

17/3/13

आयकर अपीलिय अधीकरण, न्यायपीठ - "B" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH: KOLKATA
(समक्ष) Before श्री पी. के. बनसल, लेखा सदस्य एवं/and श्री महावीर सिंह, न्यायीक सदस्य
[Before Shri P. K. Bansal, AM & Shri Mahavir Singh, JM]

आयकर अपील संख्या / I.T.A No. 2280/Kol/2010
निर्धारण वर्ष / Assessment Year: 2007-08

Income-tax Officer, Wd-3(1), Asansol.

Vs.

M/s. MGB Transport
(PAN: AAOFM1663P)

(अपीलार्थी/Appellant)

(प्रत्यर्थी/Respondent)

Date of hearing: 14.02.2013

Date of pronouncement: 15.03.2013

For the Appellant: Shri K. N. Jana, JCIT, Sr. DR

For the Respondent: Shri Arvind Agarwal, Advocate

आदेश/ORDER

Per Bench

This appeal by revenue is arising out of order of CIT(A), Asansol in Appeal No. 182/CIT(A)/Asl/W-3(1)/Asl/09-10 dated 25.10.2010. Assessment was framed by ITO, Ward-3(1), Asansol u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as "the Act") for Assessment Year 2007-08 vide his order dated 31.12.2009.

2. The first issue in this appeal of Revenue is against the order of CIT(A) deleting disallowance made by Assessing Officer by invoking provisions of section 40(a)(ia) of the Act in respect of transport charges paid without deducting tax. For this, Revenue has raised following Ground No. 1:-

"Whether Id. CIT(A), Asansol was justified in deleting the addition by A.O. u/s. 40(a)(ia) of the I.T. Act, 1961 in view of the facts and circumstances of the case and material on record".

3. We have heard rival contentions and gone through facts and circumstances of the case. At the outset, it is seen that assessee has paid Dumper hire charges amounting to Rs.36,37,815/- to ten different parties. According to Assessing Officer, no TDS has been deducted on these payments, though these were contractual/sub-contractual payment in nature under section 194C of the Act. According to Assessing Officer, since there is default in not deducting TDS, the payments made attract



provisions of section 40(a)(ia) of the Act. The assessee could not explain before Assessing Officer as to why TDS was not deducted, the Assessing Officer made the disallowance. Aggrieved, the assessee preferred appeal before CIT(Appeals). CIT(Appeals) deleted the disallowance by following the decision of ITAT, 'A' Bench, Kolkata in the case of M/s. Samanwaya in ITA No. 484/Kol./2008 dated 23.04.2009 by stating that there was no contractual agreement between the assessee and the Dumper owners as noted by the Assessing Officer in the remand report. We find that this issue is covered against the assessee by the decision of the Hon'ble Karnataka High Court in the case of Smt. J. Rama -vs.- CIT (2010) 236 CTR (Kar.) 105, wherein it is held that "*law does not stipulate the existence of a written contract as a condition precedent for invoking the provisions of section 194C of the Act with respect to payment of TDS.*" Hon'ble Karnataka High Court concluded as under :-

"In order to provide vehicles to a customer as per agreement, assessee used to hire vehicles from others and hiring of vehicles by the assessee is in the nature of transport contract and hence, the disallowance under section 40(a)(ia) was justified when no tax was deducted at source from payments made to those persons".

Further, following Smt. J. Rama's case of Hon'ble Karnataka High Court (supra), we have taken a decision dated 17.02.2012 of ITAT, Kolkata Bench in ITA No. 199/Kol/2010 in the case of DCIT, Circle-9 -vs.- Kamal Mukherjee & Co. (Shipping) (P.) Ltd., wherein it is held as under :-

(From Head notes)

.....Undoubtedly, these decisions do indicate that there is a workman employer relationship between the dock workers and the stevedores like assessee when they employ those workers, but be that as it may, the fact remains that the assessee has made payments to the CDLB for supply of labour, even when this labour may be treated as employed by the assessee for all practical purposes, the provisions of section 194C are clearly attracted. In such a situation, i.e. when labour hired by the assessee through CDLB is considered to be in assessee's employment, the payments made to CDLB cannot be treated as payments for any work, but nevertheless these payments could still be covered by the provisions of section 194C because these are payments made for supply of labour which are specifically covered by section 194C(1). CDLB is an agent of the stevedores like the assessee in the sense that the labour is recruited by the assessee through CDLB, but when this fact does not affect the nature of payment by the assessee to the CDLB which is admittedly in the nature of payment for supply of labour. The reasoning adopted by the Commissioner (Appeals), though somewhat impressive at first glance, is fallacious. There is no cause and effect relationship between workers assigned by the CDLB having employer workman relationship with the assessee, and the payments being made by the



assessee to CDLB being not in the nature of 'payment for supply of labour'.

4. Since the facts and circumstances are exactly identical, what was before us in Kamal Mukherjee & Co. (Shipping) (P.) Ltd. (supra) and also that in the case of Smt. J. Rama of Hon'ble Karnataka High Court (supra), respectfully following the same, we are of the view that even oral contract is sufficient and admittedly the assessee has taken the dumpers on hire and he has paid charges for the same. Respectfully following the same, we confirm the disallowance made by the Assessing Officer and reverse the order of CIT(Appeals). However, as regard to alternative arguments made by Id. counsel for the assessee regarding applicability of the decision of ITAT, Special Bench, Vishakhapatnam in the case of Merilyn Shipping & Transports Vs. Addl. CIT (Visakhapatnam) (SB) reported in (2012) 136 ITD 23 (SB), wherein it is held that the disallowance will be restricted to the amount payable at the end of year and not on the amount already paid during the relevant year. Ld. counsel for the assessee before us stated that this payment was made within the due date and nothing remains payable and he relied on the decision of Special Bench of this Tribunal in the case of Merilyn Shipping & Transports Vs. Addl. CIT (Visakhapatnam) (SB) reported in (2012) 136 ITD 23 (SB), wherein it is held that the TDS is to be deducted only in relation to payments which remains payable at the end of the year i.e. 31st March of the relevant financial year. It was pointed out to Ld. counsel that the operation of the order of Special Bench of this Tribunal in the case of Merilyn Shipping & Transports (Supra), is stayed by Hon'ble Andhra Pradesh High Court in I.T.T.A.M.P. No.908 of 2012 in I.T.T.A. No.384 of 2012 wherein Hon'ble High Court observed, "Interim suspension. Notice." Vide dated 8th October, 2012.

5. On this, the Ld. counsel for the assessee argued that effect of the order staying a pending appeal before any High Court does not amount to any declaration of law but is only binding upon the parties to that proceedings and such interim order does not destroy the binding effect of the principals as laid down in the order as a precedent because the interim order had no occasion to lay down any proposition of law. For this proposition, he relied on the case law of Hon'ble Calcutta High Court in the case of Pijush Kanti Chowdhury Vs. State of West Bengal & Ors (2007) 2 CALLT 577 dated 14th May, 2007 wherein, at para 10 and 13, it has been held as under:

"10. After hearing the learned counsel for the parties and after going through the aforesaid provision we find that the Supreme Court by those interim orders has no doubt stayed the operation of the order of the Division Bench of this court by directing the parties to maintain status quo and at the same time even restrained the State from inducting third parties on the lands which were the subject-matters before the Apex Court. Such interim order is binding upon the parties to the proceedings but the law is equally settled that by mere passing of an interim order staying the



operation of a judgment with certain further conditions, the existence of the said judgment is not wiped out and at the same time, for such interim orders inter parties, the authority of a decision as a precedent is never undermined. Unless a decision is set aside by the Superior Court, the said decision remains binding as a precedent though may not be binding upon the parties to the proceedings where the Superior Court has granted interim order. Moreover, once a provision has been declared ultra vires the Constitution of India, the State cannot invoke the said ultra vires proceeding against the citizens of the country simply because an interim order of stay of operation order declaring the provision as ultra vires has been passed in an appeal against such order. The object of granting interim order is to see that the relief claimed in the appeal may not become inappropriate or the appeal does not become infructuous for not granting such interim order; but by mere grant of interim stay, the effect of a binding precedent is not destabilized. Over and above, the interim orders of the stay granted by the Supreme Court clearly indicate that the said Court never intended that notwithstanding the decision of the High Court declaring a part of the provisions of vesting as ultra vires the State would nevertheless be free to proceed with the process of vesting during the pendency of the proceedings before the Supreme Court and that is why status quo as regards possession has been maintained and even, the State has been restrained from creating any third party interest in the lands in question.

13. Therefore, the effect of the order of stay in a pending appeal before the Apex Court does not amount to any declaration of law but is only binding upon the parties to the said proceedings and at the same time, such interim order does not destroy the binding effect of the judgment of the High Court as a precedent because while granting the interim order, the Apex Court had no occasion to lay down any proposition of law inconsistent with the one declared by the High Court which is impugned."

6. Even, Hon'ble Supreme Court in the case Shree Chamund Mopeds Ltd. vs. Church of South India Trust Association, Madras, AIR 1992 SC 1439, 1444 has analysed the difference between "stay of operation" of an order and "quashing" of an order" and held that 'stay of order' of an appellate authority / court by a higher court means that the order passed by the appellate authority / lower court still continues to exist in law inspite of the 'stay' and its existence is not destroyed. But where the order of the appellate / lower court is quashed and the matter is remanded back, it means that the appeal disposed of by the said order of the appellate authority/lower court would be restored and it can be said to be pending before the said authority/lower court.

7. In view of the above, particularly the decision of the Hon'ble Jurisdictional High court in the case of Pijush Kanti Chowdhury (supra), as also in obedience to decision of the Hon'ble Supreme Court in the case of Shree Chamund Mopeds Ltd. (supra), we are of the view that the decision of the special bench of this tribunal in the case of Marilyn Shipping & Transports (supra) still holds ground and accordingly, TDS provisions will apply, for the purpose of invocation of the provisions of section 40(a)(ia) of the Act, only on the amounts remained payable at the end of financial year and not on the paid amounts. Hence, we direct the AO to recompute the disallowance accordingly. Appeal of assessee is partly allowed for statistical purposes.



8. The next issue in this appeal of Revenue is against the order of CIT(Appeals) deleting the addition being balance credit amount of Rs.1,18,419/- out of total sundry creditors of Rs.3,96,280/-. For this, Revenue has raised the following Ground No. 2:-

"Whether Id. CIT(A), Asl. was justified in deleting the addition made by A.O. on account of liability as sundry creditor to the tune of Rs.3,96,280/- in balance sheet as on 31.03.2009 in view of the facts and circumstances of the case and material on record".

However, in the ground, the amount disallowed is mentioned at Rs.3,96,280/- and the disallowance is restricted to Rs.1,18,419/-.

9. We have heard rival contentions and gone through facts and circumstances of the case. We find that the outstanding details of sundry creditors and total claim made reads as under:-

		Outstanding as on 31.03.2007	Total claim
1.	Labour charges payable	69,890/-	3,15,890/-
2.	Salary & Wages	6,700/-	44,400/-
3.	Fooding Expenses payable	10,230/-	30,535/-
4.	Travelling & Conveyance	8,930/-	22,780/-
5.	Repairs & Maintenance	22,670/-	2,65,310/-
		1,18,420/-	

The assessee before us contented that it is following accounting system, which provides for outstanding expenses as on 31st March of every year and the assessee before Assessing Officer as well as before CIT(Appeals) produced ledger copies of the expenses and the amounts have been paid in subsequent years and necessary evidence were also produced before CIT(Appeals). The Assessing Officer made disallowance of the outstanding liabilities at Rs.1,18,420/- in the absence of vouchers. However, CIT(Appeals) after verifying the vouchers deleted the addition and we confirm the deletion. This issue of revenue's appeal is dismissed.

10. The next issue in this appeal of Revenue is with regard to *ad hoc* disallowance of Rs.1,00,000/-. The total expenses claimed by assessee reads as under:-



	Head of expenses	Amount claimed
1.	Repairs & Maintenance	2,65,310/-
2.	Rent	38,500/-
3.	Road Tax & Permit	43,800/-
4.	Insurance	54,000/-
5.	Labour charges	3,15,890/-
6.	Telephone Expenses	7,819/-

Out of these, the Assessing Officer made disallowance of *ad hoc* expenses at Rs.1,00,000/-. In the absence of proper vouchers CIT(Appeals) deleted the addition by noting that the expenses are petty in nature for which supporting evidence were not readily available and Assessing Officer has not doubted that these expenses have not actually been incurred. As there is no cogent basis, CIT(Appeals) deleted the addition. Similarly, we also confirm the deletion. This issue of Revenue's appeal is dismissed.

11. In the result, the appeal filed by the Revenue is partly allowed for statistical purposes.

12. Order pronounced in the open court on 15.03.2013.

Sd/-

पी. के. बनसल, लेखा सदस्य
(P. K. Bansal)
Accountant Member

Sd/-

महावीर सिंह, न्यायीक सदस्य
(Mahavir Singh)
Judicial Member

(तारीख) Dated : 15th March, 2013

Sl. Sr. PS



आदेश की प्रतिलिपि अग्रेषित:- Copy of the order forwarded to:

1. अपीलार्थी/APPELLANT – ITO, Ward-3(1), Asansol
2. प्रत्यर्थी/ Respondent – M/s. MGB Transport, C/o, Ashok Mahato Punjabi More, 110 NSB Road, Raniganj, Burdwan-713347.
3. आयकर कमिशनर (अपील) / The CIT(A), Asansol
4. आयकर कमिशनर / CIT , Asansol
5. विभागिय प्रतिनीधी / DR, Kolkata Benches, Kolkata

सत्यापित प्रति/True Copy,

आदेशानुसार/ By order,

[Signature]
सहायक पंजीकार/Asstt. Registrar.

