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26.09.2016

ITA No./509/Coch/2015

आयकर अपीलीय अधिकरण

कोचिन पीठ, कोचिन

IN THE INCOME TAX APPELLATE TRIBUNAL  
COCHIN BENCH, COCHIN

सर्व श्री बी.पी. जैन, लेखा सदस्य एवं जोर्ज जोर्ज के., न्यायिक सदस्य के समक्ष

—BEFORE S/SHRI B. P. JAIN, AM & GEORGE GEORGE K., JM

आयकर अपील संख./ I.TA No.509/Coch/2015

(निर्धारण वर्ष/Assessment Year : 2011-12)

The Assistant Commissioner of Income-tax, Circle-1, Alleppey.	Vs	M/s. Premier Marine Foods, Nizam Manzil, Vandanam, Alleppey.
(अपीलार्थी/Revenue- Appellant)		(प्रत्यर्थी/Revenue -Respondent)

स्था. ले. संख./PAN No.	AAEFP 7788C
अपीलार्थी की ओर से/Revenue By	Shri Shantam Bose, CIT(DR)
प्रत्यर्थी की ओर से/Assessee By	Shri R. Sreenivasan, FCA
सुनवाई की तारीख/ Date of Hearing	08/09/2016
घोषणा की तारीख/Date of pronouncement	26/09/2016

आदेश/ORDER

PER B.P. JAIN, AM:

This appeal of the Revenue arises from the order of the Ld. CIT(A), Kottayam dated 27-08-2015 for the AY 2011-12.

2. The Revenue has raised the following grounds of appeal:

a. The order of the Ld. In so far as the points stated below are concerned is opposed to law on the facts and in the circumstances of the case.

b) The Ld. CIT(A) has erred in deleting the disallowance of Rs.1,14,07,877/- holding that the amount paid to M/s. Geo Acquatic under the head "Plant Repair" represented reimbursement of expense and hence, no tax was deducted at source.

Requested by Ranganmai 20.

c) The agreement entered into by the assessee with M/s. Geo Aquatic (the processor) clearly states the works to be undertaken by the processor/contractor as "Washing, Cleaning, Processing, Freezing, Packing and Storing" and the payments made include storing charges, peeling charges repacking charges, labour charges etc.

d) The name of work undertaken by the processor and the nature of payments made to them itself show that the assessee had to necessarily deduct tax at source u/s. 194C of the Act.

e) The Ld. CIT(A) has erred in deleting the addition u/s. 40(a)(ia) of Rs.20,02,535 for non deduction of tax at source from clearing and forwarding charges.

f. The Ld. CIT(A) ought to have noted that the payments made under the head "Clearing and Forwarding" are usually also inclusive of commission/service charges paid to the agency. Circular No. 5/2002 of the CBDT clarifies that clearing and forwarding agents acts as independent contractors and any payment made to them would, hence, be liable for deduction of tax at source.

g. The interest on vehicle loan paid by the assessee to M/s. Sundaram Finance and other private companies was separately debited in the profit and loss account and hence, tax was deductible at source on the interest paid.

2. The brief facts of the case are that by order dated 28/02/2014, the Additional Commissioner of Income Tax has completed the assessment of the assessee firm determining a total income of Rs.4,16,47,383/- as against returned income of Rs.35,20,460/-. Various additions have been made which have been deleted by the Ld. CIT(A). This Revenue is in appeal.

3. During the year the assessee had claimed an expenditure of Rs.1,14,07,877/- under the head plant repairs. According to the Assessing Officer

the assessee firm is liable to deduct tax on this expenditure paid to M/s. Geo Aquatic. During the assessment proceedings, it was explained to the Assessing Officer that this amount comprises of reimbursement of expenses to M/s. Geo Aquatic as per list enclosed. M/s. Geo Aquatic is processing marine product for the assessee by virtue of an agreement. According to the Assessing Officer the assessee is having the contract for processing, freezing and storing the marine products for export by the firm, which are mentioned in the agreement. According to the Assessing Officer, one each of the bill raised by M/s. Geo Aquatic, item wise charges under various heads are mentioned. The Assessing Officer concluded that this is the nature of work and on this the assessee is liable to deduct tax at source. Further, she concluded that bills raised by M/s. Geo Aquatic is a consolidated one and hence on the entire amount of tax has to be deducted under sec. 194C.

4. The Ld. CIT(A) in his order has partly allowed the various issues raised by the assessee against which the Revenue is in appeal before us.

5. Ground No. 2(b), (c) and (d) relate to deletion of addition made to the extent of Rs.1,14,07,877/- holding that the amount paid as plant repairs to M/s. Geo Aquatic (P) Ltd. represent the reimbursement of expenses and hence no tax was deductible at source. According to the revenue the agreement entered into by the assessee with M/s. Geo Aquatic (P) Ltd. (the principal)

clearly states that work to be undertaken by the processor/contractor was freezing, processing, packing and storing and the payment includes peeling charges, repacking charges, labour charges etc. According to them the nature of work undertaken by the processor and the nature of payment made by them itself shows that the assessee has to necessarily deduct tax at source u/s. 194C of the Act. On this basis the Ld. DR contended that the agreement read with the nature of work would suggest that this is a contract within the meaning of Sec. 194C of the I.T. Act liable to tax deduction at source.

6. Ground No. 2(e) and (f) relate to deletion of addition of Rs.20,02,535/- under the head clearing and forwarding for non deduction of tax u/s. 40(a)(ia). According to the Ld. DR, the Ld. CIT(A) has not appreciated the fact that the payment made under the head clearing and forwarding are normally inclusive of commission, service charges paid to the agency. In this regard Circular No. 05/2002 of CBDT was relied upon which clarify that clearing and forwarding agents act as independent contractors and any payment made to them would be liable for deduction of tax at source.

7. Ground No. 2(g) relates to interest on vehicle loan paid by the assessee to M/s. Sundaram Finance and others which are separately debited in the profit and loss account and hence liable for deduction of tax on interest paid.

8. The Ld. Counsel for the assessee, Shri R. Sreenivasan, FCA reiterated the arguments made before the Ld. CIT(A). As for non deduction of tax at source on the reimbursement of expenses paid to M/s. Geo Acquatic, it was submitted to the Assessing Officer that the ratio of the case of the Hon'ble Apex Court in Hindustan Coco Cola Beverages Pvt. Ltd. vs. CIT squarely applies to the facts since the recipient firm is also assessed to tax and have included all the receipts in their income. According to the Assessing Officer, the case of the Hon'ble Supreme Court (supra) cannot be applied in a case where addition is made u/s. 40(a)(ia) of the Act.

9. It was also submitted that sec. 40(a)(ia) of the Act has been amended from 01.04.2013 by which no addition should be made unless the assessee was deemed to be in default and the recipient having filed their return of income within the due date. In the assessee's case, the recipient was an assessee on record by PA number and the amendment being procedural applies for all pending cases.

10. It was also submitted that the assessee had actually paid the entire amount to M/s. Geo Acquatic before the close of the previous years. So much so nothing is outstanding, and having regard to the decision of the Hon'ble Supreme Court in the case of CIT vs. Vector Shipping Services Pvt. Ltd., the provisions of sec. 40(a)(ia) are not applicable. Copy of the decision of the

Hon'ble Supreme Court and Hon'ble Allahabad High Court of the same enterprise were filed. Copy of the decision of the Chennai Bench of ITAT in the case of Thekkathir Press Madras was also referred to. As the case law stands today by verdict of the Hon'ble Supreme Court the disallowance is not warranted. Reliance was also placed on the Jurisdictional High Court in the case of Muthoot Fincorp Ltd. and Hon'ble Delhi High Court in the case of DLF Commercial Projects.

11. The Ld. CIT(A) held that in respect of the various reimbursements of expenses as given in the list the assessee had not deducted tax. According to the assessee these payments have been made in consonance with clause 3, sub-section (b) to (h) of the agreement of 07/10/2010. The agreement clearly shows that apart from the payment made by virtue of clause 3a to the agreement, being processing charges which would attract TDS and which has been deducted, the rest of the payments are in the nature of reimbursement. M/s. Geo Aquatic have also raised the bill, separately showing the processing charges and various expenses incurred by them. According to the authorized representative, reimbursement of expenses is not taxable in the hands of the recipient. This will only go to reduce their expenditure incurred under particular heads and in such cases there is no liability to deduct tax. The assessee has placed reliance on the decision of the ITAT Delhi Bench D in the case of ITO vs. Dr. Willmar Schwab (I) Pvt. Ltd., a copy of which has been filed. It has been

held in the said decision that reimbursement of expenses does not attract the provisions of TDS.

12. Now the issue to be decided here is whether the payment made under the head plant repair represents reimbursement of expenses. In our view the split up given by the assessee has to be read in conjunction with clause 3(b) to (h) of the agreement. It would be clear that payments are in nature of reimbursement of expenses. Respectfully following the decision of ITAT Delhi Bench D, and the decision of Hon'ble Kerala High Court (supra), we hold that the payment made to M/s. Geo Aquatic, debited under the head plant repairs does not attract TDS liability.

13. Further the Ld. AR filed a second paper book showing copy of bills raised by M/s. Geo Aquatic Pvt. Ltd., Chandiroor. He stated that page 1 to 32 of the paper book relates to bills raised for processing charges on which TDS has been deducted. Page 33 to 116 relates to bills raised with annexure for reimbursement of various expenses incurred which is the subject matter of dispute. According to him, separate bills have been raised for expenses on which TDS has been deducted and for reimbursement of expenses and hence they are not liable for TDS. He also referred to the decision of ITAT Delhi Bench in the case of ITO vs. Willmar Schwabe India (P) Ltd. to the effect that reimbursement of expenses does not attract the provisions of TDS. He also

referred to the decision of ITAT Delhi Bench D in the case of DLF Commercial Projects to this effect. Reference was also placed on the decision of the Hon'ble Kerala High Court in the case of Muthoot Fincorp Ltd., Trivandrum, wherein the Hon. Jurisdictional High Court have given a direction to Assessing Officer to verify the nature of reimbursement of expenses in that case where separate bills have been raised. The ACIT, Cir(1) TVM by her order dated 11/08/2014 have given effect to the order of Hon. High Court wherein she had also referred to various decisions at Page 3 of the order and concluded that since the assessee raised separate bills for reimbursement of expense they are not liable to deduct tax and deleted the addition made u/s. 40(a)(ia). It was argued that the assessee has also given separate bill and therefore the provisions of TDS are not applicable for them also.

14. The second issue relates to deletion of clearing and forwarding charges paid to M/s. Al Mustafa agencies without deduction of tax. According to the Ld. Counsel for the assessee M/s. Al Mustafa Agencies are engaged for filing of documents at customs, inspection by customs, labour charges, payment for trailer and other port payments. None of these expenditure are within the purview of TDS provisions. The Ld. CIT(A) held that it is a fact that Al Mustafa Agencies were carrying out various services to the assessee for the effective



export and shipping of goods like filing documents with customs, payment of cess, payment for inspection by customs, labour charges in port, rent for trailer and other port dues. May be they are charging service charges for all the activities. Nevertheless the above payments pertain to payment made to statutory authorities, labourers and trailer rent on behalf of the assessee and none of them have accrued to the agent. Accordingly, this payment will not be liable to tax deduction. The assessment order is also not clear or the Assessing Officer has not quantified what are the exact charges paid to Al Mustafa Agencies towards these services. In these circumstances and in the absence of material on record he has held that the disallowance of clearing and forwarding charges as he has done is not warranted. He has also considered the decision of Hon'ble Delhi High Court.

15. Yet another point in revenue's appeal is on the deletion of addition made out of vehicle loan hire charges of Rs.3,61,136/- without deduction of tax. This is mainly paid to M/s. Sundaram Finance. Here also this is paid as EMI along with principal payment. Therefore the provisions of TDS are not applicable. The Ld. CIT(A) held that hire purchase payment would not come within the meaning of sec. 194C for the purpose of tax deduction. Further payments are made under the Equated Monthly Instalment Scheme. It is not covered by the TDS provisions. Accordingly, the addition made on this score has been deleted.

16. We have considered the rival submissions and perused the facts of the case. The first issue is regarding deletion of addition made under section 40(a)(ia) on reimbursement of expenses paid to M/s. Geo Aquatic (P) Ltd. In this case as pointed out by the Ld. AR separate bills have been raised for processing charges and reimbursement of expenses and the assessee has deducted on the portion of processing charges and not deducted tax on reimbursement of expenses. Reimbursement of expenses comprises of various items like storing charges, peeling charges, flake ice charges, utility of lab and consumables, re-glazing and hardening repacking charges, tunnel, lab charges, maintenance, disposal expense, generator charges etc. Agreement 3b to h prescribes the rate for all these activities. In our view this agreement is based on the parties having regard to the actual expenses incurred. The processing charges paid is separately billed on which TDS has been deducted. Having regard to the fact that separate bills have been given and based on various Judicial Pronouncements cited by the Ld. AR and having regard to the fact that the revenue has accepted this fact of separate bill is another case as directed by the Jurisdictional High Court. We are of the considered opinion that the assessee is not liable to deduct tax on reimbursement of expenses to the tune of Rs.11407877 and accordingly, we uphold the decision of the Ld. CIT(A) in this regard.

17. With regard to the addition of cleaning and forwarding charges to Al Mustafa Agencies, the amount paid is in the nature of documentation charges, customs charges, payment for trailer and other port payments. According to the Assessing Officer the bills issued by them only shows the breakup of work done and therefore the payment is within the provisions of TDS. The Ld. CIT(A) has held that M/s. Al Mustafa Agencies were carrying out various services to the assessee for the export of goods such as documentation with customs, registration, insurance, rent and other port dues. Nevertheless all the above payment relates to payment to statutory authorities, labourers and others, on behalf of the assessee and none of them accrued to the agent. In our view the above payment will also not be liable to TDS. The Assessing Officer has neither quantified nor clear of the exact charges paid to M/s. Al Mustafa Agencies. In the absence of any material on record, we uphold the view of the Ld. CIT(A) in this regard.

18. As regards the vehicle loan hire charges of Rs.361136 made to m/s. Sundaram Finance, as stated by the Ld. AR this is paid as Equated Monthly Instalment (EMI) along with principal. The Ld. CIT(A) has held that hire purchase payment would not come within the meaning of section 194C for the purpose of tax deduction. In our view merely because a claim for the hire charges portion has been made in the account, it cannot be stated that such payment are liable to TDS. Further the assessee has been claiming such payment in

earlier years also which has been accepted by the department. The legislature thought it fit to introduce Form 26a with effect from 01/04/2013, for obtaining certificate from the receiver to the effect that they have included such receipts as part of their income. In view of the above we are of the view that the verdict of Ld. CIT(A) on this score has also to be upheld. Thus all the grounds raised by the Revenue in its appeal fails.

19. In the result, the appeal of the Revenue is dismissed.

Pronounced in the open court on 26-09/2016.

sd/- (जोर्ज जोर्ज के.) (GEORGE GEORGE K.)	sd/- (बी.पी. जैन) (B. P. JAIN)
न्यायिक सदस्य/JUDICIAL MEMBER	लेखा सदस्य/ACCOUNTANT MEMBER

स्थान/Place: कोचि/Cochin

दिनांक/Dated: 26th September, 2016.

GJ/जीजे

आदेश की प्रतिलिपि अग्रेषित/copy to:

1. अपीलार्थी/M/s. Premier Marine Foods, Nizam Manzil, Vandanam, Alleppey.
2. प्रत्यर्थी/The Assistant Commissioner of Income-tax, Circle-1, Alleppey.
3. आयकर आयुक्त (अपील)/The Commissioner of Income-tax(Appeals),Kottayam.
4. आयकर आयुक्त/The Commissioner of Income-tax, Kottayam.
5. विभागीय प्रतिनिधि, कोचिन पीठ/The DR/ITAT, Cochin Bench.
6. गार्ड फाईल/Guard File.

आदेशानुसार/By Order

सहायक पंजीकर/Assistant Registrar  
आई. टी. ऐ. टी., कोचिन/I.T.A.T., COCHIN