

**In the Income-Tax Appellate Tribunal,
Delhi Bench 'E', New Delhi**

**Before : Shri Bhavnesh Saini, Judicial Member And
Shri O.P. Kant, Accountant Member**

**ITA No. 5706/Del/2016
Assessment Year: 2009-10**

Naresh Kumar Garg, Prop. Garg Electricals V.P.O. Dhigawa ,Tehsil- Loharu, distt. Bhiwani (Haryana) (Appellant)	vs.	A.C.I.T., Bhiwani. (Respondent)
--	------------	--

Appellant by	Sh. Satyajeet Goel, C.A.
Respondent by	Sh. Shankar Naskar, Sr. DR

Date of Hearing	31.10.2019
Date of Pronouncement	14.11.2019

ORDER

Per O.P. Kant, A.M.

This appeal has been preferred by the assessee against order dated 29/08/2016 passed by the Ld. Commissioner of Income-tax (Appeals), Hisar [in short the Ld. CIT(A)] for assessment year 2009-10.

2. In the grounds of appeal raised, the assessee is aggrieved with the legality of reassessment proceedings completed under section 143(3) read with section 147 of the Income Tax Act, 1961 (in short the Act) as well as additions made in reassessment proceeding.

3. Briefly stated, facts of the case are that the assessee is a government contractor and filed return of income on 30/09/2009 declaring total income of Rs.26,79,270/-. The assessment under section 143(3) of the Act was completed on 20/09/2011 after making addition of Rs.2,00,000/- to the returned income. Subsequently, the Assessing Officer recorded reasons on 01/03/2013 that income of the assessee had escaped assessment and issued notice under section 148 of the Act. The reassessment proceedings in the case were completed on 21/03/2014, wherein following additions were made:

Sr No.	Additions	Amount
1.	disallowance of the interest on borrowed funds for diverting to interest-free advances	Rs. 2,25,912/-
2.	Cash expenses in violation of provision section 40A(3) of the Act	Rs. 1,07,671/-
3.	Disallowance u/s 40(a)(ia) of the Act for non-deduction of tax at source on crane Charges (Rs. 9,36,058/-) and Boki Charges (Rs. 5,90,452/-)	Rs. 9,63,058/-
4.	Other additions for loans , salary etc	Rs. 21,54,000/-
	Total	Rs. 34,80,423/-

On further appeal, the Ld. CIT(A) rejected the contention of the assessee challenging the proceeding under section 147 of the Act, however allowed the appeal partly on merit. The Ld. CIT(A) allowed the disallowances/addition as under:

Sr No.	Additions	Amount	Upheld by CIT(A)
	disallowance of the interest on borrowed funds for diverting to interest-free advances	Rs. 2,25,912/-	Rs. 90,968/-
	Cash expenses in violation of provision section 40A(3) of the Act	Rs. 1,07,671	Nil
	Disallowance u/s 40(a)(ia) of the Act for non-deduction of tax at source on crane Charges (Rs. 9,36,058/-) and Boki Charges (Rs. 5,90,452/-)	Rs. 9,63,058/-	Nil
	Other additions for loans , salary etc	Rs. 21,54,000/-	19,50,000/-
	Total	Rs. 34,80,423/-	

4. Before us, the Ld. counsel of the assessee filed a paper book containing pages 1-22 and referred to copy of reasons recorded for reopening of the assessment. The Ld. counsel submitted that in the case of the assessee, no addition can be sustained if the Ld. CIT(A) has deleted the addition, on the basis of which the assessment was reopened, relying on the decision dated 28.07.2011 of the Hon'ble Delhi High Court in the case of CIT Vs Adhunik Niryat Ispat Ltd in IT Appeal No. 2090 of 2010, wherein it is held that when the grounds for reopening the reassessment do not exist any longer and no additions were ultimately made on that account, the addition in respect of the other items, which were not part of the "reasons to believe" cannot be made.

5. The Ld. DR on the other hand, relied on the order of the lower authorities.

6. We have heard the rival submission and perused the relevant material on record. The Hon'ble High Court in the case of Adhunik Niryat Ispat Ltd. (supra) has held that when the ground of reopening do not exist any longer and no additions are ultimately made on that account, then addition on account of other items, which are no longer part of "reasons to believe" cannot be made. Similar finding has been given by the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd Vs CIT (2011) 242 CTR 117 (Del). We have to examine whether the ratio of the above decisions of the Hon'ble High Court apply in the case of the assessee.

7. The reasons recorded by the Assessing Officer for reopening of the assessment in the case of the assessee, as available on page 2 of the paper book, are reproduced as under:

"Return of income in this case was filed on 30.09,2009 declaring income of Rs. 26,79,270/- and the assessment was completed at income of Rs. 28.79,270/-.

Perusal of the vouchers placed on file revealed that the assessee has got fabricated a tractor trolley from Garg Engineering Works for Rs. 78000/-. This is 'work contract' covered u/s 194C of the Act on which tax is required to be deducted at source.

Ledger account for carriage inward expenses shows that the assessee has made the payment of freight M/s. Haryana Concrete, Hansi to the tune of Rs.1,363,600/- on account of carriage inward. The assessee has purchased 9 mtr. Electric pole from Haryana Concrete. The payment of freight is covered u/s. 194C Income Tax Act. The assessee should have deducted tax at source on the above freight payment but has failed to do so. The assessee may take the plea that these payments of freight are included in the cost of goods and the seller have given delivery of goods on FOR basis, but when the cost of freight has been mentioned in the bills separately, it clearly indicates that the work has been executed on part of the purchaser. Explanation (iv)(c) to section 194C of the Act defines the work which include carriage of goods. In these circumstances the seller has executed work and received the freight payments whether they issued composite bill showing the cost of freight in the bill or otherwise. In these circumstances the seller has executed work and received the freight payments whether they issued composite bill showing the cost of freight in the bill or otherwise. In these circumstances section 194C is attracted. Since, the assessee has failed to deduct tax at source on freight payments, the expenses of Rs.1,33,600/- needs to be disallowed u/s. 40(a)(ia).

The assessee has made the payment of Rs.1,56,660/- to Ashok Crane Works for Crane Charges. These payments are nothing but the contract payments. Similarly, the assessee has paid Rs.65,540/- to Navarattan Balaji Crane Service. The assessee has paid Boki charges to Ram Kunwar amounting to Rs.14,982/-, Rs. 15,260/-, Rs.14,950/-, Rs.15,290/- and Rs.15,010/- on 27.10.2008, 25.10.2008, 24.09.2008, 20.09.2008 and 27.10.2008 respectively totalling to Rs.75,492/-. These are nothing but the contract payments covered u/s. 194C of the Act. The assessee has paid Rs.1,80,000/- to Rajender Aggarwal on account of accounting and consultancy charges which are covered u/s. 194J of the Act. The assessee has not deducted tax on any of the above payments as mentioned in column 27(a) of the audit report. Since the assessee has failed to deduct tax on above expenses aggregating to Rs.6,39,382/- (78,000 + 1,33,600 +1,56,660 +65540 + 75,492 +1,30,000) the same is required to be

disallowed u/s. 40(a)(ia) and added back to the income of the assessee. The A.O. may examine other expenses with this point of view.

I have therefore, reasons to believe that income of Rs.6,39,382/- chargeable to tax has escaped assessment for the A.Y. 2009-10 and also any other income chargeable to tax which has escaped assessment and which comes to the notice of the A.O. subsequently in the course of the proceedings under this section.

Issue notice under section 148 of the Income Tax Act, 1961.”

8. We find that in the reasons recorded, the Assessing Officer has expressed escapement of the income of Rs.6,39,382/- on following items:

1. non-deduction of tax at source on u/s 194C for freight payment of Rs.1,33,600/- paid to Haryana Concrete
2. non-deduction of tax at source u/s 194C on payment of Rs.1,56,660/- to Ashok Crane Works for crane charges
3. non-deduction of tax at source under section 194C on payment of Rs.65,540/- to Navratan Balaji for Crane service.
4. Non-deduction of tax at source under section 194C on payment of Rs. 75, 492/- to Ramkunwar for Boki Charges
5. non-deduction of tax at source under section 1904J for payment of Rs.1,30,000/- to Rajendra Agarwal on account of accounting and consultancy charges.

9. On perusal of the impugned reassessment order, we find that out of the items of escapement of income in reasons recorded, in the reassessment order he made addition of Rs.9,92,840/- in terms of section 40(a)(ia) of the Act for non-deduction of tax at source on crane charges of Rs. 5,26,858 and Boki charges of Rs. 4,65,982/- totaling to Rs.9,92,840/-. This addition made by the Assessing Officer has also been deleted by the Id. CIT(A) observing as under:

“6.1 In ground No. 5, the appellant has objected to disallowance of Rs.9,92,840/- on account of payments made to contractors u/s 40a(ia) of the I.T. Act. It was found by the AO that the appellant had failed to prove that some payments had been made to casual workers directly. The record submitted by the appellant has shown that a few names were repeated many times which led the AO to the conclusion that these are labour contractors until the appellant proves otherwise. The AO held that even if alternative view is taken, the amount of Rs. 5,26,858/- (remained payable out of Rs. 9,63,058/-) & Rs. 4,65,982/- (remained payable out of Rs. 5,90,452/-) and disallowed the same under section 40a(ia). The AO stated that the same has been accepted by the appellant in his reply dated 05.02.2014.

6.2 In its written submission, the appellant has stated as under:

“As per para no. 3.3 the Ld. ACIT has held that the assessee has failed to prove that some payments have been made to casual workers directly. He has further held that the records submitted by the assessee clearly shows that a few names are repeated again and again which lead him to decide that those are labour contractor until assessee proves otherwise. The Ld. ACIT has further stated that the assessee should have deducted TDS on every payable amount before making payment therefore disallowance of Rs. 9,92,840/- which remained payable at the close of the year are disallowed under section 40(a) (ia) and has made addition of Rs. 9,92,840/- on this issue.

It is true that the assessee has debited on account of crane charges worth Rs. 9,63,058/- and Boki Charges worth Rs. 5,90,452/- and Rs. 2,04,15,441/- on account of wages and labour charges. Out of above expenses, the payable expenses remained at Rs. 5,26,851/- + Rs. 4,65,892/-. The Ld. ACIT has grossly rejected these payments which were to be made on account of crane charges and Boki charges and not out of the wages and labour charges which were Rs. 2,04,15,441/-. The assessee himself is a Govt, contractor supplying cables, Transformers, Electric poles, Wires, M.s Goods & Labour etc. All the above said payments were made in cash and below Rs. 20,000/-. These payments are related to labour work and the question of non deduction of TDS is not applicable. It is correct that a few of the labourers continuously engaged by the Contractor for disposal of his work. Therefore a few names of such labourer are repeated in the ledger to which these payments are made. No such labour contractor was engaged for this work and payments were made direct to the labour which is below Rs. 20,000/- in a day in every case. Thus the provisions of section for deduction of tax at source as provided under section 40(a) (ia) are not applicable in this case. All these payments were paid to the labourers

working at the site directly and no contractor was engaged for this purpose. Moreover such payment never exceeds Rs.50000.00 to a single labour throughout the year therefore there was no liability to deduct TDS. The same may kindly be deleted sir. ”

6.3 I have carefully examined the facts of the case. The aforesaid payments for crane charges and Boki charges are on account of wages and labour. The appellant, being a labour contractor has made payments to labour in cash and all payments are below Rs. 20,000/-. According to the appellant, as these payments are to labours and related to labour contract, it does not attract provision for deduction of TDS. As some of the labourers are engaged continuously, names of few labourers appear in the ledger repetitively. However, as payments are below Rs. 20,000/- in a day in every case, provisions of section 40(a)(ia) of the Act are not applicable in its case. There is no payment in excess of Rs. 50,000/- to a single labour in a day and therefore there was no liability to deduct TDS. Considering the facts and circumstances of the case, the additions made by the AO of Rs. 9,92,840/- on account of non-deduction of TDS u/s 40(a)(ia) of the Act is directed to be deleted. This ground of appeal is allowed.”

10. It is evident that the Assessing Officer himself did not make addition in respect of the first part of the items of reason recorded i.e. freight to M/s Haryana Concrete. The addition made by the Assessing Officer on the second part of the reason recorded i.e. disallowance of crane charges and boki charges has been deleted by the Ld. CIT(A). Thus we find that no addition on account of the items of reasons recorded is in existence after the order of the Ld. CIT(A). As per the record, the Revenue is not in appeal against said deletion by the Ld. CIT(A). In the circumstances, following the decision of the Hon'ble High Court in the case of Adhunik Niryat Ispat Ltd (supra) and Ranbaxy Laboratories Ltd (supra) , the additions made on account of the items

other than the items in reasons recorded , cannot survive. We direct the AO to delete the additions accordingly. The issue in dispute involved in the grounds raised by the assessee is accordingly allowed in favour of the assessee. Since we have allowed the appeal on legality of the addition made in reassessment proceedings, we are not adjudicating on merit of the additions.

11. In result, the appeal of the assessee is allowed .

Order pronounced in the open court on 14th November, 2019.

Sd/-
(Bhavnes Saini)
Accountant Member

Sd/-
(O.P. Kant)
Judicial member

Dated: 14th Nov., 2019

aks

Copy of order forwarded to:

(1) <i>The appellant</i>	(2) <i>The respondent</i>
(3) <i>Commissioner</i>	(4) <i>CIT(A)</i>
(5) <i>Departmental Representative</i>	(6) <i>Guard File</i>

By order

Assistant Registrar
Income Tax Appellate Tribunal
Delhi Benches, New Delhi