

आयकर अपीलीय अधिकरण, विशाखापट्टणम पीठ, विशाखापट्टणम

**IN THE INCOME TAX APPELLATE TRIBUNAL,
VISA KHAPATNAM BENCH, VISA KHAPATNAM**

**श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
श्री डि.एस. सुन्दर सिंह, लेखा सदस्य के समक्ष**

**BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER**

**आयकर अपील सं./I.T.A.No.238/Viz/2017
(निर्धारण वर्ष/Assessment Year:2011-12)**

ACIT
Circle-1(1)
Guntur

Vs. M/s Best India Tobacco
Suppliers Pvt. Ltd.
D.No.9-11-1, Kothapet
Guntur
[PAN :AAACB9184B]

(अपीलार्थी/ Appellant)

(प्रत्यर्थी/ Respondent)

**CO.No.59/Viz/2017
(arising out of I.T.A.No.238/viz/2017)
(निर्धारण वर्ष/Assessment Year:2011-12)**

M/s Best India Tobacco
Suppliers Pvt. Ltd.
D.No.9-11-1, Kothapet
Guntur
[PAN :AAACB9184B]

ACIT
Circle-1(1)
Guntur

राजस्व की ओर से/ Revenue by : Shri V.Appala Raju, DR
निर्धारिती की ओर से/ Assessee by : Shri G.V.N.Hari, AR

सुनवाई की तारीख / Date of Hearing : 26.07.2018
घोषणा की तारीख/Date of Pronouncement : 08.08.2018

आदेश /O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

This appeal is filed by the revenue against the order of the Commissioner of Income Tax (Appeals) [CIT(A)]-1, Guntur vide I.T.A.No.40/CIT(A)/GNT/2014-15 dated 31.01.2017 and cross objection filed by the assessee in support of the Ld.CIT(A) order, for the assessment year 2011-12.

2. All the grounds of appeal are related to the addition made u/s 40(a)(ia) of Income Tax Act, 1961 (hereinafter called as 'Act'). The Assessing Officer (AO), during the assessment proceedings found that the assessee has debited export charges of Rs.1,58,38,236/- to the Profit & Loss account but not deducted the TDS. Therefore, the AO disallowed the entire sum of Rs.1,58,38,236/- u/s 40(a)(ia) of the Act and added back to the income.

3. On appeal before the Ld. CIT(A), the assessee has submitted that the expenditure relating to export charges were incurred for the purpose of clearing and forwarding charges consisting of payments towards customs

duties, transport charges, postage expenses, commission to the C&F agent and the service tax. It was also explained that all the expenses included under the head export charges except the service charges / commission to C&F agent were pertaining to reimbursement of actual expenses incurred by the C&F agent on behalf of the assessee. The assessee argued before the Ld.CIT(A) that the reimbursement of expenses are not subject to TDS under the Income Tax Act. The assessee also relied on the decision of Hon'ble ITAT Delhi in the case of ITO Vs. Dr.William Schwabe India (P) Ltd., [95 TTJ 53], wherein, it was held that no TDS is required to be made on the reimbursement of expenses when the agent raised separate bills for the actual expenses incurred. The assessee also relied on the decision of Hon'ble ITAT, Mumbai in the case of Mahindra & Mahindra Ltd. Vs. DCIT [313 ITR 263]. The Ld.CIT(A) observed that the assessee debited the sum of Rs.1,58,38,236/- towards charges of tobacco division. The assessee made the payments to two parties namely, M/s M.Sherif & Sons Pvt. Ltd. and M/s Prakash Shipping Agencies (in short Shipping Agent) without deducting the tax at source. The assessee company submitted before the Ld.CIT(A) that the assessee has deducted the TDS on the amounts of commission paid to agents and on the balance amount, the tax was not deducted since it

represented the reimbursement of expenses incurred by the agent on behalf of the assessee company. During the appeal hearing, the Ld.CIT(A) verified the bills submitted by the assessee and found that the payments were made towards ocean freights, documentation charges, container freight station(CFS) charges, transportation charges and other incidental charges. The assessee argued before the Ld.CIT(A) that the relationship between the assessee and the Shipping Agent is that of Principal and Agent but not contractor and the contractee. The Ld.CIT(A) did not accept the contention of the assessee that the relationship between the assessee and the payee is the principal and agent and held that the relationship is that of the contractor and contractee, hence held that the assessee is bound to deduct the TDS u/s 194 C of the Act on such payments. However, the Ld.CIT(A) observed from the bills that the payment made to agents was towards the local transportation charges paid on behalf of the assessee is outside the scope of provisions of section 194C(6) of the Act, since any payment made to the contractor during the course of business of plying, hiring or leasing of goods shall not be subjected to TDS. Accordingly out of the total expenditure, the payments made towards local transport charges

of Rs.33,76,446/- was deleted from the disallowance u/s 40(a)(ia) of the Act.

4. The Ld.CIT(A) further observed that the assessee has paid the Shipping Agents an amount of Rs.1,23,43,259/- towards reimbursement of ocean freight and held that any payment made to non- resident persons carrying on shipping business or to their agents, TDS is applicable as per the provisions of section 172 of the Act and according to Section 172 of the I.T.Act, TDS is not required to be made in respect of the payment made to Shipping Agent. Thus relying on section 172 of the Act and the decision of Mahindra and Mahindra Ltd. (supra), the decision of Mitra Logistics, ITAT Kolkata in appeal No.1216 & 1217/Kol/2001, the Ld.CIT(A) deleted the addition of Rs.1,23,43,259/- and confirmed the balance amount of Rs.1,75,527/-.

5. Aggrieved by the order of the AO, revenue filed appeal before this Tribunal and cross objection filed by the assessee for the balance amount confirmed by the Ld.CIT(A). During the appeal hearing, the Ld.DR argued the Ld.CIT(A) deleted the addition in respect of transportation charges

amounting to Rs.33,76,446/- holding that the payments made to agents towards transportation charges was outside the scope of TDS as per the provisions of section 194C(6) of the Act. The Ld.DR argued that there is no application of section 194C(6) of the Act in the assessee's case, hence the Ld.CIT(A) erred in deleting the addition. Similarly, in respect of payment made to the Shipping Agents, though the payments said to be paid for reimbursement of expenses, there is no evidence from the bills with regard to the ocean freight except a few bills. The assessee has not furnished the details before the AO. The bills furnished in the paper book also do not indicate the nature of the payment, the purpose of the payments etc..except in few bills. The Ld.DR invited our attention to page No.36 of the paper book and stated that the service provider has quoted the service tax registration number which shows that the service provider, M.s M.Sherif & Sons Pvt. Ltd. provided the service to the assessee and the actual bills and the challans in respect of ocean freight was not made available from the respective authorities and hence the payments should be taken for the purpose of services rendered and accordingly TDS is applicable.

5. On the other hand, the Ld.AR supported the orders of the Ld.CIT(A) and argued that ocean freight and local transportation charges does not attract the TDS, hence, there is no requirement for the disallowance u/s 40(a)(ia) of the Act. The Ld.AR argued that no interference is called for in the order of the Ld.CIT(A).

6. We have heard both the parties, perused the material placed on record. It is understood from the Ld.CIT(A)'s order that the assessee has made the payments to the Shipping Agencies and the bills were produced by the assessee before the Ld.CIT(A) who has verified the same and found that the payments were made towards ocean freight, documentation charges, container freight station charges and transportation charges and other incidental charges. The Ld.CIT(A) also observed that the relationship between the assessee and the Shipping Agent is that of the contractor and contractee but not the Principal and Agent, thus the assessee is bound to deduct the tax at source and there is no dispute that the assessee required to deduct the tax at source on the payments made to the shipping agents.

6.1. The Ld.CIT(A) found that a sum of Rs.33,76,446/- out of the payment made to Shipping Agents was incurred towards local transportation charges and the same are excludible from the purview of deduction of tax at source u/s 194C(6) of the Act and a sum of Rs.1,23,43,259/- was paid towards the ocean freight and TDS is not deducted since the same constitute the reimbursement of expenses. Accordingly deleted the addition of Rs.1,57,19,705/-.

6.2. As per the observations of the Ld.CIT(A), the assessee has paid to the shipping agencies a sum of Rs.33,76,446/- towards the local transportation charges and the same does not attract the TDS u/s 194C(6) of the Act. There is no dispute that the relationship between the assessee and the payee is that of the contractor and contractee and the TDS is required to be deducted on the payments made to the contractor u/s 194C of the Act.

Section 194C (6) which was relied upon by the Ld.CIT(A) reads 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, where such contractor owns ten or less goods carriages at any time during the previous year and furnishes a declaration to that effect along with his Permanent Account Number, to the person paying or crediting such sum."

From the plain reading of subsection 6 of Section 194 C it is observed that TDS is not required to be made in the case of engaging the vehicles in business of plying, hiring or leasing goods carriages, with a condition that contractor should own 10 or less than 10 goods carriages at any time during the previous year and furnish a declaration to that effect along with Permanent Account Number. It is apparent from the above, that the vehicles should be used by the assessee in the business of plying, hiring or leasing goods carriages and contractor should own 10 or less than 10 goods carriages and furnish the declaration to that effect and also furnish a Permanent Account Number. Whereas in the assessee's case, the payment was made to the Shipping Agents stated to be towards the transportation charges and the assessee has not taken the goods carriages for using them in the business of plying, hiring or leasing of goods carriages. The Ld.CIT(A) also did not give any finding regarding the number of vehicles owned by the contractor and PAN No. of the contractor. Therefore, section 194C(6) has no application in the assessee's case. However the Ld.CIT(A) held that the payment was towards reimbursement of expenses but no finding was given by the AO in this regard and the Ld.CIT(A) did not afford any opportunity to the AO to verify the nature of expenses with the agreement

and supporting bills of transportation or the tickets of Railway, Road Carriers etc., Hence in all fairness we consider it is just and fair to remit the matter back to the file of the AO to verify the nature of payment with the C&F agreement, relevant bills of authenticated transport operators and decide the issue afresh on merits after giving opportunity to the assessee.

6.3. The second issue in this case is the payment made to the Shipping Agents to the extent of Rs.1,23,43,259/- deleted by the Ld.CIT(A) stating that the payments are covered by Section 172 of the I.T.Act. Section 172 deals with the application of TDS in case of shipping business of non residents. In the case of the assessee, the payments were made to local Shipping Agents, hence section 172 has no application in the case of the assessee. Though the Ld.CIT(A) quantified the sum of Rs.1,23,43,259/- as ocean freight and stated to be reimbursement of expenses, the Ld.CIT(A) has neither given the break up nor referred the issue to the AO to verify the correctness of the claim of the assessee and complete details are not made available before us during the course of hearing. The bills produced before us do not show that the entire payments were made for ocean freight. The assessee also did not furnish the C&F agreement entered by the assessee

with the shipping agencies. In case, the expenses were incurred for ocean freight, the assessee is entitled for deduction and no TDS is required to be made on the ocean freight since the ocean freight and the reimbursement of actual expenses does not include the profit element. However, the assessee has furnished the copies of the bills issued by Shipping Agents but not supported the expenditure with relevant vouchers of payment of ocean freight either from Port Authorities or from the ship or from customs authorities. In addition the expenses claimed over and above the ocean freight must be established by the assessee that the same represent the reimbursement of expenses with relevant evidences. Therefore, in all fairness, we are of the view that the issue should be remitted back to the file of the AO to make detailed verification of the nature of expenses with relevant bills and supporting evidences and to decide the deductibility of TDS and consequent disallowance u/s 40(a)(ia). Accordingly, we direct the AO to examine the issues and redo the same after giving opportunity to the assessee. In the result appeal of the revenue is allowed for statistical purpose.

7. The assessee filed Cross Objection supporting the order of the Ld.CIT(A) and agitated against the addition confirmed by the Ld.CIT(A). Since we have set aside the appeal of the Revenue, we consider that the ground raised by the assessee which form part of the same addition also needs to be remitted back to the file of the AO to examine the entire issue and decide the matter afresh after examining the agreement, bills, vouchers and complete evidences. Therefore, the appeal of the revenue and cross objection of the are allowed for statistical purpose.

8. In the result, appeal filed by the revenue and the cross objection filed by the assessee is allowed for statistical purpose.

The above order was pronounced in the open court on 8th Aug, 2018.

Sd/-
(वी.दुर्गा राव)

(V. DURGA RAO)

न्यायिक सदस्य/**JUDICIAL MEMBER** लेखा सदस्य/**ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam

दिनांक /Dated : 08.08.2018

L.Rama, SPS

Sd/-
(डि.एस. सुन्दर सिंह)
(D.S. SUNDER SINGH)

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

1. निर्धारिती/ The Assessee - M/s Best India Tobacco Suppliers Pvt. Ltd.
D.No.9-11-1, Kothapet, Guntur
2. राजस्व/ The Revenue –ACIT, Circle-1(1), Guntur
3. The Pr.Commissioner of Income Tax, Guntur
4. The Commissioner of Income Tax(Appeals)-1, Guntur
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
- 6.गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM