

**IN THE INCOME TAX APPELLATE TRIBUNAL
"F" Bench, Mumbai**

Shri Joginder Singh (Judicial Member)

&

Before Shri Ashwani Taneja (Accountant Member)

**ITA No.3778/Mum/2015
(Assessment Year: 2010-11)**

ITO, Wd.28(3)(3), Navi Mumbai	Vs.	Shri Sopan Dhondibhau Patade Shop No.A/66, Mahavir Market, Near Onion Potato Market, Sector No.18, Vashi Navi Mumbai-400 705 PAN – AKYPP2070R
Appellant		Respondent

Appellant by: Shri B.S. Bist
Respondent by: Shri K Shivram

Date of Hearing: 11.05.2017
Date of order: 19.05.2017

ORDER

Per Ashwani Taneja, A.M.

This appeal has been filed by the Revenue against the order passed by the Ld.CIT(A)-XXXII, Mumbai dated 20th March, 2015 against the assessment order u/s 143(3) dated 30th March, 2013 for AY 2010-11 on the following grounds:-

- (1) On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in deleting the additions u/s 40(a)(ia) on account of freight charges paid.*
- (2) On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in treating the assessee as Transport*

Broker / Agent as against Transport contractor as mentioned by the auditor in his Audit report.

(3) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in appreciating the fact that Res Judicata is not applicable as each assessment year is a separate proceedings as held by Hon'ble Apex court in various judgments.

(4) On the facts and circumstances of the case and in law, the Ld.CIT(A) has erred in appreciating the fact that during the course of assessment proceedings the assessee has not submitted details of PAN and the names of the parties to whom the freight charges paid.

(5) On the facts and circumstances of the case and in law, the Ld. CIT(A) has erred in allowing expenditure in respect of freight charges for the period 01/10/2009 to 31/03/2010 involving total amount of Rs.3,20,16,550/- as provisions of section 194C(7) are interconnected and assessee has not complied with the provisions of section 194C(7) of the I.T. Act."

2. The solitary issue involved in these grounds is whether the assessee was liable to deduct TDS u/s 194C and in case assessee failed in deducting the tax at source, then whether the amount of freight charges paid by the assessee were disallowable u/s 40(a)(ia) of the Income-tax Act, 1961.

3. The brief facts as culled out from the orders passed by the lower authorities are that assessee is an individual and during the year he derived income from business and other sources. The assessee is a proprietary unit of M/s Balaji Roadways and the said proprietorship concern was stated to be engaged in the business of transport. During the course of assessment proceedings, it was noted by the AO that assessee had paid freight charges aggregating to Rs.6,37,00,780/- upon which, TDS had not been deducted. Therefore, this amount was disallowed by the AO. Being aggrieved, assessee filed appeal before the Ld. CIT(A) and made detailed submissions to argue that assessee was not liable to deduct TDS u/s 194C, since assessee was not

a transport operator, but was merely a transport agent and further, Permanent Account Numbers were provided in the case of all the payees wherever the aggregate amount paid exceeded a sum of Rs.50,000. Therefore, the impugned payments were not liable for deduction of tax at source as per provisions of section 194C(6) & 194C(7) of the Act. Ld. CIT(A) reversed the action of the AO and deleted the disallowance made by the AO by making following observations:-

“4.10. I have gone through all the written submissions very carefully and also perused the assessment order and the various documents and evidences and explanations furnished by the appellant. I find merit in the contention made by the appellant that TDS is not deductible in respect of the Freight Charges paid on the reasons and findings given as under: -

4.11. There is no denial of the fact that the business carried on by the appellant is that of Transport Agent/Broker and not of a Transport Operator. This fact brings more substance to the case when it was pointed out by the AR that the appellant does not possess/own any Truck for plying or carrying on the business of Transport Operator and the main source of Income was Commission Income which was carried on by the appellant for several years.

4.12. The nature of business activities carried on, by the assessee for assessment year under consideration was primarily that of an agent. The gross freight charges paid by the consignors to the assessee were a kind of reimbursement of similar payments made by the assessee to the owners of the transport vehicles engaged. The deduction of tax at source by the consignors from the freight charges paid to the assessee by it could not lead to the conclusion that the freight charges constituted the assessee-firm's gross business receipts or trading turnover. Similarly, the routing of freight charges paid by the consignors and payments made by the assessee to the vehicle owners through its bank account would not constitute the receipts and expenses as part of any trading transaction of the assessee. The payments made to the vehicle owners, therefore, would not constitute assessee's

business expenditure for the purpose of computation of profit and gains of any business carried on by the assessee in accordance with the provision of Income-tax Act.

4.13. Once it is proved that the Freight payments would not constitute the appellant's business expenditure for the purpose of computation of profit and gains of the business therefore there will be no applicability of section 40(a)(ia) of the Act as this section is applicable only for sums which are otherwise allowable under section 30 to 38 of the Act while computing the income chargeable under the head "profits of business or profession".

4.14. The fact that an earlier assessment, i.e. for A. Y. 2008-09 was completed u/s. 143 (3) of the Act by the same Assessing Officer Mr. K A Paryani proved that there was nothing on record for him to deviate from following the same principle of consistency for the year under consideration, i.e., for A.Y. 2010-11. On scrutinizing of the said assessment order for A.Y. 2008-09, the AO had come to the conclusion that the appellant was not liable to deduct TDS on Freight Charges paid and as such provisions of section 40 (a)(ia) was not invoked.

4.15. On the basis of above submissions, it can be seen that the AO has himself in a previous assessment order pertaining to A.Y. 2008-09 passed order u/s. 143 (3) of the Act and opined that no TDS on Freight Charges is liable to be deducted so as to call for any additions on that account and on the other hand, the same AO while passing the assessment order for the year under consideration has assessed to the contrary and changed his stance without assigning any specific reasons and gone on to make additions on account of non-deduction of TDS on Freight Charges which is devoid of any facts and evidentiary proofs

4.16 I am satisfied with the view points as discussed above and that the appellant being Transport Agent and on the basis of my observations and legal position more specifically explained in the preceding paras 4.10 to 4.15, it is amply clear that no TDS is liable to be deducted on the total Freight Charges of Rs.6,37,00,780/- so as to call for additions of Freight Charges.

4.17. I think the appellant has a very strong case based on material facts and explanations as above, I would further like to ponder on the fact that the Act has given a more liberal view and amended the section 194C to suit the transport fraternity being

an unorganized sector at large, which is discussed in the foregoing paras of mine.

4.18. The AR during the course of assessment proceedings submitted a letter dated 19-03-2013 which is reproduced above states that for the purpose of TDS deductibility in the case of Transport business for the year under consideration has two parts to it, one pertaining to the period 01-04-2009 to 30-09-2009 and other from 01-10-2009 to 31-03-2010.

4.19. For the period 01-04-2009 to 30-09-2009, the total freight charges were Rs.3,16,84,130/- and the same is covered under second proviso to clause (1) of sub section (3) sec 194C of the Act, which was inserted in the Finance Act 2005 w.e.f 1.6.2005, which states as under:

Provided further that no deduction shall be made under sub-section (2), from the amount of any sum credited or paid or likely to be credited or paid during the previous year to the account of the sub-contractor during the course of business of plying, hiring or leasing goods carriages, on production of a declaration to the person concerned paying or crediting such sum, in the prescribed form and verified in the prescribed manner and within such time as may be prescribed, if such sub-contractor is an individual who has not owned more than two goods carriages at any time during the previous year.

The aforesaid facts have been verified by the Auditor and forms part of the Audit Report and is on records. The Audit Report states the fact that the appellant has been covered under the second proviso to clause (1) of the sub section (3) of Section 194C till 30-09-2009.

The aforesaid fact was again reiterated in the submission made dated 19-03-2013 before the Assessing Officer reproduced by me again.

4.20. Alternatively, during the course of assessment proceedings the AR has attached list of details of freight charges paid from 01-04-2009 to 30-09-2009 amounting to Rs.3,16,84,130/- month wise, truck wise and PAN wise stating that since the aggregate contract amount paid to individual transporter had not crossed Rs.50,000/- then as per first proviso to clause (1) of the sub section (3) of Section 194C no liability to deduct TDS arises.

4.21. For the period 01-10-2009 to 31-03-2010, the total freight charges were Rs.3,20,16,650/- and the Finance Act has amended section 194C (6) from 1/10/2009 which states as under:

No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

The aforesaid fact was again reiterated in the submission made dated 19-03-2013 before the Assessing Officer. During the course of assessment proceedings, the AR has attached list of details of freight charges paid from 01-10-2009 to 31-03-2010 amounting to Rs.3,20,16,650/- month wise, truck wise and PAN wise and the AO has agreed to the fact that details submitted by the appellant had the PAN Numbers quoted too but has made contradictory statements as can be seen from clause 2.4 of the assessment order as under: -

- i) Assessee has not quoted PAN against all entries.*
- ii) Assessee has not produced books of account.*
- iii) Assessee has mentioned only PAN against payment made but not given name of contractor to whom payment is made.....*

4.22. *On perusing the assessment order in toto, the AR pointed out that during the year under consideration, there was only one SOLIDATORY TRANSACTION with one truck owner with PAN No. AVOPB0529J having three trucks and the total amount was Rs.98,380/-. I have decided and come to the conclusion that no addition is called for in respect of non-deductibility of TDS on Freight Charges paid as invoking of section 40(a)(ia) is not applicable in the case of Transport Broker/Agent and is in line with the previous assessment order passed by the AO for A.Y. 2008-09.*

4.23. *In view of the above, I direct the AO to delete the said addition on account of Freight Charges paid of Rs.6,37,00,780/- accordingly."*

4. Being aggrieved, Revenue is in appeal before the Tribunal. During the course of hearing, Ld. DR contested the order passed by the Ld. CIT(A). It was submitted that assessee is transport operator and not merely a transport agent. Our attention was drawn on the tax audit report of the assessee

wherein it was stated that assessee is engaged in the business of transport contractors and supply of labourers. Further, our attention has been drawn on the profit & loss account of the assessee wherein *Hamali Charges* (i.e. loading and unloading charges) aggregating to Rs.11,04,426 have been paid during the year indicating that assessee himself was engaged in the business of transport. Further, it has been stated that assessee has neither produced the books of account before the lower authorities nor did give proper details to show from where it could be seen that whether aggregate payment made to each person did not exceed Rs.50,000 and wherever it exceeded Rs.50,000 whether PAN has been obtained in such cases and given to the AO or not. Though certain charts were produced by the assessee before the AO, but in absence of ledger account of the payees and proper books of account, these facts could not be verified as to whether the payment made in aggregate exceeded the threshold limit of Rs.50,000 or not. It was thus submitted that fairly speaking, all these issues should go back to the file of the AO where assessee shall produce all the book of account and supporting evidences where all the facts could be brought on record and proper decision could be taken by the AO.

5. Per contra, Ld. Counsel of the assessee supported the order passed by the Ld. CIT(A) and submitted that huge details were submitted to the Ld. CIT(A) and after analysing these details only Ld. CIT(A) gave relief to the assessee. However, Ld. Counsel was not able to show any documentary evidence whereby it could be established that assessee had produced complete books of account and supporting vouchers for verification of the requisite details.

6. We have gone through the orders passed by the lower authorities and submissions made by both the sides. It has been claimed by the assessee that assessee is not a transport operator but merely a transport agent. To decide this issue, it is necessary to examine the *Bilty etc* issued by the assessee or the main transporter, in case main transporter is some other person. But none of the parties before us produced copies of *Bilty* or any other documentary evidence from where it could be conclusively established whether the assessee acted as the main transport operator or merely as a transport agent. Further, with regard to the claim of the assessee that in each case, wherever the amount of payment in aggregate per payee exceeded Rs.50,000/-, PAN was provided, it was noted by us that though detailed charts were submitted, but from these charts it was not possible to decipher the aggregate amount of payment made to one person. The charts have been prepared truck number-wise and not person-wise. Under these circumstances, in absence of supporting ledger accounts and in absence of proper re-tabulations of these charts, it is not possible to decide how much payment has been made to a particular person. Under these circumstances, when these queries were put to the Ld. Counsel, he very fairly and gracefully expressed that these issues could be sent back to the AO for verification of proper facts. Thus, under these circumstances, we find it appropriate to send the matter back to the file of the AO where the AO shall give adequate opportunity of hearing to the assessee to give complete details to establish whether the assessee is a transport operator or a transport agent and how much amount has been made per payee during the year to each payee. The AO shall examine all the details and documentary evidences and decide this issue afresh after considering all the details and documentary evidences submitted by the assessee on objective basis. Further, the assessee is free to

raise any legal or factual issue before the AO. Thus, with these directions, all the grounds are sent back to the file of the AO.

7. In the result, the appeal filed by the Revenue is treated as allowed, for statistical purposes.

Order was pronounced in the open court at the conclusion of the hearing.

Sd/-

Sd/-
(Joginder Singh)
Judicial Member

(Ashwani Taneja)
Accountant Member

Mumbai, Dated: 19th May, 2017

Pk/-

Copy to:

The Appellant

1. *The Respondent*
2. *The CIT(A) -39, Mumbai*
3. *The CIT - 2, Mumbai*
4. *The DR, "F" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai