

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, ए.मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "A", MUMBAI**

श्री जी.एस. पन्नू, लेखा सदस्य एवं

श्री जोगिन्दर सिंह, न्यायिक सदस्य, के समक्ष

**Before, Shri G.S. Pannu, Accountant Member and
Shri Joginder Singh, Judicial Member**

**ITA NO.4609/Mum/2014
Assessment Year: 2010-11**

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|---|---------------------|---|
| DCIT(OSD)-892), Room No.218, 2 nd Floor, Aayakar Bhavan, M.K.Road, Mumbai-400020 | बनाम/ Vs. | M/s Leo Duct Engineers and Consultants Ltd. 603,604, 605 Shalimar Morya Park, Off. Link Road, Andheri (West) Mumbai-400053 |
| (राजस्व /Revenue) | | (निर्धारिती /Assessee) |
| PAN. No.AAACL9470G | | |

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|-----------------------------------|---------------------|
| निर्धारिती की ओर से / Assessee by | Shri Madhur Agrawal |
| राजस्व की ओर से / Revenue by | Shri Aarsi Prasad |

| | |
|--|-------------------|
| सुनवाई की तारीख / Date of Hearing : | 09/02/2016 |
| आदेश की तारीख /Date of Order: | 01/03/2016 |

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 30/04/2014 of the ld. First Appellate Authority, Mumbai, wherein disallowance of Rs.3,32,52,416/- made u/s 40A(2)(b) of the Act was deleted by the ld. Commissioner of Income Tax (Appeals) allegedly ignoring the fact that the assessee failed to conclusively prove the commercial expediency and reasonableness of impugned expenditure with supporting corroborative documentary evidences.

2. During hearing of this appeal, the ld. DR, Shri Aarshi Prasad, defended the addition by defending the addition made by the ld. Assessing Officer by inviting out attention to various pages of the assessment order and further contending that the documents number 7 & 10 mentioned in the paper book were not made available before the Assessing Officer.

2.1. On the other hand, Shri Madhur Agrawal, ld. counsel for the assessee strongly defended the conclusion arrived at in the impugned order by contending that ad-hoc addition was made by the Assessing Officer without any reason and further the onus cast upon the Assessing Officer was not discharged by him and he has not demonstrated that the payments were excessive. Reliance was placed by the ld. counsel upon the decision from Hon'ble Gujrat High Court in

CIT vs Enviro Control Associated Pvt. Ltd. (2014) 225 taxman 56 (Guj.) and CIT vs Ashok J. Patel (2014) 225 taxman 79 (Guj.).

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee company is engaged in the business as consulting engineers, OSP of Infotech Industries and Turnkey Projects for providing services for Telecom Grid, declared total income of Rs.2,06,86,980/- in its e-filed return on 30/09/2010, which was processed u/s 143(1) of the Act. The case of the assessee was selected for scrutiny, therefore, notice u/s 143(2) of the Act was issued and served upon the assessee. The ld. Assessing Officer while going through annexure -3, clause 18, forming part of form 3CD noticed the report of the auditors with respect to following parties, which inter-alia, covered u/s 40A(2)(b) of the Act.

| Name of the person | Nature of payment | Amt. (Rs.) |
|--------------------------------|-------------------|------------|
| Alen Enterprises | Labour charges | 16611765 |
| Cannon construction | Labour charges | 13616696 |
| Fastek Consultant | Labour charges | 19604654 |
| Techno Fab | Labour charges | 6467819 |
| Vol-Tax Fabricators | Labour charges | 16945762 |
| Z.E. Square Eng. & Fabricator | Labour charges | 21615971 |
| Hi-Chem Eng. (India) Pvt. Ltd | Labour charges | 2830580 |
| Hi-Tech Valves Pvt. Ltd. | Labour charges | 17363669 |
| Leo Duct Contractors Pvt. Ltd. | Labour charges | 13851023 |
| Pentas Engineering | Labour charges | 14217836 |
| S.M. Ehsan | Labour charges | 16174681 |
| Azaid Azmi | Labour charges | 6961624 |
| | Total | 166262080 |

2.3. The Id. Assessing Officer observed, from the details furnished by the assessee that it made aforesaid labour charges, to the related parties as sub-contract charges. The assessee was asked to prove the genuineness of the sub-contract charges to the related party transaction along with supporting evidences. The assessee vide reply dated 07/02/2013, explained as under:-

“The Sub-Contracts are given to Related Parties and also to outsider to control each site spread all over India particularly the workers and labour job works.

The company cannot employ 100 to 200 workers. Because if the company intends to employ, the Fixed Overheads on account of workers will increase. We have to keep them employed whether the work is there or not.

While the Sub-Contract is given from site to site as per the requirement of workers and for limited period and thereby reduce the Fixed Overheads burden. Further, through various Sub-Contractors including the Related Party Contractor, it is better to control each site. Sometimes 15 to 25 sites are working and sometimes 8 to 10 sites and that to for a limited period. Therefore, the company has adopted the policy to give the maximum work to Sub-Contractors to have a better control instead of employing Site Supervisor Executives at various sites. It is better to give work to Sub-Contractor who in turn will execute the work with better control and in an economic way since due to personal supervising they get better output from workers.

We are enclosing a statement which gives sales to Related party Sub-Contractors, their Gross Profit and Net Profit. From the statement you will observe that Gross Profit or Sub-Contractor is hardly 10-15% and Net Profit is 2-3% and therefore there is no excess payment to related party The rate is based on the market condition and ultimately works out cheaper for the company.”

2.4. The aforesaid submissions of the assessee were not found acceptable and observed that the following parties are

shareholders/sister concern of the assessee company, included in the related parties, claimed u/s 40A(2)(b) of the Act.

| Sr. No | Name of the Party | Relation |
|--------|-----------------------------------|----------------|
| 1 | Mr. Mohd Zaid Azmi | Shareholder |
| 2 | Mr. S.M. Ehsan | Shareholder |
| 3 | Leo Duct Contractors Pvt. Ltd. | Sister Concern |
| 4 | Hi Chem Engineering (I) Pvt. Ltd. | Sister Concern |

2.5. In view of the above, the Id. Assessing Officer held that the assessee could not substantiate, with documentary evidence that the sub-contract payments made to so called related parties is not excessive when compare to the market conditions of the similar work, thus, he made addition u/s 40A(2)(b) of the Act.

2.6. The assessee carried the addition in appeal before the Id. Commissioner of Income Tax (Appeals), wherein, the evidences filed by the assessee were duly examined and finally the addition was deleted. The Revenue is aggrieved and is in appeal before this Tribunal.

2.7. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the Id. respective counsel, if kept in juxtaposition and analyzed, the issue arises whether the assessee paid excess amounts to the related sub-contractors

in comparison to other sub-contract, employed by the assessee for doing its day to day work at various sites. It is noted that various invoices raised against such sub-contractors were duly examined by the Id. Commissioner of Income Tax (Appeals) and observed that the Assessing Officer even did not took pain to go through such invoices, submitted by the assessee, during assessment proceedings. The Id. Commissioner of Income Tax (Appeals) found that the rates at which contract was awarded to the related parties and also to the non-related parties are exactly same and rather on the contrary, there were instances, where low rates were given to the related parties in comparison to non-related parties. Even before us, no such instance was brought to our notice by the Revenue to controvert the finding of the Id. Commissioner of Income Tax (Appeals). We are in agreement with the finding of the Id. First Appellate Authority that the payments were genuinely made for the legitimate needs of the business of the assessee and at the same time these were beneficial and economical to the assessee to safeguard its business interest. It is also noted that the sub-contractors were having educational qualification like B.E., Civil Engineering, MBA, B.Com and M.Com, etc. having experience of execution of infrastructure projects/industry each ranging from 15 to 13 years. In para 2.3.6, there is categorical uncontroverted finding by the Id. Commissioner of Income Tax (Appeals) that the assessee placed on record, sample work order and found that there was no difference in terms

and conditions between the work orders to the related parties and not related sub-contractor, meaning thereby, there were standard terms and conditions for both. The assessee duly submitted the financial accounts of the sub-contractors, confirmation letters, PAN, and qualifications of the senior person of the sub-contractor and further the payment made by the contractors are duly reflected by them in their return of income. We are in agreement with the finding of the Id. Commissioner of Income Tax (Appeals) contained in para 2.3.7 and further the factum of submissions of information in the tax audit report.

2.8. So far as, non-furnishing of details of work executed by the assessee, there is uncontroverted finding in para 2.3.8 of the impugned order that entire details, details of bill raise, work executed were duly furnished by the assessee during assessment proceedings. Which are summarized as under:-

- *The note on the necessity of taking the services of sub contractor whether related or not related.*
- *Justification of the implementation of project by the educated, family member who has stake in the goodwill of the company as against non related subcontractors*
- *Financial comfort with related parties sub contractors as against non related sub contractors. In case of related parties sub contractors there is no necessity of employing site supervisor the senior person of the related contractor take care of this work and therefore cost savings in case of related parties sub contractors.*
- *The margin of related parties is 10-15% gross margin and 2-3% net margin and therefore there is no excess payment to related parties in compare to the cost incurred in execution of work by them.*
- *The terms and conditions with related parties and non related party*

were same. The appellant takes labour contract and pass on the execution to sub contractors after retaining around 20% of the contract price. This around 20% margin is to cover the cost of technical and skill providing supervision, cost of stores like hand glows, tools etc and providing machines and to cover overheads and their margin and cost of interest.

- The Assessing Officer was given a chart of related parties contractors giving details of Bill Amount. Payment made during the year. Site Place where they have to give services.
- The customers for whose works we were doing the work. Nature of work. Total wages paid by them in respect of their site.
- The Confirmation letter from all related parties, PAN no. Profit and Loss account and Balance Sheet. No. of workers employed by them on site.

It is also noted that the ld. Assessing Officer disallowed 20% of the sub-contractor payment merely on presumption, doubt and surmises, ignoring the margin in the related field and the necessary details filed by the assessee even ignoring the profit and loss account, balance sheet of those related parties which were submitted by the assessee for verification.

2.9. As per section 40A(2)(b), the ld. Assessing Officer is to scrutinized the payments made to the related parties. However, we find that the Assessing Officer has nowhere demonstrated in the assessment order that the payments made to the related parties are excessive. It is the Assessing Officer who has to form a opinion on the basis of evidences filed by the assessee. Under the general law, transactions even with the relatives and/or associate concerns cannot be discarded, thus, the onus is on the Department to prove that the transactions were sham or the amounts shown in the books were either actually not paid or the transaction is not

bona-fide. Our view find support from the decision in Marghabhai Kishabhai Patel & Company vs CIT 108 ITR 54 (Guj.) relying upon 28 ITR 952 (Mad.), CIT vs Keshavlal Chandulal 59 ITR 120 (Guj.) and Das & Company vs CIT 45 ITR 369 (Pat.). The scope of section 40A(2) is to disallow only unreasonable or excessive payments in computing the income of the assessee. The ratio laid down in TCV Engineering Ltd. vs ACIT (2006) 284 ITR 470 (Mad.) supports our view.

2.10. Hon'ble Gujarat High Court in CIT vs Ashok J. Patel (2014) 225 taxman 79 (Guj.) on the issue of excessive or unreasonable payments made by the assessee, it was held that the onus is upon the assessee. In the present appeal, the ld. Assessing Officer neither quoted fair market competitive rates nor brought on record any evidence as to how the payments made by the assessee are unreasonable or excessive. The ld. Assessing Officer has not discharged the onus cast upon him, thus, the disallowance so made is unsustainable in law. Identical ratio was laid down in CIT vs Enviro Control Associated (P.)Ltd. (2014) 225 taxman 56 (Guj.). In that case, assessee made payments to sister concern for supply of labours for operating and maintenance work and claimed deduction. The ld. Assessing Officer disallowed the 10% of the payments on the ground that the sister concern was run by wife of the Director of the assessee company. The Tribunal confirmed the stand of the ld. Commissioner of Income Tax (Appeals) that there was no

finding in the assessment order that the payments made by the assessee were not genuine. It was held that the Tribunal rightly deleted the addition. Identical are the facts of the present appeal before us. Thus, considering the totality of facts, uncontroverted finding contained in the impugned order and the judicial pronouncements discussed hereinabove, we find no infirmity in the conclusion drawn by the Id. Commissioner of Income Tax (Appeals), resulting into dismissal of appeal of the Revenue.

Finally, appeal of the Revenue is dismissed.

This Order was pronounced in the open court in the presence of Id. representatives from both sides at the conclusion of the hearing on 09/02/2016.

Sd/-

Sd/-

(G.S. Pannu)

(Joginder Singh)

लेखा सदस्य / ACCOUNTANT MEMBER

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 01/03/2016

Shekhar, P.S./नि.स.

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai