

state and they have no knowledge of Income Tax Act. It was submitted that the labour sardars were paid commission from the labour bill which is included in the labour payments. It was further submitted that no payment has been made over Rs 20,000/- in cash and the overall limit of commission paid to each labour sardar also fall within the limit prescribed u/s 194C of the Act. Accordingly, it was claimed that the question of obligation to deduct tax at source does not arise. The Id AO however found that the payments were made to the labour contractors / labour sardars and the payments made to each sardar was above Rs 50,000/- in a financial year thereby warranting deduction of tax at source in terms of section 194C of the Act. Accordingly he disallowed the entire labour charges u/s 40(a)(ia) of the Act.

4. Before the Id CITA , apart from reiterating the submissions made before the Id AO, the assessee submitted that the labour contractors / labour sardars were paid commission at the rate of 1.5% to 2% on labour bills which does not exceed the overall aggregate limit of Rs. 50,000/- in terms of section 194C of the Act. It was also argued that such a bulk volume of government contract jobs could not be performed by 14 contractors. Hence obviously , various labourers had to be employed under each labour contractor / labour sardars to carry out the civil contract work at various project sites of the assessee. It was submitted that the labour payments were paid to the labourers through labour sardars. It was also explained that labour sardars and labour contractors are different. A labour sardar merely brings labourers who are directly paid by the employer. The sardar simply gets a commission every time labourers are paid which may vary from 1.5% to 2% of labourers payment and in turn they manage the labours and their turnover. On the other hand, a labour contractor supplies labour and receives any payment in his own name and by keeping his cut, he pays the labourers. Thus labourers are not liable to get any direct payment from the employers. The assessee also filed details that more than 100 labourers were employed under each labour sardar. The Id CITA observed that there was no contract between the assessee and the labourers or even with the sardars. It was argued that there was no contract entered into by the assessee. The Id CITA deleted the disallowance by observing as under:-

“4.7. That section 40(a)(ia) requires that unless tax is deducted according to section 194C on payment to contractors or sub-contractors, which includes supply of labour for carrying out any work, it will attract disallowance of expenditure. The Hon’ble supreme court in

Birla Cement Works Vs. CBDT (2001) 248 ITR 216 has laid down the conditions precedent for attracting the provisions of section 194C, viz. (i) there must be a contract must be for carrying out of any work, (iii) the work is to be carried through the contractor, (iv) the consideration for the contract should exceed the amount fixed by section 194C and (v) that the payment is made to the contractor for the work carried out by him. Therefore, section 40(a)(ia) cannot be read in isolation or to the exclusion of section 194C. In the instant case, the controversy was regarding the payments made for disbursement of labour charges to labour sardars. The appellant had specifically stated before the AO that there was no contract between the appellant and the labour sardars. Keeping in view the totality of the facts and circumstances of the case and the submissions of the assessee, I am of the firm opinion that in the instant case, the appellant does not fall within the ambit of section of 40(a)(ia) of the Act. I find force in the argument of the A/R of the appellant that the labour sardars in the instant case cannot be said to be labour contractors within the meaning of the provision of section 194C(2). In the circumstances, there is no requirement in law to deduct tax at source by the appellant under the provisions of section 194C(2). I find in this case, the Labour Sardars have no locus standi as Labour Contractors as a Labour Sardar and a Labour Contractor are as different as chalk and cheese. I find there was no contract between the appellant and the Labour Sardars for the supply of labour and without which there cannot be any application of section 194C and as such the invocation of provision of sec. 40(a)(ia) is outside the scope and ambit of the such enactment. In view of the matter I am of the considered opinion that section 194C(2) being not applicable in this case, the disallowance of Rs.2,04,79,685/- made by the AO by invoking section 40(a)(ia) of the I.T. Act, 1961 is hereby deleted.”

5. Aggrieved, the revenue is in appeal before us on the following ground:-

“ Ld. CIT(A) erred in fact and in law, in deleting the addition of Rs.2,04,79,685/- made on account of violation of section 40(a)(ia) of the I. T. Act 1961 though there was been failure on part of the assessee to deduct TDS from the payments made to 14 labour contractors. Ld. CIT(A) erred in holding that there was no oral contract between the assessee and the labour sardars/contractors and also failed to appreciate that the payments on account of labour charges was made by the assessee to the labour contractors despite the fact that the assessee could not adduce any evidence to prove that the payments were made directly to the labourers.”

6. The Id DR argued that the observation of the Id CITA that there is no contract is incorrect. He stated that the muster roll was not submitted by the assessee before the Id AO which would become the primary document. He argued that formal contract is not necessary. In the instant case, all the ingredients of contract have been duly fulfilled and provisions of section 8 & 9 of the Contract Act were fulfilled. He argued that there is no difference between labour sardars and labour contractors with regard to the payment of labour charges. Accordingly he argued that the order of the Id AO need not be interfered with. In response to this, the Id AR argued that the ledger accounts of entire labour charges for each labour contractors / labour sardars were furnished before the Id AO. In the said ledger, the payments made to labour sardars towards their commission portion is reflected separately in the said ledger account and hence the primary evidences were indeed

submitted by the assessee. He argued that the wage registers as called for by the Id AO would be maintained only for permanent labourers and not for temporary labourers. There is no direct contract entered into by the assessee and hence the payments made by the assessee is outside the ambit of provisions of section 194C of the Act. He placed reliance on the following decisions in support of his contentions :-

(a) Order of Hon'ble Calcutta High Court in the case of CIT vs Stumm India in ITA No. 127 of 2009 dated 16.8.2010.

(b) Decision of this Tribunal in the case of Samanwaya vs ACIT reported in 34 SOT 332 in ITA No. 484 (Kol) of 2008 dated 23.4.2009 .

(c) Decision of this Tribunal in the case of ITO vs Saha Agency in ITA No. 2453/Kol/2013 dated 20.5.2016.

(d) Decision of this Tribunal in the case of Seaking Enterprise vs ITO in ITA No. 1670/Kol/2009 dated 26.8.2016.

(e) Decision of this Tribunal in the case of ACIT vs Supreme Construction in ITA No. 1252/Kol/2013 dated 7.9.2016.

7. We have heard the rival submissions. The assessee had made payments of labour charges as below:-

DETAILS OF LABOUR CHARGES PAID FOR THE YEAR 2008-09

Sl. No.	Name of Labour Sardar	Address	No. of Labourers under the Sardars	Paid to Labourers	Paid to Sardar	Gross amount	% paid to sardars
1.	MONTU SEIKH	Begunbari, Beldanga, Murshidabad	150	15,32,335.00	31,500.00	15,63,835.00	2.06
2.	KALU SEIKH	Begunbari, Beldanga, Murshidabad	160	18,38,625.00	32,000.00	18,70,625.00	1.74
3.	ARMAN Ali	Begunbari, Beldanga, Murshidabad	130	13,30,370.00	21,500.00	13,51,870.00	1.62
4.	IFAQIDDIN MOLLA	Begunbari, Beldanga, Murshidabad	160	14,53,737.00	28,500.00	14,82,237.00	1.96
5.	RAKHIBUL ALAM	Bhagabangola, Murshidabad	120	12,17,383.00	23,120.00	12,40,503.00	1.90
6.	SUBOL NATH	Ranaghat, Nadia.	110	10,37,680.00	18,000.00	10,55,680.00	1.73
7.	BASAR SEIKH	Basanti, South 24 Parganas.	170	18,54,250.00	31,500.00	18,85,750.00	1.70
8.	RABIUL ALAM	Basanti, South 24 Parganas	190	16,95,090.00	30,260.00	17,25,350.00	1.79
9.	SURABUDDIN SEIKH	Basanti, South 24 Parganas	110	11,59,480.00	15,800.00	11,75,280.00	1.36
10.	ABUL KAHAR MOLL	Basanti, South 24 Parganas.	120	11,96,685.00	23,750.00,	12,20,435.00	1.98
11.	MD KHAJABUDDIN	Kaliachak, Malda.	180	18,53,830.00	31,750.00	18,85,580.00	1.71
12.	PARI MAL DAS	Golabari, South 24 Parganas	140	13,85,585.00	23,100,00	14,08,685.00	1.67
13.	SAHAJAHAN GHARAMI	Canning, South 24 Parganas	125	12,55,795.00	20,200,00	12,75,995.00	1.61
14.	SUNIL MANDAL	Ghutuari Sharif, South 24 Parganas	135	<u>13,18,085.00</u> 2,01,28,930.00	<u>19,775.00</u> 3,50,755.00	<u>13,37,860.00</u> 2,04,79,685.00	<u>1.50</u>

7.1. We find that the Id CITA had deleted the disallowance on the ground that there is no contract entered into by the assessee and the labour sardars. We find that the impugned issue is covered by the decision of the Hon'ble Calcutta High Court in the case of *CIT vs Stumm India in ITA No. 127 of 2009 dated 16.8.2010*, wherein it was held that :-

“The court: This appeal is sought to be preferred against the judgment and order of the Ld. Tribunal in relation to the assessment year 2005-06, dated October 24, 2008, being aggrieved by a portion of the same.

It is urged before us that the learned Tribunal ought not to have accepted the judgment and order of the CIT (Appeal) who has quashed the disallowance of deduction of Rs.41,33,710/- and on account of tax deduction at source. The learned Tribunal has recorded the fact that the department has not been able to bring any material on record to show that the assessee has made the payment to the transporters in pursuance of contract for carriage of goods of the assessee and the question of deduction at source under section 194C does not and cannot arise. In the absence of evidence of payment made by the assessee to the transporters, the assessee cannot be saddled with the liability of deducting tax at source. Before us no other point has been urged not it is said that the aforesaid fact finding is truthful without any basis whatsoever.”

7.2. We find that the decision of this tribunal in the case of *Samanwaya vs ACIT reported in 34 SOT 332 in ITA No. 484 (Kol) of 2008 dated 23.4.2009* directly supports the case of the assessee wherein it was held that :-

“We find that in this case, admittedly, the labour sardars in the present case has no locus standi as labour contractor as a labour sardar and a labour contractor are as different as chalk and cheese. We find that there was no contract between the assessee and the labour sardars for supply of labourers and without which there cannot be any application of section 194C and as such the invocation of provision of section 40(a)(ia) is outside the scope and ambit of such enactment. In view of the matter, we are of the considered opinion that section 194C(2) being not applicable in this case, the disallowance of Rs. 74,33,210/- made by the Assessing Officer by invoking section 40(a)(ia) of the Income Tax Act, 1961 and sustained by the Id CIT(A) is hereby deleted. This ground of the assessee is allowed.”

7.3. We also find that the decision of this tribunal in the case of *ACIT vs Supreme Construction in ITA No. 1252/Kol/2013 dated 7.9.2016* had held as under:-

“9. We have heard rival contentions of both the parties and perused the materials available on record. At the outset, we find that AO has called the labour contractors by issuing summons u/s. 131 of the Act and their statements were duly recorded. The AO failed to bring anything on record that the labour charges were paid in pursuance of contract either in writing or the oral with the labour sardar. The AO has held that the assessee has not complied the provision of Sec. 194C r.w.s. 40(a)(ia) of the Act on the presumption and surmise. There is no evidence that the payments have been made to the contractors. We do not find any merit in the arguments placed by Ld. DR in this connection. The AO has given the clear finding in his order which is as follows :

“In my opinion, all these labourers who are treated as Labour Sardars are enjoying some privileged position in the eyes of assessee because the assessee collects other

labourers through them, make payments to the other labourers in their presence, though there is no written contract. In the absence of any documentary evidence, I can't call them as Labour Sardars but they are enjoying some special status before the assessee. All the payments were made through them as per Books of Accounts whereas the assessee produced the Muster Roll establishing through it that payments were made to the other co-labourers in their presence for the sake of convenience and the amounts were debited in their names only because the assessee can not keep track of all the labourers without the help of these labourers. Though the assessee claims them to be it's labour and these persons have deposed that they are the labourers, yet, I am not fully convinced with their plea that these persons are simply labourers and nothing more than that. From their appearance, dress, behavior and confidence, I am confident that they are the labour sardars, though they are denying this fact. Whether you admit or not but it can not be denied that these persons enjoy some privileged positions in comparison to other labourers."

From the above it is amply clear that the AO himself is not sure and forming the opinion on his own surmise and conjecture. In our considered view the ld. DR has not brought anything contrary to the findings of ld. CIT(A). In this connection we rely on the decision of ACIT vs. Kalindi Agro Biotech Ltd. (2012) 20 taxmann.com 339 where it was held that the provisions of Sec. 194C of the Act are applicable if the payment has been made to a contractor for the year exceeding Rs.20,000/-. Similarly the jurisdictional ITAT, Kolkata in the case of Samanwaya Vs. ACIT 34 SOT 332 has held as under :

"Business expenditure—Disallowance under s. 40(a)(ia)—Need for TDS under s. 194C relating to payments made for disbursement of labour charges to labour Sardars—Assessee had specifically stated before the lower authorities that there is no contract between the assessee and the labour Sardars—Revenue authorities could not controvert the submission of the assessee in this respect—Even before the Tribunal, the Department could not bring out any evidence by producing cogent material in respect of any contract between the assessee and the labour Sardars to contradict the submission of the assessee that there was no contract between the assessee and the labour Sardar—A contractor or a sub-contractor is engaged on the basis of a contract which is the most important essence of a contract job and is a primary requirement for the application of s. 194C—Labour Sardars in the present case has no locus standi as labour contractor as a labour Sardar and a labour contractor are as different as chalk and cheese—There was no contract between the assessee and the labour Sardars for supply of labourers and without which there cannot be any application of s. 194C and as such the invocation of provision of s. 40(a)(ia) is outside the scope and ambit of such enactment"

Relying in the aforesaid decisions we find that there is nothing on record to suggest that the payment to labourers were paid to the contractors. On the contrary, assessee has made payment to labourers directly and in support of its claim, Ld. AR of assessee has produced the muster roll. In this regard, Ld. DR failed to bring any defect / information from the muster roll which suggested that the labour charges paid by assessee are subject to TDS. Since no cogent material has been brought on record, in our considered opinion, AO was not justified in invoking the provision of Sec. 194C r.w.s. 40(a)(ia) of the Act. In the background of the above discussions and precedent we do not find any infirmity in the order of Ld. CIT(A) and accordingly we uphold the same. In the circumstances, this issue of Revenue's appeal is dismissed."

7.4. Respectfully following the judicial precedents relied upon hereinabove, we do not find any reason to interfere with the order of the Id CITA and accordingly dismiss the ground of the revenue.

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

Order pronounced in the open court on 14.10.2016

Sd/-
(N. V. Vasudevan)
Judicial Member

Sd/-
(M. Balaganesh)
Accountant Member

Dated : 14th October , 2016

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. APPELLANT – ITO, Ward-33(2), Kolkata.
2. Respondent –M/s. Kwaliti construction, 48, A.J.C. Bose Road, Kolkata-700 016.
3. The CIT(A), Kolkata
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata

/True Copy,

By order,

Asstt. Registrar.