

**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA '(SMC)' BENCH, KOLKATA**

Before Shri P.M. Jagtap, Accountant Member

**I.T.A. No. 423/KOL/2015
Assessment Year: 2010-2011**

M/s. Ghosh and Chakraborty Transport,.....Appellant
Vill. Anandpur, P.O. Churulia,
District-Burdwan-713 368
[PAN: AAEEG 6324 K]

-Vs.-

Income Tax Officer,.....Respondent
Ward-2(1), Asansol,
Parmar Building, G.T. Road (West),
Apcar Garden, Asansol-713 304

Appearances by:

Shri S.K. Tulsiyan, Advocate, for the assessee

Shri Rajat Kumar Kureel, JCIT, Sr. D.R., for the Department

Date of concluding the hearing : February 27, 2017

Date of pronouncing the order : April 12, 2017

O R D E R

This appeal filed by the assessee is directed against the order of Id. Commissioner of Income Tax (Appeals), Asansol dated 16.02.2015.

2. The issue involved in Ground No. 1 relates to the disallowance of Rs.29,38,990/- made by the Assessing Officer under section 40(a)(ia) and confirmed by the Id. CIT(Appeals) for the failure of the assessee to deduct tax at source as required by the provisions of section 194C.

3. The assessee in the present case is a partnership firm, which is carrying on the business as a transport sub-contractor. The return of income for the year under consideration was filed by it on 30.03.2011 declaring total income of Rs.41,048/-. In the Profit & Loss Account filed along with the said return, a sum of Rs.54,54,582/- was debited by the assessee on account of transport charges. During the course of assessment proceedings, the claim of the assessee for transport charges

was examined by the Assessing Officer. In this regard, he found on perusal of the bank statement of the assessee with Punjab & Sind Bank Account that there were several payments made to different parties and some of such payments made otherwise than crossed cheques or Bank Drafts apparently on account of transport charges to different parties were in excess of Rs.20,000/- in case of single payments and in excess of Rs.50,000/- in case of payments during the year. He also found that the entries appearing the assessee's Bank account were totally different from the entries recorded in assessee's ledger account. He, therefore, concluded that the transactions shown in the assessee's ledger accounts of transporters were fabricated in order to avoid the disallowance under section 40(a)(ia) and since the payments made by the assessee in excess of Rs.20,000/- in case of single payments and in excess of Rs.50,000/- in case of aggregate payments for a year to 23 different parties amounted to Rs.29,38,990/- from which no tax at source was deducted by the assessee as required under section 194C, he disallowed the said amount by invoking the provisions of section 40(a)(ia).

4. The disallowance of Rs.29,38,990/- made by the Assessing Officer under section 40(a)(ia) was challenged by the assessee in the appeal filed before the Id. CIT(Appeals). During the course of appellate proceedings before him, the matter was remanded by the Id. CIT(Appeals) to the Assessing Officer with a direction to record the statement of the concerned 23 parties so as to find out the exact amounts paid by the assessee to them from time to time. During the remand proceedings, the assessee was directed by the Assessing Officer to produce the said 23 parties, but the assessee could produce only 15 parties. After examining the said parties, the remand report was submitted by the Assessing Officer to the Id. CIT(Appeals) giving outcome of the examination. One of the objections mainly raised by him in his remand report was that the claim of the assessee of having made the payments in the sums not exceeding Rs.20,000/- in case of single payments and Rs.50,000/- in case of aggregate payments in the year as shown in the cash book was not

supported by any bills or vouchers. He also rejected the stand of the assessee that the cash was actually withdrawn by the truck owners from its Bank accounts from time to time for and on its behalf as the Bank was situated far away from its village and the same was deposited with the assessee from which the payments were made to them in cash as shown in the cash book. According to the Assessing Officer, the amounts withdrawn from the bank account of the assessee were not in round figures and it was, therefore, not possible to accept the stand of the assessee that the same reflected withdrawals made by the concerned parties for and on behalf of the assessee from the bank account.

5. After considering the remand report submitted by the Assessing Officer as well as the comments and counter comments offered on behalf of the assessee and the material available on record, the Id. CIT(Appeals) found no infirmity in the disallowance made by the Assessing Officer under section 40(a)(ia) and proceeded to confirm the same for the following reasons given in paragraphs no. 9 & 10 of his impugned order:-

"9. On a deeper scrutiny of evidence brought to record concerning the case, the facts emerging are:

A. that sums were received by the alleged transporters,

B. sum debited as transportation charges comes to nearly 88% therefore the receipts in all likelihood is transportation charges in hand of the transporters.

C. considering the character of quantum of withdrawals, as pointed by Assessing Officer, being not round sums, the same is not an ordinarily cash withdrawal through the transporters.

D. Since assessee has not obtained form 15-1 the post dated entry in books of accounts is made with a view to escaping provisions of section 40(a)(ia).

E. out of the 23 persons except Shri Dhiren Maji, all the other 14 who appeared before the Assessing Officer stated that their relationship with the appellant is of a transporter (Shri Dhiren Maji declared himself to have received sums as transporter and has withdrawn cash for the firm).

F. The annual work of transporting cannot be such that entry for transportation charges payable/paid cannot take place only in the second part of a FY and receipts spread over the entire year.

10. The entire arguments put forth by appellant, the contents of assessment order, remand report etc. has been considered. Some of the incongruities noted, both direct and circumstantial are listed in paragraph 9. After considering all aspects, I hold that the payments were indeed made on or before 30.09.2009 and the same entered in books of accounts as having made after 30.09.2009 is done artificially aimed at escaping rigours of section 40(a)(ia). Since Form 15-1 was not obtained the liability to deduct tax at source was indeed present and having not done one of the automatic consequence viz. disallowance under section 40(a)(ia) is attracted. The act of Assessing Officer in disallowing the expense is held to be correct. Accordingly I dismiss ground 1”.

6. The ld. counsel for the assessee submitted that the impugned disallowance under section 40(a)(ia) has been made by the Assessing Officer and confirmed by the ld. CIT(Appeals) merely on the basis of mismatch found by them in the amounts paid to the concerned parties on account of transport charges as appearing in the books of account of the assessee and as appearing in the Bank account of the assessee. He contended that the explanation offered by the assessee in this regard was that the amounts appearing in its Bank account were actually the amounts withdrawn by the concerned parties for and on behalf of the assessee from its Bank account and after the same were deposited by them with the assessee, further payments were made by the assessee to them which were less than Rs.20,000/- in case of single payments and Rs.50,000/- in case of aggregate payments for the year. He submitted that this explanation of the assessee, however, was not found acceptable either by the Assessing Officer or by the ld. CIT(Appeals) on the ground that the same was not supported by any bills/vouchers. He contended that the assessee has duly maintained its books of account along with supporting vouchers regularly but neither the Assessing Officer nor the ld. CIT(Appeals) required the assessee at any point of time to produce the

same in order to support and substantiate its explanation. He also contended that no adverse material has been brought on record by the Assessing Officer at any stage while rejecting the explanation of the assessee and keeping in view that there is nothing adverse even in the statement of the 15 concerned parties recorded by the Assessing Officer, one more opportunity should be given to the assessee to support and substantiate its explanation by producing the relevant vouchers/bills for the verification before the Assessing Officer.

7. The Id. D.R., on the other hand, contended that the entries appearing in the Bank statement of the assessee clearly establish that bearer cheques were issued by the assessee to the concerned parties towards payment of transport charges. He submitted that the entries for different amounts, however, were made by the assessee in the books of account so as to overcome the rigorous of section 40(a)(ia) and after having detected this manipulation, the disallowance under section 40(a)(ia) was made by the Assessing Officer and confirmed by the Id. CIT(Appeals) on the basis of entries appearing in the Bank account of the assessee.

8. I have considered the rival submissions and also perused the relevant material available on record. It is observed that the disallowance in question under section 40(a)(ia) on account of transport charges has been made by the Assessing Officer and confirmed by the Id. CIT(Appeals) mainly on the basis of mismatching entries as found recorded in the books of account of the assessee and its Bank statement. In this regard, the explanation offered by the assessee that the entries appearing in its bank account represented withdrawals made by the concerned parties for and on its behalf was not accepted by the authorities below and the relevant entries found recorded by the assessee in its books of account were not treated reliable by them mainly because the assessee failed to produce the relevant bills and vouchers to support and substantiate the same. In this regard, the Id. counsel for the assessee has submitted that

such bills and vouchers are regularly maintained by the assessee but in the absence of any specific opportunity given either by the Assessing Officer or by the Id. CIT(Appeals), the same could not be produced for verification. He has contended that the assessee in the facts and circumstances of the case including the fact that nothing adverse has been brought on record by the Assessing Officer to doubt the relevant entries appearing in the books of account of the assessee may be given one more opportunity to produce the relevant bills and vouchers before the Assessing Officer in order to support and substantiate its case. I find merit in this contention of the Id. counsel for the assessee. Accordingly, the impugned order of the Id. CIT(Appeals) on this issue is set aside and the matter is restored to the file of the Assessing Officer for deciding the same afresh after giving one more opportunity to the assessee to produce the relevant documentary evidence in support of its case. Ground No. 1 is accordingly treated as allowed for statistical purposes.

9. The issue raised in Ground No. 2 relates to the disallowance of Rs.10,17,535/- made by the Assessing Officer under section 40(a)(ia) and confirmed by the Id. CIT(Appeals) for the failure of the assessee in terms of section 194C(5) of the Act.

10. The verification made by the Assessing Officer of the transport charges claimed by the assessee revealed that the amount of Rs.10,17,535/- paid to twelve different parties was in excess of Rs.20,000/- in case of single payment and in excess of Rs.50,000/- in case of aggregate payments made during the year under consideration. Since these payments were made after 30.09.2009 and the Permanent Account Numbers of the payees were not furnished by the assessee as required by section 194C(5), the Assessing Officer invoked the provisions of section 40(a)(ia) and made a disallowance of Rs.10,17,535/-. During the course of appellate proceedings before the Id. CIT(Appeals), it was pointed out by the assessee that the Permanent Account Numbers of the concerned twelve parties were given in the e-TDS return filed by it and the same

were accepted. The ld. CIT(Appeals), however, did not accept this stand of the assessee and proceeded to confirm the disallowance made by the Assessing Officer under section 40(a)(ia) for the following reasons given in paragraph no. 14 of the impugned order:-

"14. The matter is concerned. The law mandates obtaining PAN prior to payment. This is due to the fact that liability to deduct tax at source arises latest at time of payment. The phraseology "at the time of credit of such sum to the account of the contractor or at the time of payment thereof" figuring in section 194C(1) makes clear the time for tax deduction at source. If tax is not to be deducted, then latest prior to payment, PAN must be obtained. Obtaining of PAN is the sanction for payment without deduction of tax at source. The events after payment does not guide disallowance under section 40a(ia) including the furnishing PAN in the TDS return, the claim now made by assessee. Matters concerning TDS return govern demand under section 201(1)/201(1A) and not disallowance under section 40(a)(ia). Even if e-TDS return on summary processing results in not raising demand of short deduction of tax at source, if a scrutiny is done, demand will arise since the recipients did not furnish PAN for which the latest possible time is time of payment. Therefore the acceptance of e-TDS return on summary processing, quoted by appellant is not accepted. This is due to reasons already stated in this paragraph plus the fact that as per provisions of section 40(a)(ia), disallowance is mandatory in a case where there is default. In other words section 40a(ia) is attracted automatically once a default takes place. The Assessing Officer has brought out absence of PAN or generation of payment after payment proving that in respect of such persons PAN did not exist. After considering all aspects, I uphold the disallowance under section 40a(ia) since assessee was liability to deduct tax at source on the payment on PAN was not provided prior to payment. Accordingly ground 2 is dismissed".

[para 14]

11. I have heard the arguments of both the sides on this issue and also perused the relevant material available on record. The ld. counsel for the assessee has submitted that the e-TDS return filed by it was relied upon by the assessee before the ld. CIT(Appeal) in order to point out that the PANs of the concerned twelve parties had already been obtained. He has

contended that the ld. CIT(Appeals), however, proceeded to decide the issue against the assessee on the basis of wrong presumption that the said PANs were obtained by the assessee at the time of filing the TDS return and not at the time of payment/credit. He has submitted that the PANs were duly obtained by the assessee at the time of credit/payment of the relevant amounts and the same thereafter were furnished while filing the e-TDS return. He has contended that the case of the assessee on this issue is open for verification and if the matter is sent back to the Assessing Officer, the assessee can establish its case on evidence. I find merit in this contention of the ld. counsel for the assessee and since the ld. D.R. has also not raised any objection in this regard, I restore this issue to the file of the Assessing Officer for deciding the same afresh after giving the assessee an opportunity to produce the relevant documentary evidence to support and substantiate its case. Ground No. 2 is accordingly treated as allowed for statistical purposes.

12. In the result, the appeal of the assessee is treated as allowed for statistical purposes.

Order pronounced in the open Court on April 12, 2017.

**Sd/-
(P.M. Jagtap)
Accountant Member**

Kolkata, the 12th day of April, 2017

- Copies to : (1) **M/s. Ghosh and Chakraborty Transport,
Vill. Anandpur, P.O. Churulia,
District-Burdwan-713 368**
- (2) **Income Tax Officer,
Ward-2(1), Asansol,
Parmar Building, G.T. Road (West),
Apcar Garden, Asansol-713 304**
- (3) **Commissioner of Income Tax (Appeals), Asansol;**
- (4) **Commissioner of Income Tax-** ,
- (5) **The Departmental Representative**
- (6) **Guard File**

**By order
Assistant Registrar,
Income Tax Appellate Tribunal,
Kolkata Benches, Kolkata**