

आयकर अपीलीय अधिकरण "E" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "E" BENCH, MUMBAI
BEFORE SHRI MAHAVIR SINGH, JUDICIAL MEMBER
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.2058/Mum/2014

(निर्धारण वर्ष / Assessment Year: 2008-09)

Shriniwas Shriteju Sharma, (Prop. Seema Engg. Co.), Opp D/3/44, 1 st floor, Shri. Ganesh CHS, Near Vakola Bridge, Near Dhobi Ghat, Santacruz(E) , Mumbai -400098	बनाम/ v.	ITO 19(1)(4), Mumbai
स्थायी लेखा सं./PAN : AAJPS0743F		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by:	Ms. Malvika Bajaj
Revenue by :	Shri. V. Justin

सुनवाई की तारीख /**Date of Hearing** : 27-02-2018

घोषणा की तारीख /**Date of Pronouncement** : 02-04-2018

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the assessee, being ITA No. 2058/Mum/2014 for assessment year 2008-09 is directed against the appellate order dated 24.12.2013 passed by learned Commissioner of Income-tax (Appeals)-30, Mumbai (hereinafter called "the CIT(A)") for assessment year 2008-09, appellate proceedings had arisen before learned CIT(A) from the assessment order dated 27.12.2010 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143(3) r.w.s. 144 of the Income-tax Act, 1961 (hereinafter called "the Act").

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

“ The appellant objects to the order dated 24/12/2013 passed by ITO 19(1)(4) ,Mumbai passed u/s 143(3) r.w.s 144 of the Income Tax Act, 1961 for the Assessment Year 2008-09 on the following amongst the other grounds:

- 1. The learned Assessing Officer has erred in disallowing the entire contract charges u/s 40(a)(ia) of the Act without appreciating the facts of the case in right perspective.*
- 2. The learned Assessing Officer has erred in disallowing Indirect expenses to the extent of 20% amounting to Rs. 1,58,040/- without appreciating the facts of the case in right perspective.*
- 3. The learned Assessing Officer has erred in levying interest u/s 234A, B and C of the I.T Act, 1961 without appreciating the facts of the case in the right perspective.*
- 4. The ground of appeal is without prejudice to the other.*
- 5. The appellant reserve the right to amend, alter or add to the grounds of appeal.”*

3. The assessee in an individual and during the year under consideration was engaged in the business of Civil Contractor under the name and style M/s. Seema Engineering Company and mainly carrying out work of India Oil Corporation Limited at various sites. It was observed by the AO during the course of assessment proceedings that assessee has debited wages, salaries and contract charges amounting to Rs. 71,92,450/-. The AO asked the assessee to give reasons for such expenses and to produce supporting evidences but since the assessee did not submitted the details of these expenses nor submitted evidences of having deposited the income-tax at source on these payments towards labour/contract charges, the AO made additions to the tune of Rs. 71,92,450/- u/s. 40(a)(ia) towards non payment of income-tax at source on these payments which was added back to the income of the assessee by the AO, vide assessment order dated 27-12-2010 passed by the AO u/s 143(3) r.w.s. 144 of the 1961 Act.

4. Aggrieved by the assessment order dated 27-12-2010 passed by the AO u/s 143(3) r.w.s. 144 of the 1961 Act, the assessee filed first appeal before learned CIT(A). The assessee challenged the aforesaid addition made by the AO . The assessee explained that the assessee is running business under the name and style of M/s. Seema Engineering Company and is working as a contractor with Indian Oil Corporation Limited at various sites . It was

submitted that proper and adequate opportunity of being heard was not provided by the AO to the assessee and the assessment was completed ex-parte. The learned CIT(A) remanded the matter to the file of AO in view of the contentions of the assessee as to breach of principles of natural justice. The assessee submitted before learned CIT(A) that there was an accident in Gorakhpur site and the assessee was hospitalised for 15 days and thereafter assessee was advised complete bed rest for 30 days which led to dislocation and details could not be submitted before the AO which resulted in an ex-parte order. The assessee requested one more chance to present his explanations/ evidences and the learned CIT-A asked the AO to submit remand report after giving an opportunity to the assessee. The AO issued several letters to the assessee in remand proceedings to submit details but the assessee did not submitted details nor books of accounts were produced by the assessee before the AO in remand proceedings including no details were submitted by the assessee as to deduction of tax at source and its remittance to the credit of Central Government on these payments towards labour, wages and contract charges to the tune of Rs. 71,92,450/- . The learned CIT-A after considering remand report submitted by the AO gave relief to the tune of 40% and upheld balance additions to the tune of 60% u/s 40(a)(ia) of the 1961 Act which were held to be towards contract charges on which the assessee was liable to deduct income-tax at source on which no income-tax was deducted at source u/s 40(a)(ia) keeping in view factual matrix of the case and more so the assessee has not come forward and filed details even before learned CIT(A), vide appellate order dated 24-12-2013 passed by learned CIT(A).

5. The assessee being aggrieved by the appellate order passed by learned CIT(A) has filed an appeal with the tribunal . At the outset Ld. Counsel for the assessee submitted that assessee has filed additional evidences in accordance with Rule 29 of the Income-Tax (Appellate Tribunal) Rules , 1963, wherein all the details with respect to the payment made towards wages, salaries and contract charges to the tune of Rs. 71,92,450/- are submitted and it is claimed before us that assessee has made no payments to the contractors/sub-contractors and direct payments were made to the labour/employees on which no income-tax was deductible at source within provisions of Section 40(a)(ia) . It was prayed that the additional evidences

running into 335 pages are now filed which need to be admitted and matter be remanded to the AO for fresh adjudication of this issue on merits.

The Ld. DR submitted that the assessee has not co-operated before the authorities below and no evidences were submitted before the authorities below . It was also submitted that no books of accounts were produced before the authorities below. The learned DR relied upon the decision of Hon'ble Supreme Court in the case of Hukumchand Mills Ltd. 63 ITR 232(SC) and also decision of Hon'ble Supreme Court in the case of Mahalaxmi Textiles Mills Ltd. 66 ITR 710(SC) to contend that the issue may be remanded to the AO for fresh adjudication on merits including verifying the genuineness of these vouchers which are submitted by the assessee now before the tribunal as an additional evidences.

The Ld. AR on the other hand in rejoinder submitted that the Revenue has not come in an appeal before the tribunal against the part relief granted by learned CIT(A) and now the only issue which can be looked into by the AO should be restricted to the verification of these vouchers from the perspective of the liability towards deduction of tax at source u/s. 40(a)(ia). She relied upon the decision of the Hon'ble Supreme Court in the case of Mcrop Global P. Ltd. v. CIT in civil appeal no. 955/2009 arising out of SLP(C) No. 4286/2007 dated 12-02-2009.

6. We have considered rival contentions and have perused the material on record . We have observed that the assessee is an individual who is carrying on the business of Civil Contractor under the name and style M/s. Seema Engineering Company and mainly carrying out work of Indian Oil Corporation Limited at various sites. The assessee has debited Rs. 71,92,450/- towards wages, salary and contract charges . The assessee did no furnished any detail before the AO during the assessment proceeding and books of accounts were also not produced before the AO which led to the addition to the tune of Rs. 71,92,450/- made by the AO on the grounds that the assessee did not produced any evidence of payment of income-tax at source on these payments as is required u/s 40(a)(ia). The assessee pleaded before the learned CIT(A) that he met with an accident at Indian Oil Corporation site at Gorakhpur which led to his hospitalisation and dislocation which was the prime factor in not producing the various details /

evidences as was sought by the AO during the assessment proceedings including non production of books of accounts. The learned CIT-A remanded the matter to the file of AO to furnish remand report keeping in view the medical reasons cited by the assessee for not producing the details/evidences before the AO, but again the assessee did not co-operated with the AO during remand proceedings and no details was furnished nor books of accounts were produced before the AO during the course of remand proceedings . The learned CIT-A disallowed 60% of expenses to the tune of Rs. 71,92,450/- on account of contract charges included in the expenses towards wages, salaries and contract charges on which the assessee was liable to deduct income-tax at source u/s 40(a)(ia) but which was not deducted by the assessee in the absence of any evidences on record. We have also noted that learned CIT(A) in his operative part of appellate order has noted as under:

“ 7.2 The AR of the appellant, during the course of appellate proceedings vide order sheet entry dated 19.12.2013, has made oral submissions that the appellant is a civil contractor and in a civil contract, wages and labour always form 60% and above of the total receipts , whereas the AO has disallowed the full amount.”

Thus, the assessee has consistently not furnished any details/evidences before the AO as well learned CIT(A) nor books of accounts were produced before the authorities below. The assessee had cited that the assessee met with an accident at Gorakhpur site of Indian Oil Corporation Limited and was hospitalised as well advised bed rest which led to dislocation and due to this bonafide reasons , the assessee could not produce necessary evidence before the authorities below. The assessee has now come forward and submitted large number of evidences running into 335 pages and it is stated that the assessee had not given any contract to any sub-contractor/contractor and consequentially no contract charges were paid , thus, there is no question of deduction of income-tax at source within the provisions of Section 40(a)(ia). We are of the considered view that these additional evidences needed to be admitted in the interest of justice as the assessee was prevented to produce these evidences due to medical emergencies and the matter need to be remanded back to the file of the AO for necessary verification of these evidences and thereafter to decide the

issue afresh on merits in accordance with law. Similarly, the contention raised by the assessee that there was no contract/sub-contract given by the assessee and hence consequentially there was no contract charges paid by the assessee which could be covered within the ambit of deductibility of income-tax within the mandate of provisions of Section 40(a)(ia) needs to be verified in the context of provisions of Section 40(a)(ia) and the issue be decided accordingly on merits in accordance with law in de-novo proceedings. We have also noted that learned CIT(A) in his operative part of appellate order has noted as under:

“ 7.2 The AR of the appellant, during the course of appellate proceedings vide order sheet entry dated 19.12.2013, has made oral submissions that the appellant is a civil contractor and in a civil contract, wages and labour always form 60% and above of the total receipts , whereas the AO has disallowed the full amount.” .

The learned CIT(A) has mainly relied upon this statement of the assessee to uphold additions to the income to the tune of 60% towards contract charges on which no income-tax was deducted at source u/s 40(a)(ia). But now before the Bench , the assessee has contended that no payments towards contract charges were paid as the assessee has not entered into any contract/sub-contract and consequentially no income-tax is required to be deducted at source within provisions of Section 40(a)(ia) of the 1961 Act. These are contrary statements but in any case needed verification by the AO as to the truthfulness of the contentions of the assessee and genuineness of these evidences which are placed for the first time before the tribunal and thereafter the issue is to be decided afresh by the AO on merits in accordance with law as judgment obtained by fraud is nullity is well established principle of jurisprudence. This disposes of ground no. 1. We order accordingly.

7 Ground No. 2 – The ground number 2 is concerning disallowance of 20% expenses on the ground that no evidences were placed before the authorities. The AO disallowed an amount of Rs. 1,72,336/- being 20% of expenses to the tune of Rs. 8,61,684/- on the grounds that no evidences/ details were furnished while before learned CIT(A), the assessee furnished details of expenses of Rs.71,485/- which benefit was granted by learned CIT(A) and disallowance was restricted to Rs.1,58,040/- . The assessee has raised

similar plea as in ground no. 1 pleading for restoration of the matter to the file of the AO for fresh adjudication on merits in accordance with law. The assessee has pleaded medical reasons for not furnishing details/evidences before the authorities below and submitted that if an opportunity is allowed, the assessee will produce all necessary documents/details/evidences before the AO to justify these expenses. The learned DR objected to the restoration of the matter to the file of the AO. After hearing both the parties, we are of the considered view that the matter need to be restored back to the file of the AO for fresh adjudication on merits in accordance with law and similar directions as were given by us while adjudicating ground no1 shall apply. We order accordingly.

8. Ground No. 3 is concerning leviability of interest u/s 234A, B and C which is consequential in nature and does not require separate adjudication. This ground is therefore dismissed.

9. The ground no 4 and 5 are general in nature and does not require separate adjudication and are hereby dismissed.

10. In the result appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 02.04.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 02.04.2018 को की गई ।

Sd/-

(MAHAVIR SINGH)
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)
ACCOUNTANT MEMBER

Mumbai, dated: 02.04.2018

Nishant Verma
Sr. Private Secretary

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench, H
6. Master File

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BY ORDER

DY/ASSTT. REGISTRAR
ITAT, MUMBAI