Navine Fluorine International Ltd. Vs ACIT, TDS Cir, Surat "which is" denotes to singular item and thus the singular item would be waste and scrap. The words waste and scrap thus cannot be read differently as is argued by the learned DR. The list of scrap sold by the assessee is reproduced above which are not connected with manufacture or mechanical working of material. The findings of the learned CIT(A) are based on presumption only that since the assessee is engaged in manufacture of

fluorine and other refrigerated gases, therefore, entire scrap is generated out of its manufacturing activities. The findings of the learned CIT(A) are not based on any material or evidence. The assessee is admittedly engaged in manufacturing of fluorine and other refrigerated gases and list of scrap items noted above would indicate that same cannot be used for manufacturing or mechanical working of material of fluorine and other refrigeration gases. By the nature of the scrap items noted above, the same cannot be used while manufacturing gases or doing any mechanical working of the material for the gases. The items of the scrap in the case of the assessee would not form part of the definition of the scrap as is provided in Explanation (b) to section 206 C of the IT Act. Thus, the explanation is wrongly applied in the case of the assessee.

13. Considering the facts noted above, we are of the view that the authorities below have wrongly applied the meaning of scrap as is provided in Explanation (b) to section 206 C of the IT Act in the case of the assessee. Therefore, the assessee cannot be held to be in default. The assessee is not required to deduct tax u/s 206 C (6) of the IT Act on the items of scrap as noted above. Resultantly, no Navine Fluorine International Ltd. Vs ACIT, TDS Cir, Surat interest could be charged u/s 206C (7) of the IT Act. We accordingly, set aside the orders of the authorities below and allow both the appeals of the assessee."

5. Further, we find that the Special Bench of the Rajkot Bench of the Tribunal in the case of 'M/s Bharti Auto Products vs. CIT-II' in ITA Nos.391&392/Rjt/2011, held that irrespective of manufacturing, all the traders in scrap are liable to collect TCS under the provisions of section 206C of the Act.

6. We further find that the Ahmedabad Bench of ITAT in the case of 'ITO(TDS) vs. Priya Blue Industries Pvt. Ltd.' in ITA No.2207/Ahd/2011, vide order dated 14/5/2015, again relied on the order of the Ahmedabad Bench of the ITAT in the case of 'Navine Fluorine International Ltd. vs. ACIT(TDS)' [supra] and held that the words 'waste' and 'scrap' should have nexus with manufacturing or mechanical working of materials. For the

sake of completeness, the findings of the Ahmedbad Bench of the ITAT are reproduced below:

"We find that ITAT 'B' Bench, Ahmedabad in ITA Nos. 1213 and 1214/Ahd/2010 dated 15.02.2011 in case of Navine Fluorine International Ltd Vs. ACIT, TDS Circle Surat, for A Y 2009-10 & 2010-11, inter alia held that term "waste and scrap" are one item. The "waste and Scrap" must be from manufacture or mechanical working of material which is definitely not usable as such because of breakage, cutting up, ware and to other reasons. It would mean that these waste and scrap being one item should arise from manufacture or mechanical working of material. The words waste and scrap should have nexus with manufacturing or mechanical working of materials. Therefore, the word used is "which is" definitely not usable. The word "is" as used in this definition of the scrap meant for singular item i.e. "waste and scrap". As stated above, assessee is engaged in ship breaking activity and as given to understand these items/ products in question are finished products obtained from the activity. They constitute sizable chunk of production done by ship breakers. Though such products may be commercially known as "scrap" they are definitely not "waste and scrap". The items in question are "usable as such" and therefore does not fall within the definition of scrap as given in of section 206C(1). Having said so, we restore the issue to Assessing Officer with direction to grant relief to assessee under the provision of 206C(1) of Act, with regards to only sale of scrap arising out of manufacturing activity in course of ship breaking after providing due opportunity of hearing to assessee."

7. *The Hon'ble High Court, in 'CIT(TDS) vs. M/s Priya Blue Industries Pvt. Ltd.' (supra), vide order (APB:14-22), dated 3/11/2015, passed in ITA No.604 of 2015, upholding the above findings of the Tribunal, observed as follows:*

"5. From the facts as narrated hereinabove, it is apparent that the respondent assessee had collected and paid tax at source (TCS) on the seven items as enumerated in the orders passed by the Commissioner (Appeals) as well as

the Tribunal and had not collected tax at source on the following four items

1. Old and used plates

2. Non-excisable (exempted) like furniture, wood, etc.

3. Trading of scrap (melting)

4. High seas sale.

6. The Tribunal, after considering the definition of scrap under clause (b) to section 206C of the Act, has noted that the assessee is engaged in ship breaking activity and the items in question are finished products obtained from the activity and constitute sizeable chunk of production done by ship breakers. Though such products may be commercially known as "scrap" they are not "waste and scrap", as such items are usable as such, and, therefore, do not fall within the definition of scrap as envisaged in the Explanation to section 206C(1) of the Act.

7. Section 206C of the Act bears the heading, "Profits and gains from the business of trading in alcoholic liquor, forest produce, scrap etc." and provides that every person, being a seller shall, at the time of debiting of the amount payable by the buyer to the account of the buyer or at the time of receipt of such amount from the said buyer in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the buyer of any goods of the nature specified in column (2) of the Table below, a sum equal to the percentage specified in the corresponding entry in column (3) of the said Table, of such amount as income-tax. The nature of goods specified at serial No.(vi) is scrap, and the percentage provided is 1%. The expression of scrap is defined under clause (b) to the Explanation to section 206 of the Act, to mean waste and scrap from manufacture or mechanical working of materials which is definitely not usable as such because of breakage, cutting up, wear and other reasons. On a plain reading of the said expression, it is evident that any material which is usable as such would not fall within the ambit of the

expression "scrap" as envisaged under clause (b) of the Explanation to section 206C of the Act.

8. The Tribunal, in the impugned order, has recorded that the items/products in question obtained from the activity of ship breaking are usable as such and, therefore, do not fall within the definition of scrap. However, since the assessee had not collected tax at source on items other than items obtained out of the manufacturing activity in the course of ship breaking, the Tribunal has remitted the matter to the Assessing Officer for the purpose granting relief to the assessee under the provisions of section 206C (1) of the Act with regard to only sale of scrap arising out of manufacturing activity in the course of ship breaking after providing due opportunity of hearing to the assessee. Thus, the Tribunal after recording a finding of fact to the effect that the products obtained by the assessee in the course of ship breaking activity are usable as such, and, therefore, do not fall within the definition of scrap has remitted the matter to the Assessing Officer to grant relief accordingly. Essentially, therefore, the impugned order of the Tribunal is based upon a finding of fact which does not give rise to any question of law.

9, Insofar as the course of action adopted by the Tribunal in remitting the matter to the Assessing Officer to decide in relation to which of the items the assessee is entitled to relief under the provisions of section 206C(1) of the Act is concerned, no fault can be found in the approach adopted by the Tribunal, inasmuch as, out of the four items of which tax was not collected at source, the matter has merely been referred to the Assessing Officer for the purpose of examining as to what extent relief is required to be granted to the assessee under the provisions of section 206C(1) of the Act having regard to the findings of fact rendered by it."

8. Thus, the Hon'ble High Court held that the expression "scrap" is defined in clause (b) of the Explanation to section 206C of the Act to mean 'waste' and 'scrap' from manufacture of mechanical working of materials, which is definitely not useable as such, because of breakage, cutting up, wear and other reasons; and that a plain reading of the expression 'scrap'

as envisaged under the provisions contained in clause (b) of the Explanation to section 206C of the Act, shows that any material which is useable as such, would not fall within the ambit of "scrap". The order of the Tribunal was upheld as being one on facts.

9. *The Tribunal, in 'Dhasawala Traders vs. ITO' (APB:8-13), vide order dated 1/9/2016 in ITA No.979,980 and 1535/Ahd/2015, following the Hon'ble Gujarat High Court judgment in 'CIT(TDS) vs. M/s Priya Blue Industries Pvt. Ltd.' (supra), held that where the assessee had not generated any scrap in manufacturing activity, as contemplated under the Explanation to section 206C of the Act, and where the assessee was only a trader, having not sold scrap as such, but having sold products which were re-useable and had resulted from ship breaking activity, he was not supposed to collect tax under section 206C of the Act. The relevant portion of the order of the Tribunal reads as follows:*

"8. A perusal of the paragraph-6 of the above judgment would indicate that certain items generated out of ship breaking activity might be known commercially as "scrap" but they are not waste and scrap. These items are re-usable as such, and therefore, would not fall within the definition of "scrap" as envisaged in the Explanation to section 206C(1). The assessee has also contended that it was engaged in the sale of MS pipe, iron which were obtained from ship breaking industries. The assessee himself has not generated any scrap in manufacturing activity, as contemplated in the Explanation. He was a trader. Therefore, the assessee has not sold scrap as such. He has sold the products resulted from ship breaking activity, which are reusable. Thus, the assessee was not supposed to collect tax under section 206C of the Act. The Id. AO has erred in raising the demand. I allow all appeals and delete additions.

9. In the result, all the appeals of the assessee are allowed."

10. *In 'Azizbhai A Lada vs. ITO', vide order (APB:1-7) dated 10/1/2018, passed in ITA No.765/Ahd/2015, again, following the Hon'ble Gujarat High Court decision in 'CIT(TDS) vs. M/s*

Priya Blue Industries Pvt. Ltd.' (supra), decided the matter in favour of the assessee, holding as follows:

"9. If the facts of the case in hand are considered in the light of the decision of the Hon'ble Jurisdictional High Court (supra), we find that the items sold by the assessee do not fit into the category of scrap as explained by the Hon'ble High Court (supra). Therefore, in our considered opinion, the assessee cannot be treated as an assessee in default and on the impugned sales cannot be treated as sale of scrap thereby making the assessee out of the purview of Section 206C of the Act.

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11. Facts being similar, respectfully following the findings of the Hon'ble Jurisdictional High Court (supra), we do not find any merit in the impugned demand raised by the A.O.

12. Considering the facts of the case in the light of the afore-stated decisions of the Hon'ble Jurisdictional High Court, we set aside the findings of the Id. CIT(A) and direct the A.O. to delete the impugned demand."

11. The facts in either 'Dhasawala Traders vs. ITO' (supra), or 'Azizbhai A Lada vs. ITO' (supra), have not been shown to be any different from those of the case at hand. The only argument is that the Hon'ble High Court has not taken into consideration the Special Bench decision in the case of 'M/s Bharti Auto Products vs. CIT-II' (supra). This argument, however, we find, is prima facie unsustainable. This is so, because a bare perusal of the judgment of the Hon'ble High Court (supra) reveals that the following substantial questions of law had been raised before their Lordships:

"(A) Whether the Appellate Tribunal has substantially erred in law in interpreting the term Scrap as defined in clause (b) to Explanation to section 206C of the Income Tax Act by holding that the words 'waste and scrap' is a singular item and not distinct?

(B) Whether the Appellate Tribunal has substantially erred in law in placing reliance upon the case of Navin Flourine Chemicals despite the fact that the Hon'ble Special Bench in the case of Bharti Auto Products had held that the words 'waste and scrap' are two different and distinct words?

(C) Whether the Appellate Tribunal has substantially erred in deleting the order passed under section 201(1) of the Income Tax Act of Rs.40,16,418/- and interest charged under section 201(1A) of the Act of Rs.23,29,522?

12. The question of law at item '(B)' above is the one that is presently under the scanner. This question of law specifically raises the issue as to whether the Tribunal was not incorrect in overlooking 'Bharti Auto Products' (SB) [supra]. The Lordships, in para 8 of the judgment, have unambiguously held that since the Tribunal had remitted the matter to the Assessing Officer after recording a finding of fact that the products obtained by the assessee in the course of ship breaking activity, are useable as such, due to which, they do not fall within the definition of scrap, the order of the Tribunal, being based on a finding of fact, did not give rise to any question of law. The factual matrix remains much the same in the case at hand. Here also, the assessee is a trader in scrap. Their products are not a result of manufacturing process carried out by them.

13. In the above view of the matter, it cannot at all be held that while passing their judgment, the Lordships, in 'CIT(TDS) vs. M/s Priya Blue Industries Pvt. Ltd.' (supra), overlooked the Special Bench order in 'Bharti Auto Products' (SB) [supra].

14. Even otherwise, this decision of the Hon'ble High Court has been followed by the Tribunal in 'Dhasawala Traders vs. ITO' (supra) and 'Azizbhai A Lada vs. ITO' (supra). The order in 'Azizbhai A Lada vs. ITO' (supra) is rendered by a co-ordinate Bench of the Tribunal, to which, no contrary decision has been cited by the Department before us. Further neither 'Dhasawala Traders vs. ITO' (supra) nor 'Azizbhai A Lada vs. ITO' (supra) have been shown to be upset either on appeal or otherwise.

15. In this view of the matter, respectfully following 'CIT(TDS) vs. M/s Priya Blue Industries Pvt. Ltd.' (supra), we

decide the grounds of appeals taken by the assessee in favour of the assessee.

16. Since we have decided the appeals on merit, the stay petitions have become infructuous and hence the same are dismissed as infructuous."

5. In view of the above decision of Lucknow Bench of the Tribunal, we direct the Assessing Officer to allow relief to the assessee on account of sale of scrap due to trading activity and arrive at the demand of TCS, if any, on the sales of scrap obtained during the course of manufacturing.

6. In the result, the appeal of the assessee stands allowed. .

(Order pronounced in the open court on 16/12/2020 in accordance with Rule 34(4) of the I.T.A.T. Rules)

Sd/.
(A. D. JAIN)
Vice President

Sd/.
(T. S. KAPOOR)
Accountant Member

Dated:16/12/2020
*Singh

Copy of the order forwarded to :

1. The Appellant
2. The Respondent.
3. Concerned CIT
4. The CIT(A)
5. D.R., I.T.A.T., Lucknow

Assistant Registrar