

IN THE INCOME TAX APPELLATE TRIBUNAL "J" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER AND
SHRI D. KARUNAKARA RAO, ACCOUNTANT MEMBER
I.T.A. No.1152/M/2012 (Assessment Year: **2003-2004**)

ITO 9(2)(1), R.No.225, 2 nd Floor, M.K. Road, Mumbai – 400 020.	बनाम/ Vs.	M/s. Java Impex Pvt Ltd., 201, Hemlok Apts, Kilachand Path, S.V. Road, Kandivali (W), Mumbai – 400 067.
स्थायी लेखा सं./PAN : AAACJ6469K		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	:	Shri Sujit Bangar, Sr AR
प्रत्यर्थी की ओर से/ Respondent by	:	Shri Rajiv Khandelwal

सुनवाई की तारीख / Date of Hearing : 04.08.2016

घोषणा की तारीख /Date of Pronouncement : 12.08.2016

आदेश / O R D E R

PER D. KARUNAKARA RAO, AM:

This appeal filed by the Revenue on 20.2.2012 is against the order of the CIT (A)-20, Mumbai dated 2.12.2011 for the assessment year 2003-2004. In this appeal, Revenue raised the following grounds which read as under:-

- "1. *On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in relying on assessee's submission and holding that the matter involves only reconciliation of figures and not the verification of its correctness and genuineness.*
2. *On the facts and in the circumstances of the case and in law, the Ld CIT (A) failed to appreciate that in para 6 of the ITAT's order dated 28.5.2009 the ITAT has set aside the order of the CIT (A) and remanded the issue to the file of the AO for fresh consideration.*
3. *On the facts and in the circumstances of the case and in law, the Ld CIT (A) failed to appreciate that the ITAT has categorically stated that the AO shall grant opportunity of being heard to the assessee and also opportunity of letting in evidence to reconcile the difference and the AO shall thereafter decide the issue as per the law.*
4. *On the facts and in the circumstances of the case and in law, the Ld CIT (A) failed to appreciate that the ITAT has nowhere in its order specified that the issue is that of reconciliation."*

2. In the above grounds, the Revenue raised the issues relating to jurisdiction of the CIT (A) / AO and granting relief in respect of the addition made by the AO amounting to Rs. 45,95,894/-. Briefly stated relevant facts in this regard are that the

assessee filed the return of income declaring the total income of Rs. 1,74,660/- and the assessment was completed u/s 143(3) of the Act. Subsequently, on finding variation in receipts for the TDS certificates, assessment was reopened by issuing a notice u/s 148 of the Act. The re-assessment was completed u/s 144 r.w.s 147 of the Act after making addition of Rs. 45,95,894/-. Matter travelled to the CIT (A) and then to the ITAT. Eventually, the ITAT passed an order dated 28.5.2009 remanding the issue back to the AO with certain directions. In the remanding proceedings, AO granted various particulars to the assessee to reconcile the differences between the receipts shown in the P & L Account and the TDS certificates. Assessee furnished written submissions in this regard. AO invoked the provisions of section 133(6) of the Act calling for details from certain clients. The details are mentioned in para 4. The said letters were either returned 'unserved' or the clients did not reply to the AO in response to the said notices. Assessee was informed accordingly. Eventually, AO was informed about the non-compliance and assessee's failure to reconcile the figures relating to the gross receipts. In fact, AO initiated the penalty proceedings for non-compliance u/s 271(1)(b) of the Act. The re-assessment was completed after making additions of Rs. 45,95,894/- mentioning the following reasons. For the sake of completeness, the same are extracted as under:-

"The total receipts as per the TDS certificates furnished along with the return of income is Rs. 74,54,652/- whereas the receipts credited by the assessee in its profit and loss account is only Rs. 28,58,758/-. Also, on perusal of the assessee's AR's reply dated 09/08/2010, where he has filed a statement of details of TDS, it is seen that there are 56 parties from whom the assessee has claimed to have received amounts for the gross sales of Rs. 74,54,652/-. The assessee has vide said statement claimed that an amount of Rs. 28,58,758/- is in the form of reimbursement of expenses and again, a sum of Rs. 35,56,269/- is in the form of an advance from various parties. However, no details / confirmations from any of those parties either in respect of reimbursement of expenses or advances have been filed, despite various opportunities given as stated above. In the absence of any details or evidence or any third party evidence to validate assessee's claim in respect of reimbursement of expenses & advances of Rs. 45,95,894/-, I am compelled to take the same as part of assessee's sale proceeds only and make addition of Rs. 45,95,894/- ie to the extent of assessee has failed to file any evidence to such claim....."

3. Aggrieved with the above *ex-parte* order of the AO, the assessee filed an appeal before the CIT (A) raising various issues relating to the AO's failure to not to restrict the assessment proceedings to the reconciliation related issues but invoking the provisions of section 133(6) of the Act etc. Further, it is also agitated the issue of addition of Rs. 45,95,894/-. CIT (A) called for a remand report on the submission

and the papers filed before him. However, no bills or evidence were furnished to substantiate various accounts mentioning in the reconciliation charts. It is the claim of the assessee before him that the said amount constitutes reimbursement of the expenses incurred by the assessee on behalf of the clients. Therefore, the said receipts were credited or debited as the case may be to the individual expenditure accounts of the clients. Therefore, such reimbursements do not constitute income. The CIT (A) considered the same and held vide the contents of para 4.13 to 4.19 of his order and granted entire relief to the assessee. Aggrieved with the same, Revenue is in appeal before us.

4. During the proceedings before us, Ld DR for the Revenue argued that assessee failed to credit all the receipts including the reimbursement to the P & L Account for the year under consideration. Further, he mentioned that the assessee failed to file the reconciliation of the figures explaining the difference in the gross receipts shown in the P & L Account of the assessee appearing on the TDS certificates claimed by the assessee. He also submitted that the CIT (A) erred in mentioning that the AO exceeded the direction of the ITAT and invoked the provisions of section 133(6) of the Act. Ld DR was also critical of the order of the CIT (A), who granted entire relief to the assessee when the assessee failed to evidence the expenditure claimed to have been incurred on account of port expenses (Rs. 64.06 lakhs) (rounded of) and import / harbour expenses (Rs. 25,86,792/-). He is also critical of assessee submitted merely ledger and vouchers for verification and not the third party evidences in support of the claim of expenditure. Further, on the issue relating to the jurisdiction, Ld DR brought our attention to the contents of the order of the ITAT in the first round and read out the same as under:-

"The assessee deserves an opportunity to explain the difference between the receipts as found in the TDS certificates and Profit & Loss Account. We, therefore, set-aside the order of the CIT (A) and remand the issue to the file of the Assessing Officer for fresh consideration."

5. Explaining the above, he mentioned that the exercise of reconciliation involves various aspects including the correctness of the said reconciliation of figures. Therefore, he justified the actions of the AO and was critical of the finding of the CIT (A) in this regard.

6. On the other hand, Ld Counsel for the assessee heavily relied on the order of the CIT (A) and was critical of the decision of the AO in not restricting his inquiries to the reconciliation and in making unfair additions on account of difference of Rs.45,95,894/-. Further, Ld Counsel for the assessee mentioned that the same was never the income of the assessee as they are merely reimbursements by the clients of the assessee, who is engaged in the C & F agency. He further submitted that the Bench may decide the issue and mentioned that the assessee does not want to revisit the AO / CIT (A) for any reason.

7. We have heard both the parties and perused the orders of the Revenue Authorities as well as the relevant material placed before us. On hearing both the parties, we find that in the first round, the ITAT ordered for remanding the issue to the file of the AO with specific direction of reconciliation of total receipts as shown in the P & L Account of the assessee for the year *qua* the receipts reflected in the TDS certificates attached / mentioned to the return of income. There is no dispute in the said documents. Assessee claims that the said difference is explicable.

8. During the remanding proceedings, assessee explained the difference and the contents in page 21 of the paper books evidence the same. The said contents of page 21 are extracted by the CIT (A) on para 4.17 of his order. The said reconciliation mentions about the reimbursements received by the assessee from his clients as per the bills raised on them after incurring expenditure on accounts of port expenses; Harbour expenses and Service Tax payments etc. There is no dispute on the generation of these accounts. But, the case of the AO is that the assessee failed to provide relevant invoices / bills with supporting vouchers. Admittedly, the assessee failed to produce the same before both the AO and CIT (A). Consequently, the AO proceeded to tax the differential amount of Rs. 45.95 lakhs for want of vouchers / evidences. In other words, it is the case of the assessee that relevant receipts are undisputedly received by the assessee by way of reimbursements against the money already expended by the assessee. However, there is admittedly problem with maintenance of the bills / invoices / vouchers with supporting evidences.

9. In the light of the above factual matrix, we need to decide (i) if the AO exceeded the jurisdiction of not restricting himself to the direction of the ITAT and

(ii) if the CIT (A) is justified in deleting the addition of Rs. 45.95 lakhs for want of bills / invoices / evidences etc. Regarding the **first issue** ie AO's jurisdiction *qua* exceeding the limits of direction of ITAT, we are of the opinion that the directions of the ITAT revolves around the "requirement of reconciliation" of figures of receipts on TDS and in the P & L Account. On perusal of the said page 21 (supra) of the paper book, we find the same are relevant here which are as under:-

Less:	Amount as per TDS Certificate			Rs.74,54,652/-
	Income reflected in P & L Account		Rs. 22,14,615/-	
	Service Charges			
	<u>Other Income:</u>			
	C & F Expenses reimbursed	Rs. 96,36,142/-		
Less:	Port Expenses Incurred	Rs.64,05,208/-		
	Misc. Expenses incurred	Rs.25,86,792/-		
		Rs. 89,92,000/-	Rs.6,44,142/-	<u>Rs.28,58,757/-</u>
				<u>Rs.45,95,895/-</u>

10. From the above, it is evident the impugned reconciliation becomes meaningful only if the assessee substantiates (i) the port expenses and (ii) Harbour expenses and (iii) Sales Tax claims mentioned above. In our view, the assessee is under obligation to evidence the above (i) port expenses and (ii) Harbour expenses and (iii) Sales Tax claims. In our opinion, this exercise certainly falls within the jurisdiction of the ITAT in the first round of the proceedings. Thus, the direction for reconciliation is broad enough to include the discharge of onus by the assessee in substantiating the claims of expenditure mentioned in page 21 of the PB above. From this point of view, the stand of the Revenue before us is allowed on technical grounds. Accordingly, the relevant grounds raised by the Revenue are allowed.

11. Regarding the **second issue** relating to the deletion of Rs. 45.95 lakhs for want of bills / vouchers / invoices with evidence, we find the case of the Revenue is that the assessee failed to file evidences to demonstrate that the same do not constitute income as they are mere reimbursements of expenditure incurred by the assessee on behalf of the clients. From the figures available on the said page of reconciliation (page 21 of the PB), we find that the irreconcilable amount, which was added by the AO, is only Rs. 45,95,895/- against the gross expenditure of Rs. 89,92,000/- on account of Port and Harbour expenditure. These figures relating to Service Tax, being the amounts payable to Government, we need to exclude from all this exercise of reconciliation and in favour of the assessee. We do not know why

only Rs. 45,95,895/- out of Rs. 89,92,000/- is added by AO, when the failure of the assessee in discharge of onus is common for entire amount. In any case, we do not want to go into this area for want of jurisdiction. Therefore, we restrict ourselves to the correctness of the relief granted by the CIT (A) with reference to Rs. 45,95,895/- , added by the AO, and if the assessee discharged its onus in this regard.

12. Before us, Ld AR submitted that the Bench may take an appropriate decision in the matter and further conveyed that the assessee does not want to revisit the AO / CIT (A) on this issue. Therefore, we considered the fact of (i) assessee's business model of C & F agency, which involves the incurring of expenditure first by assessee on behalf of the claims and realizing them later from clients; (ii) admitted failure of the assessee in discharging of the onus in matters of furnishing of evidences when claim of expenditure is made; (iii) disinclination of the assessee to revisit the AO / CIT (A) with evidences / bills / vouchers and (iv) absence of any incriminating material gathered by the AO against the assessee with regard to the claim of expenditure and hold that disallowance of some ad-hoc sum should meet the ends of justice. Accordingly, we estimate disallowance @ 5% of Rs. 45,95,895/- and direct the AO to compute the disallowance. It is relevant mention here that our finding on this issue does not constitute any precedent either for the assessee or for others since the same is specific to the peculiar facts of the instant case. Accordingly, relevant grounds raised by the Revenue are partly allowed.

13. In the result, appeal of the Revenue is partly allowed.

Order pronounced in the open court on 12th August, 2016.

Sd/-

(MAHAVIR SINGH)

JUDICIAL MEMBER

मुंबई Mumbai; दिनांक 12.08.2016

व.नि.स./ OKK, Sr. PS

Sd/-

(D. KARUNAKARA RAO)

ACCOUNTANT MEMBER

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-

4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR,
ITAT, Mumbai
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,
उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**