

आयकर अपीलिय अधिकरण
मुंबई पीठ "इ", मुंबई
श्री विकास अवस्थी, न्यायिक सदस्य एवं
श्री प्रशांत महर्षि, लेखा सदस्य के समक्ष

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "E", MUMBAI
BEFORE SHRI VIKAS AWASTHY, JUDICIAL MEMBER &
SHRI PRASHANT MAHARSHI, ACCOUNTANT MEMBER

आअसं. 4160/मुं/2019(नि.व.2010-11)
ITA No. 4160/MUM/2019 (A.Y.2010-11)

DCIT-14(3)(1), Mumbai
Room No.455, 4th Floor
Aayakar Bhavan, M.K. Road
Marine Lines, Mumbai-400 020
: अपीलार्थी/ **Appellant**

बनाम/ Vs.

M/s Tag Eco Recycling India Pvt Ltd
11th Floor, A-Wing One BKC
Bandra Kurla Complex
Bandra East, Mumbai-400 051
PAN : AABCE9206A
: प्रत्यर्थी/ Respondent

Appellant by : Shri Milind Chavan
Respondent by : Shri Madhur Agarwal
सुनवाई की तारीख/
Date of Hearing : 23/12/2021
घोषणा की तारीख /
Date of Pronouncement : 17/03/2022

आदेश/ ORDER**PER VIKAS AWASTHY, JM:**

This appeal by the Revenue is directed against the order of Commissioner of Income-tax (Appeals)-22, Mumbai [hereafter referred to as 'CIT(A)'] dated 28/02/2019 for the assessment year 2010-11.

2. The Revenue in appeal has raised as many as six grounds. Grounds 1 to 4 of the appeal are in respect of a single issue relating to deleting of disallowance of Rs.3,06,12,245/- on account of forfeiture of material handling charges. Ground 5 of the appeal is against deleting the addition of Rs.24,72,795/- on account of unexplained Sundry Creditors. In ground 6 of the appeal, the Revenue has assailed deletion of disallowance of Rs.10,71,535/- under section 40(a)(ia) of the Income-tax Act, 1961 (in short, 'the Act'). Grounds 7 & 8 of the appeal are general in nature.

3. Shri Milind Chavan, representing the department submitted that the assessee is engaged in the business of import of scrap metal and other non ferrous metals from Trafigura Group of companies and sales of the same in the Indian market. During the period relevant to the assessment year under appeal, the assessee ventured into new line of business of material handling.

The assessee claimed expenditure towards forfeiture of material handling charges Rs.3,06,12,245/-. The Assessing Officer held, the assessee has failed to substantiate that the assessee carried out any business of material handling and hence, disallowed assessee's claim. In First Appellate proceedings, the CIT(A) accepted the contentions of the assessee and allowed the expenditure as revenue. The Ld.DR submitted that a perusal of assessment order would show that during the entire period, the assessee had not made any transaction under the material handling segment. The assessee had failed to substantiate the reasons for forfeiture of material handling charges. No formal agreement for the forfeiture of the amount between the parties was placed on record. The assessee made a bald statement that on the mutual agreement between the parties, the contract amount was forfeited in the month of May, 2010. There was nothing on record to suggest that there exists any agreement for the forfeiture of the amount. Initially no TDS was deducted on the amount of forfeiture, subsequently to give colour of genuineness to the transaction, TDS was deducted in the month of September, 2010 @2%. The CIT(A) has failed to take into consideration all these facts. Therefore, the findings of the CIT(A) should be reversed and the assessment order be upheld. The Id.DR made alternative submission that if at all the said transaction of forfeiture is to be

accepted as genuine, the same is in the nature of capital payment as it is in respect of new line of business. The Id.DR to support his submissions placed reliance on the decision in the case of Kanoria Chemicals & Industries Ltd vs CIT 78 Taxman 455 (Cal).

3.1 In respect of ground 5, the Ld.DR submitted that during the course of assessment proceedings, the assessee failed to reconcile the amounts payable towards Sundry Creditors. The Assessing Officer had issued notice under section 133(6) of the Act to one, M/s Arrush Metals. However, the same was returned back by the postal authorities with the remark, "left". Thus, the assessee failed to substantiate genuineness and identity of Sundry Creditors. In First Appellate proceedings, the CIT(A), without appreciating the findings of the Assessing Officer, has allowed assessee's claim.

3.2 In respect of ground 6 of the appeal, the Ld.DR submitted that assessee has deducted tax at source @4.95% in respect of payments made to M/s Rishi Kiran instead of actual rate of 20%. Thus, there was short deduction of tax at source. Consequently, the Assessing Officer made disallowance of Rs.10,71,535/- under section 40(a)(ia) of the Act. The Ld.DR prayed for

upholding the assessment order and reversing the findings of CIT(A) on this issue, as well.

4. Per contra, Shri Madhur Aggarwal appearing on behalf of the assessee vehemently supported the order of CIT(A) and prayed for dismissing appeal of the Revenue. The Id.counsel submitted that the assessee has not ventured into any new business activity. The assessee was engaged in the business of trading in ferrous and non ferrous metals and is a global leader in this business. During the period relevant to the assessment year under appeal, the assessee has entered into an agreement with Infrastructure Logistics Pvt Ltd (ILPL) for providing infrastructure and logistic support in connection with iron ore business. The assessee agreed to handle minimum quantity of 5 lakh metric tonnes with ILPL for the period of 14 months starting from 01/11/2009 to 31/12/2010. For the reasons beyond the control of assessee, the assessee could not provide minimum guaranteed business to ILPL as the mining activities were banned in Goa. In order to minimize the loss that would have arisen on account of contract with ILPL, the assessee negotiated with ILPL and terminated the contract by agreeing to pay Rs.3 crores as against Rs.4.28 crores which was due under the terms of agreement at the end of period, 31st

March, 2010. Negotiations regarding minimum guaranteed business were settled in May,2010 and it was agreed that ILPL will forfeit the deposit of Rs.3 crores towards the full and final settlement of claim. Based on mercantile system of accounting, the assessee booked Rs.3 crores as expenditure in the F.Y. 2009-10. Notice was issued by the Assessing Officer under section 133(6) of the Act to ILPL. In response to the notice, ILPL confirmed this fact. Though the final settlement was arrived at in May, the TDS remained to be deducted. It was only when the tax auditors pointed in September, 2010, the TDS was deducted and immediately deposited with the exchequer. The failure to deduct tax was because of the fact that there was no actual payment of the settlement amount. The compensation amount was adjusted against the deposits given under the agreement. The ILPL has offered the aforesaid amount to tax in the assessment year 2012-13.

4.1 In respect of ground 5, the Id.counsel submitted that the assessee had purchased iron ore from M/s Arrush Metals for Rs.35,72,208/-. Since the said amount was unpaid, it was shown as liability under the head 'Sundry Creditors'. The said amount was subsequently paid in full. Part payments were made during the months of April and May, 2020. Complete details of

purchases, payments, ledger accounts were filed before the Assessing Officer. M/s Arrush Metals had issued invoices of Rs.35,72,208/- dated 30/03/2010. Against the said invoice, after considering the payments made in April / May, 2010, outstanding balance of Rs.10,99,413/- was reflected. The material against the said invoice was received in March, 2010 and the same was reflected in the closing stock for the financial year ending on 31/03/2010. Due to this mismatch, the Assessing Officer treated the same as income without appreciating the facts that purchases from M/s Arrush Metals has been held as closing stock. The CIT(A), after having examined the issue and appreciating the facts, deleted the addition.

4.2 In respect of ground 6 of the appeal, the Id.counsel submitted that the assessee had deducted tax @4.95% in respect of rent paid to M/s Rishi Kiran Logistics Pvt Ltd by inadvertently considering low deduction certificate which was valid upto 31/03/2009 and not 31/.03/2010. The low deduction certificate for the year was effective from 16th June, 2009. Due to this inadvertent mistake, there was short deduction of tax. The Ld.counsel submitted that it is not a case where the assessee has altogether failed to deduct tax at source. He placed reliance on the decision of Hon'ble Calcutta High Court in the case of

CIT vs S.K. Tekriwal 361 ITR 432 to contend that in the case of short deduction of tax, the provisions of section 40(a)(ia) are not attracted.

5. We have heard the submissions made by rival sides and have examined the orders of the authorities below. In grounds 1 to 4 of appeal, the Department has assailed the deletion of disallowance of Rs.3,06,12,245/- by the CIT(A). Undisputedly, the assessee is engaged in trading in iron ore and other non ferrous metals. During the period relevant to the assessment year under appeal, the assessee, in order to expand its existing business, entered into an agreement dated 22/10/2009 with ILPL for providing infrastructure and logistic support in connection with iron ore business of ILPL in Goa. It is not a case where the assessee has ventured into a new line of business. The assessee has expanded its existing business of trading in metal / ores / scraps by entering into agreement with ILPL for providing services of logistic support for handling iron ore. Thus, we are in agreement with the findings of the CIT(A) in holding that it is not a new line of business but expansion of existing business. The assessee had entered into an agreement with ILPL for handling guaranteed minimum 5 lakh metric tonnes of iron ore. For the reasons beyond the control of the assessee, the assessee could not garner the business

to that extent. In fact, the said business was absolutely non starter. The assessee negotiated with ILPL and agreed to pay Rs.3 crores to ILPL as against the liability of Rs.4.26 crores. Instead of paying that amount, the said amount was adjusted against the deposit already given by the assessee under the agreement to ILPL. The payment / adjustment of that amount is not disputed by the Assessing Officer. The Assessing Officer held that the amount is not allowable as the assessee failed to show that the business activity or intent to carry out any business activity of material handling. The assessee has placed on record copy of agreement dated 22/10/2009 with ILPL to substantiate material handling business which is further corroborated by confirmation by ILPL in response to notice under section 133(6) of the Act, hence, the expenditure claimed in respect of the said business has to be allowed. The assessee has been able to explain the reason for not being able to carry out the business for the reasons beyond control. We have examined the decision rendered in the case of Kanoria Chemicals & Industries Ltd vs CIT (supra), the same is distinguishable on facts, hence, does not support the case of Revenue.

5.1 Further, the peripheral issue which emerges from the aforesaid payment is non deduction of TDS when this amount was paid. Undisputedly, the TDS

was deducted in September, 2010 wherein the aforesaid settlement had taken place in the month of May, 2010. Deduction of tax at source before the due date of filing return of income is sufficient compliance of TDS provisions. Another contention of the Revenue is the short deduction of tax. Instead of deducting tax at source @10% under the provisions of section 194I of the Act, the assessee has deducted tax @2%. The CIT(A) has rejected the above observation of the Assessing Officer by placing reliance on the decision in the case of Hindustan Thomson Associates Pvt Ltd in ITA No.6729/Mum/2014. We do not find any infirmity in the impugned order on this issue. In any case, the provisions of section 40(a)(ia) cannot be invoked in case of short deduction of tax at source in view of decision rendered in case of CIT vs S.K. Tekriwal (supra). Hence, we find no merit in the contention of the Revenue. Consequently, grounds 1 to 4 of the appeal are dismissed.

6. In ground 5 of appeal, the Revenue has assailed deletion of Rs.24,72,795/- on account of unexplained liability. In First Appellate proceedings, we find that the CIT(A) has examined the issue and on perusal of the bills and the financial statements, the CIT(A) observed:-

- (1) Purchase bills for Rs.35,22,208/- are recorded in the books of the assessee company;

- (2) The payments of Rs.10,21,005/- were made on 24/04/2010 and Rs.14,51,790/- were made on 26/04/2010 and another sum of Rs.10,99,413/- was made on 28/05/2010 against the aforesaid bill.
- (3) The entire account was squared off in the financial year 2011-12.
- (4) The purchases of Rs.35,72,208/- has been included in the value of closing stock

The payments have been made by way of banking transactions. The assessee was able to reconcile the payments made against the bill. The revenue has not been able to controvert the findings given by the CIT(A) in the impugned order on this issue. Consequently ground 5 of the appeal is dismissed being devoid of merit.

7. In ground 6 of appeal, the revenue has assailed short deduction of tax in respect of rent payment of Rs.14,96,968/- to M/s Rishi Kiran Logistics Pvt Ltd. Ostensibly, the assessee deducted tax @4.95% as against 20% under section 194I of the Act. It is the case of short deduction of tax under a mistaken belief that low tax was to be deducted by placing reliance on lower deduction certificate. The Hon'ble Calcutta High Court in case of CIT vs S.K. Tekriwal (supra) has held that no disallowance can be made by invoking the provisions

of section 40(a)(ia) for short deduction of tax. We find no merit in ground 6 of the appeal by the Revenue. Accordingly, the same is dismissed.

8. Grounds 7 & 8 of the appeal are general in nature, and hence, require no adjudication.

9. In the result, appeal of the Revenue is dismissed.

Order pronounced in the open Court on Thursday the 17th day of March, 2022.

Sd/-

(PRASHANT MAHARSHI)

लेखा सदस्य/ACCOUNTANT MEMBER

मुंबई/ Mumbai, दिनांक/Dated: 17/03/2022

Pavanan

प्रतिलिपि अग्रेषित Copy of the Order forwarded to :

1. अपीलार्थी/The Appellant ,
2. प्रतिवादी/ The Respondent.
3. आयकर आयुक्त(अ)/ The CIT(A)-
4. आयकर आयुक्त CIT
5. विभागीय प्रतिनिधि, आय.अपी.अधि., मुंबई/DR, ITAT, Mumbai
6. गार्ड फाइल/Guard file.

Sd/-

(VIKAS AWASTHY)

न्यायिक सदस्य/JUDICIAL MEMBER

BY ORDER,

//True Copy//

(Dy./Asstt. Registrar)
ITAT, Mumbai