THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD "D" BENCH

Before: Ms. Annapurna Gupta, Accountant Member
And Shri Siddhartha Nautiyal, Judicial Member

ITA No. 1603/Ahd/2019 **Assessment Year 2009-10**

Shri Vishal D. Palani, 92, Saveshwar Tower, Opp. Jay Ambe Nagar, Behind Lav Kush Tower, Thaltej, Ahmedabad PAN: ALOPP0931E (Appellant)	Vs	ITO, TDS-3, Ahmedabad (Respondent)

Assessee by: **Shri M.J. Shah, A.R. &**
Shri Rushin Patel. A.R.
Revenue by: **Shri Atul Pandey, Sr. D.R.**

Date of hearing : 23-11-2022
Date of pronouncement : 30-11-2022

आदेश/ORDER

PER : SIDDHARTHA NAUTIYAL, JUDICIAL MEMBER:-

This is an appeal filed by the assessee against the order of the ld. Commissioner of Income Tax (Appeals)-8, Ahmedabad in Appeal no. CIT(A)-8/124/15-16, in proceeding u/s. 201(1)/201(1A) vide order dated 23/08/2019 passed for the assessment year 2009-10.

2. The assessee has raised the following grounds of appeal:-

Grounds of Appeal		*Tax effect relating to each Ground of appeal (see note below)*
1	*The CIT(A) erred in law and on facts in confirming the action of the Assessing Officer to treat the appellant 'assessee in default' within the meaning of section 201(1) and thereby confirming the demand of Rs.2,89,990/- u/s.201(l) and interest thereon of Rs.2,08,800/- u/s.201(lA) of the I.T. Act, 1961.*	*Rs.4,98,790/-*
2.	*The CIT(A) erred in law and on facts in deciding the appeal of the assessee 'ex-parte'.*	-----
	The appellant craves leave to add, amend or alter the aforesaid grounds of appeal at the time of hearing, if the need arise.	-----
	Total tax effect (see note below)	*Rs.4,98,790/-*

3. The brief facts of the case are that the assessee is engaged in the business of transportation. The assessee paid a sum of Rs. 2,81,54,400/- as freight charges and assessee has not deducted TDS on these payments and therefore an addition of Rs 2,81,54,400/- was made to the total income for non-deduction of TDS on the freight charges u/s. 40(a)(ia) of the Act in the assessment order u/s. 143(3) of the Act dated 05-12-2011. In the TDS proceedings, u/s. 201/201(1A) of the Act, the TDS officer held that the assessee to be an assessee in default and tax liability u/s. 201(1) of Rs.

2,89,990/- was determined along with interest u/s. 201(1A) amounting to Rs. 2,08,800/-.

4. In appeal before ld. CIT(A), despite several opportunities, none appeared on behalf of the assessee. Accordingly, the ld. CIT(A) dismissed the assessee's appeal with the following observations:-

> *"4. The appellant is engaged in the business of transportation and during the F.Y.2008-09 it was found that he has not deducted Tax at Source on the freight amount paid totally amounting to Rs.2,81,54,400/- has obligated by the provisions of section 194 C of the Act. Accordingly, this sum was disallowed as per the provisions of section 40(a)(ia) of the Act and consequently appellant was held to be assessee-in-default by the impugned order u/s. 201(1)/201(1A) of the Act and tax liability u/s. 201(1) of Rs.2,88,990/- was determined along with the interest u/s. 201(1 A) amounting to Rs. 2,08,800/-. In the grounds of appeal appellant has contended that they have filed form No. 15-1 and hence, complied with the provisions of the Act. However, AO noted in the impugned order that appellant had failed to furnish the vehicle wise form 15-1 and other details required. In the course of appellate proceedings also appellant has not furnished any details whatsoever and any evidence to the effect of having furnished the same to the AO in the correct form and manner. Therefore, I do not find any infirmity in the action of AO and the action of AO is upheld. Ground No.1 & 2 of the appeal are dismissed.*
>
> *5. Ground No. 3 is residuary ground which has not been availed and hence, the same is dismissed."*

5. The assessee is in appeal before us against the aforesaid order passed by ld. CIT(A) confirming the order of TDS officer. The counsel for the assessee submitted that the case of the assessee is covered by the ITAT order in assessee's own case for very same assessment year i.e. 2009-10 in ITA No. 1410/Ahd/2014 wherein the ITAT has deleted the disallowance made by the Assessing Officer in the 143(3) proceedings on the ground that in the instant set of facts, there was no liability on the assessee to deduct taxes on

payments made to transporters. The counsel for the assessee has furnished the copy of said order for the purpose of our records. On perusal of the order, we observe that the issue has been decided in favour of the assessee by ITAT Ahmedabad in assessee's own case for A.Y. 2009-10 vide ITA No. 1410/Ahd/2014 dated 12-10-2022. The relevant extracts of the order are reproduced for reference:-

> *"5. We have heard the arguments of both the sides and also perused the relevant material available on record. As agreed by the learned representatives of both the sides, the issue raised in Ground No.1 of this appeal is squarely covered in favour of the assessee by the order of the ITAT passed in the case of father of assessee Shri Dilip C. Palany Vs. ITO in ITA Nos. 1393 to 1399/Ahd/2014 rendered vide its common order dated 06.07.2017 passed for AYs 2005-06, 2007-08 to 2009-10, wherein a similar issue was decided by the Tribunal vide paragraph Nos.6 & 7 as under:-*
>
> > *"6. We have heard Shri Shah representing assessee and Shri Madhushudhan appearing as Senior Departmental Representative reiterating their respective stands against and in support of the impugned disallowance. It is an undisputed fact that the assessee has not deducted TDS upon the freight payments in question. Both the lower authorities invoke Section 194C of the Act in treating the said payments to be contractual in nature whose non deduction of TDS invites Section 40(a)(ia) disallowance. We proceed to examine the basic facts in this backdrop. The assessee admittedly has collected the impugned payments from its payers thereby undertaking all the risk involved in the transportation of the goods in question. He has thereafter engaged his payees' vehicles numbering more than 3500 to perform the said transportation job in lieu of the impugned freight payments. The Assessing Officer as well as the CIT(A) in this backdrop of facts conclude that there existed oral contract (s) between assessee and his payees u/s.194C of the Act. We find no reason to agree to such a conclusion. We observe that both the lower authorities have not demonstrated by way of a single documentary evidence revealing the payees concerned to have undertaken any risk involved in performing the transportation duty in question. Nor have they called any payee to depose in the same tune that the assessee had paid them in the capacity of a sub- contractor. This tribunal's decision in ITA No.3536/Mum/2011 M/s. Bhail Bulk Carriers vs. ITO decided on 07.03.2012 deletes an identical disallowance on the same lines as under:*

"8. We have heard the parties at length and also gone through the findings of the authorities below and the case laws as have been referred in the appellate order as well as relied upon by the learned counsel. The relevant facts for adjudication of the issue are that the appellant is carrying out the business of transportation of oil through tankers. It entered into a contract with various companies (here mainly BPCL) for transporting the oils to various destinations as per the agreement entered into by the said company. The appellant was solely responsible for executing the contract on behalf of its principal. For fulfilling its transportation commitment, the appellant besides using its own tankers was also hiring the tankers from outside parties as and when required. In such a case of hiring from outside, the responsibility of successful completion of transportation work rested upon the appellant. From the record or the findings of the authorities below no where it is borne out that there was any kind of written or oral contract with the principals by such outside tank owners that they will share the risk and responsibility with the appellant.

8.1 At this stage, it is not in dispute that the department's case is that in the present case provisions of section 194C(1) are applicable and not section 194C(2). Once it is held that it is a case of 194C(1) then it would be sent that this section applies to any payment made to a person for carrying out any work in pursuance of a contract between the contractor and the person making the payment. If the condition of "carrying out any work in pursuance of a contract" is not fulfilled then the provisions of this section will not be applicable at all. Here in this case, the contract for carrying out the work was between the BPCL and the appellant. The appellant alone had risk and responsibility for carrying out the contract work as per the agreement entered into by it with its principal i.e. BPCL. There is no material on record to suggest that there was any contract or sub-contract whether written or oral with the outside tank owners and the appellant, whereby the risk and responsibility which is associated with a contract has also been passed on to these outside parties. Once the CIT(Appeals) has accepted the fact that the outside tank owners do not had any responsibility or liability towards the principal, then it cannot be held that these outside parties were privity to the contract between the appellant and its principal. Thus the payment made to the outside parties do not come or fall within the purview of section 194C, as the "carrying out any work" indicates doing something to conduct the work in pursuance of contract and here in this case, it was solely between appellant and its principal.

8.2 The judgment of Hon'ble Madras High Court in the case of CIT vs. Pompuhar Shipping Corporation Ltd. (supra) also fortifies the case of the appellant. In this case the assessee which was a Tamil Nadu Government undertaking was engaged in the business of transportation of coal from the ports of Haldia, Visakhapatnam and Paradeep to Chennai and Tuticorin under contracts executed with the Tamil Nadu Electricity Board. The assessee owned three ships. Since three ships were not sufficient to carry out the contracts entered into with Tamil Nadu, the assessee hired ships belonging to other shipping companies and paid hire shipping charges for using the ships. The assessee, however, did not deducted tax under section 194C before the making payment of hire charges to the shipping companies. The Assessing Officer directed the assessee to pay tax u/s.201(1) and levied interest u/s.201(1A) on the ground that TDS should have been deducted u/s.194C of the Act. On the these facts, the Hon'ble High Court observed and held as under :-

"We heard the arguments of learned counsel. Under section 194C, the tax is to be deducted when a contract was entered into for carrying out any work in pursuance of a contract between the contractor and the entities mentioned in sub-section (1) of section 194C. In the present case, there was no contract between the assessee and the shipping companies to carry out any work. On the other hand, the assessee-company hired the ships belonging to other shipping companies for a fixed period on payment of hire charges. The hired ships were utilised by the assessee in the business of carrying the goods from one place to another in pursuance of an agreement entered into between the assessee and the Tamil Nadu Electricity Board. There was no agreement for carrying out any work or transport any goods from one place to another between the assessee and the other shipping companies. The assessee- company simply hired the ships on payment of hire charges and it was utilised in the business of the assessee at their own discretion. It is not the case of the Revenue that the assessee entered into the said contract with the shipping company for transport of coal from one place to another. The hiring of ships for the purpose of using the same in the assessee's business would not amount to a contract for carrying out any work as contemplated in section 194C. The term "hire" is not defined in the Income-tax Act. So, we have to take the normal meaning of the word "hire". Normal hire is a contract by which one gives to another temporary possession and use of the property other than money for payment of compensation and the latter agrees to return the property after the expiry of the agreed period. Therefore, in our view, when the assessee entered into a contract for the purpose of taking temporary possession of ships in the shipping company it could not be construed as if the assessee entered into any contract for carrying out any work, and when the contract is not for carrying out any work, the Revenue cannot insist the assessee ought to have deducted tax at source

under section 194C of the Act. Further, the other argument of counsel was, section 194C was amended with effect from July 1, 1995, incorporating the Explanation and the said Explanation clarifies the existing provision of section 194C of the Act. Hence, it would be applicable retrospectively. We are concerned with the assessment year 1994-95. In a recent judgment, the Supreme Court in the case of Sedco Forex International Drill Inc. v. CIT [2005] 279 ITR 310, considering the scope of the Explanation, held that there is no principle of interpretation which would justify reading the Explanation as operating retrospectively, when the Explanation comes into force with effect from a future date. In this case, the Explanation introduced is with effect from July 1, 1995. Hence it will be applicable only for the future assessment orders and it will not be applicable to the assessment year in consideration. The Tribunal also considered the fact that the shipping companies which received the hire charges are also income-tax assessees and they had shown the hire charges in their respective income-tax returns and paid the taxes on the same. The said fact was also not disputed by the Revenue. So, we are of the view that the payment of hire charges for taking temporary possession of the ships by the assessee-company would not fall within the provision of section 194C and hence no tax is required to be deducted, and there is no error or infirmity in the order of the lower authorities. Hence, no substantial question of law arises for consideration of this court. Hence, we dismiss the above tax case. No costs. Consequently, the connected TCMP No. 1253 of 2005 is closed.

8.4 Thus in view of the findings given above and the law laid down by the Hon'ble High Court as above, we are of the considered opinion that the appellant was not liable to deduct TDS u/s. 194C(1) for payments made to the outside parties and consequently the disallowance made u/s.40(a)(ia) by the authorities below are deleted. The appellant thus gets relief of Rs.56,03,210/-."

7. We also adopt the same reasoning to conclude that both the lower authorities have erred in making the impugned Section 40(a)(ia) disallowance on the freight payment in question without indicating any material that assessee's payees had made themselves liable for any risk involved in transportation of goods concern. We therefore delete the abovestated disallowance of Rs.5,50,10,978/-."

5.1 As the issue involved in the present case as well as all the material facts relevant thereto are similar to the case of Dilip C. Palany (supra), we respectfully follow the decision rendered by the Co-ordinate Bench of this Tribunal in the said case and delete the disallowance made by the Assessing Officer and confirmed by the learned CIT(A) under Section 40(a)(ia) of the Act."

5.1 Respectfully following the above order, since the issue has been decided in favour of the assessee in the assessee's own case in quantum proceedings u/s. 143(3) of the Act, we are hereby directing that the demand u/s. 201(1)/201(1A) of the Act is liable to be deleted.

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

Order pronounced in the open court on 30-11-2022

Sd/-	**Sd/-**
(ANNAPURNA GUPTA)	**(SIDDHARTHA NAUTIYAL)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Ahmedabad : Dated 30/11/2022

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. Assessee
2. Revenue
3. Concerned CIT
4. CIT (A)
5. DR, ITAT, Ahmedabad
6. Guard file.

By order/आदेश से,

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
अहमदाबाद