

**IN THE INCOME TAX APPELLATE TRIBUNAL
“SMC-B” BENCH : BANGALORE**

BEFORE SHRI SUNIL KUMAR YADAV, JUDICIAL MEMBER

ITA No.1481/Bang/2016
Assessment year : 2008-09

Mr. M. Ashok, Contractor, Opp: Anjaneya Swamy Temple, Maruthi Nagara, Huliyar-572 218, C. N. Halli Taluk. PAN: AKAPA 8367 J	Vs.	The Income Tax Officer, Ward – 1, Tiptur.
APPELLANT		RESPONDENT

Assessee by	:	Smt. Soumya, Advocate
Revenue by	:	Smt. Swapna Das, JCIT

Date of hearing	:	18.05.2017
Date of Pronouncement	:	26.05.2017

ORDER

Per Sunil Kumar Yadav, Judicial Member

This appeal is preferred by the assessee against the order of the
CIT(A), interalia, on following grounds:

1. *The CIT (A) erred in passing the Order in the manner which he did.*
2. *The condition precedent for reopening being absent, the reopening sA47 of the Act by the AO which was confirmed by the learned CIT (A) is bad in law.*
3. *The learned CIT (A) ought to have appreciated the reopening u s.147 was on mere change of opinion and accordingly ought to have cancelled the Assessment Order.*
4. *The learned CIT (A) ought to have appreciated the fact that there was no reason to believe that income has escaped assessment and hence the proceedings initiated u/ s. 148 was bad in law.*
5. *The learned CIT(A) ought to have appreciated that there was no default on account of failure to deduct tax at source which is evident from the assessment and consequently the reopening on the said reason was opposed to law.*
6. *The learned CIT(A) ought to have appreciated the fact that a mere payment of freight charges was not conclusive to hold that the provisions of section 194C was applicable to the assessee and the CIT(A) not having made further investigations to ascertain the default payment, the impugned disallowance confirmed by the CIT(A) was bad in law.*
7. *The learned CIT (A) failed to appreciate the fact that the provision of Section 194C of the Act is not applicable to the Appellant, accordingly provision of Section 40 (a) (ia) has no relevance.*
8. *The Learned CIT(A) failed to appreciate the fact that the entire payment made was verifiable and that there was no requirement for the CIT(A) to confirm the impugned disallowance.*
9. *Without prejudice the addition/ disallowance are excessive, arbitrary and unreasonable and ought to be deleted in toto.*
10. *For these and other grounds that may be urged at the time of hearing of the Appeal the Appellant prays that the Appeal may be allowed.*

2. The assessee has challenged the reopening of the assessment at the threshold on the ground that the assessment was reopened having recorded the reasons that the assessee is a labour contractor and has received contract

receipt of Rs.1,37,76,400/- and has made the payment to subcontractors on subcontract basis or job basis but has not deducted the TDS. Therefore the expenditure said to be disallowed in terms of provisions of section 40(a)(ia) of the IT Act (hereafter to be called as an 'Act'). Whereas the assessment was framed having recorded that the assessee was engaged in transport business and the AO disallowed 10% of total transportation charges under section 37(1) of the Act. No disallowance was made under section 40(a)(ia) of the Act. Therefore the reopening itself is bad in law and the assessment framed consequent to the reopening is not sustainable in the eyes of the law. The learned counsel for the assessee further contended that it is a settled position of law that if the AO is not able to make an addition on the point on which the assessment is reopened, entire assessment is not sustainable in the eyes of law.

3. The learned DR on the other hand has placed reliance upon the order of the CIT(A).

4. Having carefully examined the order of the lower authorities and the documents placed on record, we find that the AO has reopened the assessment after recording the reasons as extracted here under:

“The assessee, an individual, is a labour contract and has received contract receipts of Rs.1,37,76,400/-. It is observed from the records that the contract expenses/payments made claimed should either be executed on sub contract basis or job work basis as prescribed in section 194C of the IT Act. However, as verified from the return it is observed that no TDS has been made on the expenditure/payments made by the assessee on contract payments. In view of the same, the expenditure had to be disallowed in terms of provision of section 40(a)(ia) of the Income Tax Act.

In the instant case, expenditure claimed on sub contract payments made has to be brought to tax. Accordingly, I have reason to believe that the income has escaped assessment within the meaning of section 147 of the IT Act.”

While completing the assessment, the AO has not examined this aspect. He rather observed that the assessee is a transporter and he was engaged in transport business and the total contract receipts was of Rs.1,37,76,400/-. He has not made any disallowance by invoking provisions under section 40(a)(ia) of the Act. He has simply disallowed the transportation charges at 10%. Therefore undisputedly the AO has not made any additions by invoking the provisions of section 40(a)(ia) of the Act whereas the assessment was reopened on the ground that TDS was not deducted and therefore expenditure are to be disallowed under section 40(a)(ia) of the Act.

5. It is a settled position of law that if the AO does not make addition on an issue or a point on which the assessment was reopened, the assessment framed consequent to such reopening is bad in law and observed to be

quashed. In the instant case the assessment was reopened on the ground that TDS was not deducted on payments. Therefore the same should be disallowed under section 40(a)(ia) of the Act. But there is no addition in this regard in the assessment order. Thus the reopening of the assessment is bad and consequent to the bad reopening, the assessment framed is also bad in law and deserves to be set aside. We accordingly annul the assessment. Since the assessment has been annulled, we find no justification to decide the issue on merit.

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

Pronounced in the open court on 26th May, 2017.

Sd/-
(SUNIL KUMAR YADAV)
Judicial Member

Bangalore.
Dated: 26th May, 2017.
/NShylu/*

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|-------------------------|---------------|
| 1. Appellants | 2. Respondent |
| 3. CIT | 4. CIT(A) |
| 5. DR, ITAT, Bangalore. | 6. Guard file |

By order

Assistant Registrar,
ITAT, Bangalore.