



**IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK**

**BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER AND
LAXMI PRASAD SAHU, ACCOUNTANT MEMBER**

ITA No.390/CTK/2014

Assessment Year : 2008-09

Debjyoti Dutta, At: Deulasahi, Tulasipur, Cuttack	Vs.	ITO, Ward 2(4), Cuttack
PAN/GIR No.AARPD 9540 M		
(Appellant)	..	(Respondent)

Assessee by : Shri P.C.Sethi, AR

Revenue by : Shri Subhendu Dutta, DR

Date of Hearing : 19/11/ 2019

Date of Pronouncement : 02/01/ 2020

ORDER

Per C.M.Garg,JM

This is an appeal filed by the assessee against the order of the CIT(A), Cuttack dated 7.7.2014 for the assessment year 2008-2009.

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

"1. That, the learned CIT(A) has committed serious error in not quashing the assessment order passed u/s 143(3)/ 263 of the Income-tax Act, 1961 (Hereinafter referred as "the Act") in accordance with prayer of the appellant and for which said assessment order is liable to be quashed.

2. That, the learned CIT(A) has committed serious error in conforming an amount of Rs.2,00,000/- u/s 40(a)(ia) of the Act ignoring the submission and the provisions of the Act and for which same is liable to be deleted.

3. That, the learned CIT(A) has committed serious error in conforming the disallowances u/s 40A(3) of the Act of Rs.4,24,045/- which is liable to be deleted.

4. That, the learned CIT(A) has committed serious error in not deleting the addition made by the learned Assessing Officer of Rs.25,00,000/- which is contrary to the facts, law and for which the said addition is liable to be deleted.

5. That, the learned CIT(A) has committed serious error in not admitting the additional grounds of appeal No.1, 2 & 3 which are legal issues and for which same is liable to be decided in accordance with the law by the learned Hon'ble ITAT .

6. That, the learned CIT(A) has committed serious error in not quashing the assessment order passed by the learned Assessing Officer by issuing notice on extraneous reasons u/s 143(2) of the Act being illegal and hence the assessment order based on such illegal notice is liable to be quashed.

7. That, the learned CIT(A) has committed serious error in not quashing the assessment order on the basis of grounds of appeal submitted before him challenging the issuance of notice u/s 143(2) of the Act without processing the return u/s 143(1) of the Act.

8. That, the learned CIT(A) has committed serious error in not quashing the assessment order which has been passed in gross violation to the section 143(4) of the Act."

3. At the outset, Id counsel for the assessee submitted that he does not press Ground No.1 and Ground Nos.5 to 9 of appeal. Hence, these grounds are dismissed as not pressed.

4. Apropos Ground Nos.2 to 4 of appeal, Id counsel for the assessee submitted that an amount of Rs.2 lakhs was paid to Shri K.C.Swain as machine hire charges for the assessment year 2007-08 and no tax has been deducted. Ld counsel further referred to the paper book from pages 72 to 107, containing cash book of the assessee for the period 1.4.2007 to

31.3.2008, and submitted that from the above, it is clearly discernible that payments to Shri K.C.Swain has been made in small amounts which are less than Rs.20,000/- in a day. Therefore, the provisions of section 40(a)(ia) of the Act cannot be applied. Ld counsel submitted that these payments are machine hire charges, which were not made in a single day and, therefore, provisions of section 40(a)(ia) are also not applicable.

5. Replying to above, Id DR submitted that prior to 1.10.2009, the assessee has made payment of Rs.2 lakhs in a year to Shri K.C.Swain, which is exceeding Rs.50,000/- and, therefore, TDS provision has to be applied.

6. Ld counsel, in the rejoinder, submitted that the payment has been made to Shri K.C.Swain as machine hire charges without any contract and K.C.Swain was neither a contractor nor sub-contractor, therefore, provisions does not apply.

7. On careful consideration of the rival submissions, we are of the considered view that Id D.R. could not controvert the situation that payment to Shri K.C.Swain has been made in a small amount which is less than Rs.20,000/- in a day and there is no contract or sub-contract between the assessee and Shri K.C.Swain. It is also not in dispute that the amount has been paid by the assessee as per the requirement of use of machine hire charges. The AO has not examined and verified the contention and explanation of the assessee, thus, the same is restored to the file of the AO

for re-adjudication. Consequently, Ground No.2 of the assessee is allowed for statistical purposes.

8. Apropos Ground No.3 of appeal, Id counsel for the assessee, in the original assessment order, no disallowance u/s.40A(3) of the Act was made and this disallowance has been made in the subsequent assessment year in pursuance to order under section 263 of the Act. Ld counsel submitted that no payment has been made exceeding Rs.20,000/- in contravention of section 40A(3) of the Act and the assessee has submitted certificate establishing this fact before the lower authorities, which has been ignored by them without any reason. Ld counsel submitted that the amount of Rs. 4,24,045/- was paid to different persons for certain purchases and expenses under compelling circumstances to the sub-contractors, who does not have bank account and for getting the work with them, the assessee has made cash payment. Therefore, Id counsel for the assessee submitted that some payment has been made to the truck owners, who denied to have accepted cheque or draft by stating that they are required to purchase fuel in cash and to the labourers during odd hours because it is difficult to withdraw the amount from bank during that odd hours. Therefore, this kind of payment made under compelling circumstances may kindly be allowed.

9. Replying to above, Id D.R. strongly supported the action of the Assessing Officer and submitted that any payment in contravention of section 40A(3) has to be disallowed.

10. Placing rejoinder, Id counsel submitted that the assessee has shown payment of Rs.82,92,867/- as labour charges and out of which Rs.4,24,045/- has been paid in cash under compelling circumstances, therefore, such kind of payment may kindly be deleted.

11. On careful consideration of the rival submissions, we are of the considered view that section 40A(3) of the Act is applicable in the assessment year 2008-09, which clearly provides that where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on bank or account payee bank draft, the payment so made shall be deemed to be the profits and gains of business or profession and, accordingly chargeable to income tax as income of the subsequent year if the payment or aggregate of payments made to a person in a day, exceed twenty thousand rupees, but the provision has been attached to the said section, wherein, it has been provided having regard to the nature and extent of banking facilities available, considerations of business expediency and other relevant factors, no disallowance shall be made and no element of profits and gains under sub-section (3) of the Act.

12. In the present case, from the list noted by the AO at page 6 of the assessment order, we observe that most of the impugned payments have been made ranging between Rs.24,000/- to Rs.30,000/-. From the list, it is clearly discernible that some payments have been made to the sub-

contractor, truck owners and some amount has been deposited to the bank for making further payment. From the page 6 of the CIT(A) order, it is discernible that payments of Rs.4,24,045/- were paid in cash to different persons for certain purchases and expenses which as per the AO clearly violated the provisions of section 40A(3) of the Act. In the present case, the contention of the assessee is that the said payments were paid to truck owners and sub-contractors during the odd hours for meeting the urgent and business necessity, as the payments were required to be paid to the labourers. We also note that the assessee was doing the business in the remote area and specially the amounts were paid for making labour charges and for making certain purchases, where, it is very difficult to make payment through banking channels. In this situation, the provision attached to sub-section (3) of section 40A is to rescue the assessee from the rigour of disallowance under section 40A(3) of the Act. Keeping in view the totality of facts and circumstances and nature of work undertaking by the assessee, the disallowance restricted by the CIT(A) of Rs.4,24,045/- cannot be held as sustainable. We accordingly, direct the AO to delete the same.

13. Apropos Ground No.4 of appeal, Id counsel for the assessee submitted that in response to summons issued by the AO, Mr Debkamal Dutta appeared and has made categorically statement that he has not given any loan to the assessee. He submitted that Mr Kiran K Mallavarrap has

given loan to the assessee through the account of Mr Debkamal on different dates and the said amount has been repaid by the assessee to him and no interest was provided by the assessee. He submitted that all the amounts have been paid by cheque. Ld counsel submitted that Mr Debkamal Dutta is the brother of the assessee. He submitted that Mr Debkamal Dutta has admitted to have supervised the contract work of the assessee and assisted the work of the assessee without any remuneration. He submitted that Mr Kiran K Mallavarrap has given the loan to the assessee though the brother of the assessee as he was not directly related to the assessee. Hence, the amount has been received through the banking channel of the brother of the assessee as his brother could withdraw the amount at the work place of the assessee being supervising the work. He submitted that Mr Kiran K Mallavarrap is an income tax assessee with PAN No.AGBPK 7459 G and residing at Bangalore, Karnataka. Since he was residing in a far place, it was not possible on the part of the assessee to produce him before the AO. However, Mr Kiran Mallavarap has submitted his bank statement evidencing the payment of unsecured loan to Debkamal Dutta, brother of the assessee and the said loan was repaid by the assessee through RTGC which is evident from the customer foil of bank and also from the bank statement. This fact has been confirmed by the AO in the remand report. The repayment of loan has been credited to the bank account of the assessee in HDFC Bank A/c. No.01841000021552 in Bangalore has also been confirmed

and verified by the AO. He submitted that when the transaction is not disputed by the Assessing Officer and the assessee and the lender has confirmed the amount routed through the banking channel, at this juncture, the addition is not called for.

14. Replying to above, Id DR submitted that the identity and creditworthiness of the lender is not proved. Therefore, both the lower authorities are justified in making addition.

15. On careful consideration of the rival submissions, we find that an amount of Rs.25,00,000/- was taken by the assessee from Shri Kiran K Mallavarap through the brother of the assessee Mr Debkamal Dutta. Mr Debkamal Dutta was supervising the work of the assessee at Jeypre, wherein the work of the assessee was going on. Hence, due to some urgent requirement, the assessee had borrowed the money from Kiran K Mallavarap. The main dispute allegation of the AO as well as Id CIT(A) is that the source and creditworthiness of the assessee is not explained. On this ground, we see that Mr Kiran K Mallavarap is residing at Bangalore, Karnataka and his address and PAN No.was given to the Assessing Officer for verification. The Assessing Officer issued summon u/s.131 of the Act for personal attendance with proof of identity. However, Mr Kiran K Mallavarap was not able to come to Orissa due to his illness but submitted his bank statement and other details to prove that the transactions have been done. The Jurisdictional Assessing Officer of Bengaluru was also required to

examine and report the matter within 20 days of receipt of the assessee but the Jurisdictional AO did not examine and send the report. But this fault of AO cannot be attributed to assessee alleging his failure in discharging the onus to establish genuineness of transaction and identity and creditworthiness of unsecured creditor. When the assessee submits plausible explanation corroborated with all possible documentary evidence under his control and command in the form of PAN No., Bank statement and confirmation then it has to be held that the assessee has discharged onus lay on his shoulders as per requirement of section 68 of the Act. When the assessee has furnished his bank accounts , PAN No. and proof of address, it cannot be presumed that the identity and creditworthiness has not been proved. The onus shifted on the AO to contradict explanation of the assessee but there is no exercise by the AO in this regard for dismissing explanation and corroborative evidence by the assessee. Once there is proof of taking and repaying the loan, the addition in this regard is not called for. Hence, we direct the AO to delete the addition of Rs.25,00,000/- and allow this ground of appeal of the assessee.

16. In the result, appeal of the assessee is partly allowed.

Order pronounced on 02 /01/2020.

Sd/-
(Laxmi Prasad Sahu)
ACCOUNTANT MEMBER

sd/-
(Chandra Mohan Garg)
JUDICIAL MEMBER

Cuttack; Dated 02 /01/2020

B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : Debjyoti Dutta, At: Deulasahi,
Tulasipur, Cuttack
2. The respondent: ITO, Ward 2(4), Cuttack
3. The CIT(A)- Cuttack
4. Pr.CIT- ,Cuttack
5. DR, ITAT, Cuttack
6. Guard file.
//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack