

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH 'SMC', KOLKATA
[Before Shri Rajesh Kumar, Accountant Member & Shri Sonjoy Sarma, Judicial Member]

I.T.A. No. 2495/Kol/2019
Assessment Year : 2011-12

ITO, Ward-3(4), Kalimpong	Vs	M/s. Marda Associates
		PAN: AALFM 7955 K
Appellant		Respondent

Date of Hearing	13.03.2023
Date of Pronouncement	31.03.2023
For the Assessee	Shri Siddharth Agarwal, Advocate
For the Revenue	Shri Vijay Kumar, Addl. CIT

ORDER

Per Shri Sonjoy Sarma, JM:

This appeal filed by the revenue is directed against the order of Id. Commissioner of Income Tax (Appeals), Siliguri dated 19.09.2019 in relation to the assessment year 2011-12 on the following grounds:

"i. For that the Id. CIT(A) has erred in deleting the addition made by the AO on account of non-deduction of TDS invoking the provision of section 40(a)(ia) of the Income-tax Act, 1961.

ii. For that the Id. CIT(A) has erred in not considering the payment of amount credited separately which is not part of sale bill as commission.

iii. That the appellant may be allowed adding, amend or alter the grounds of appeal, if any."

2. Brief facts of the case are that the assessee-firm was engaged in the business of distributor of readymade garments. The assessee-firm filed its return of income on 28.08.2018 in response to notice u/s 148 of the Act. Subsequently, notices u/s 143(2) and 142(1) of the Act were issued upon the assessee and which were duly complied by the assessee. During the assessment

proceeding, the assessing officer observed that assessee-firm received a sum of Rs. 30,40,147/- from Levi Strauss (India) Pvt. Ltd. as incentive on which TDS of Rs. 3,04,000/- was deducted u/s 194H of the Act and out of said amount of Rs. 28,14,094/- was paid to various parties each sum exceeding Rs. 5,000/- as per schedule G of the audit report and the ld. AO viewed that the assessee-firm was liable to be tax deducted at source u/s 194H of the Act on incentive paid to the dealers as the same were in the nature of commission and on such payment no tax was deducted by the assessee therefore, the assessee in violation of provision of section 194H of the Act. During the course of assessment proceedings, the ld. AR of the assessee made a written submission by which he has requesting to the AO to dispose of the objection and drop the proceeding initiated u/s 148 of the Act by placing reliance on various judgments rendered by the superior authority. However, the ld. AO after considering the submission made by the assessee and completed the assessment by making disallowance and computed the income at Rs. 37,95,872/-.

3. Being aggrieved by the assessment order, assessee filed an appeal before the ld. CIT(A) wherein the ld. CIT(A) allowed the appeal of the assessee. At the time of hearing, the ld. DR submitted before the bench that the ld. CIT(A) erred in deleting the addition of Rs. 28,14,094/- made by the AO on account of incentive paid

to various parties u/s 40(a)(ia) of the Act due to non-deduction of TDS as per provision of section 194H of the Act. The ld. DR further contended that the reasons given by the ld. CIT(A) while allowing the appeal of the assessee in respect of the issue involved was not found to be convincing.

4. On the other hand, ld. AR relied on the order of the ld. CIT(A) and further he submitted that the ld. CIT(A) has viewed that the discount given to the various parties by the assessee in the nature of turnover discount did not attract TDS u/s 194H of the Act. He further contended that assessee in the instant case did not have any right or control over the goods sold to the retailers and the goods hold by the retailers on their own behalf and not on behalf of the appellant. In such circumstances, the parties to whom incentive were made by the assessee did not act as an agents of the assessee. In such a situation, the ld. CIT(A) has rightly allowed the appeal of the assessee by deleting the addition made by the ld. AO while framing the assessment in respect of instant issue.

5. We have heard the rival submission of the parties and perused the material available on record where the ld. CIT(A) allowed the appeal of the assessee by observing as under:

"I am of the opinion that A.O. misunderstood that the benefit/ incentive/additional margin passed on by the appellant through credit notes was in the nature of commission. He further, misunderstood that discount/additional margin could be given only on the invoice and not post invoice. It is submitted that the commission is paid after completion of the task/service. However, the same was paid because of the sales scheme announced on earlier occasion i.e. prior to completion of task/ service. Thus, the same was in the nature of turnover discount and, hence, not liable for deduction of TDS u/s 194H. The A.O. has also prejudiced his mind from the fact that Levi Strauss (India) Pvt. Ltd. deducted TDS u/s 194H and the appellant claimed credit of the said TDS by declaring the said incentive income as "income from incentive". It is submitted that the appellant has already placed on record letter from Levi Strauss (India) Pvt Ltd (PB 14) wherein it has confirmed that the credit notes issued were not in the nature of commission and, inadvertently, TDS was deducted on such credit notes. Further, the appellant just in order to avail the credit of TDS declared the credit notes as income.

In the instant case goods were invoiced by the appellant to the retailers leading to transfer of ownership in goods (with complete risk and rewards). The appellant, thereafter, did not have any right or control over the goods sold to the retailers. The retailers held the good on their own behalf and not on behalf of the appellant. Thus, they did not act as agents of the appellant. This is the acid test for deciding the nature of relationship.

In view of the above facts & circumstances of the case, A.O. was not justified in making the disallowance on account of target incentive u/s 40(a) (ia) of the I.T. Act, 1961. Accordingly, this ground is allowed."

6. Thus, the Id. CIT(A) rightly observed that the payment of incentive are made to the various parties by the assessee leading to transfer of ownership in the goods (with complete risk and

rewards) the assessee in such a situation did not have any right or control over the goods sold to the retailers, as the retailers held the goods on their own behalf and not on behalf of the assessee and therefore they did not act as an agents of the assessee as such no TDS is deductible u/s 194H of the Act as it is not applicable in the case of assessee. Thus we confirmed the order passed by the ld. CIT(A) and there is no need to interfere with the findings given by the ld. CIT(A), therefore, the grounds taken by the revenue are dismissed.

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

Order pronounced in the open court on 31.03.2023.

Sd/-

Sd/-

(Rajesh Kumar)
Accountant Member

(Sonjoy Sarma)
Judicial Member

Dated: 31.03.2023
Biswajit, Sr. PS

Copy of the order forwarded to:

1. Appellant- ITO, Ward-3(4), Kalimpong.
2. Respondent – M/s. Marda Associates, Marda Building, 10th Mile, Rishi Road, Kalimpong-734301.
3. Ld. CIT
4. Ld. CIT(A)
5. Ld. DR

True Copy

By Order

Assistant Registrar
ITAT, Kolkata Benches, Kolkata