IN THE INCOME TAX APPELLATE TRIBUNAL
*KOLKATA BENCH "**B**" KOLKATA*

Before **ShriMahavir Singh, Judicial Member**and
ShriWaseem Ahmed, Accountant Member

ITA No.892/Kol/2011 Assessment Year :2008-09

Deputy Commissioner of Income Tax, Circle-10, Kolkata	**V/s.**	Shalimar Chemicals Works Ltd., 92E, Alipore Road, Kolkata – 700 027 [**PAN No.AAECS 7442 K**]
अपीलार्थी /Appellant	..	प्रत्यर्थी/Respondent

अपीलार्थीकी ओर से/By Appellant	ShriNiraj Kumar, CIT-DR
प्रत्यर्थी की ओर से/By Respondent	ShriSomnath Banerjee, Advocate
सुनवाई की तारीख/Date of Hearing	16-09-2015
घोषणा की तारीख/Date of Pronouncement	28-09-2015

आदेश/O R D E R

PER Waseem Ahmed, AccountantMember:-

This appeal by the Revenue is arising out of order of Commissioner of Income Tax (Appeals)-XII, Kolkata in appeal No.240/CIT(A)-XII/Cir-10/10-11 dated 23.03.2011. Assessment was framed by ACIT, Range-10, Kolkata u/s 143(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act') vide his order dated 31.12.2010 for assessment year 2008-09. Revenue has raised the following grounds of its appeal:-

> *"1. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the disallowance U/s 40(a)(ia) of the I.T. Act, 1961 amounting to Rs.4,04,12,991/- towards packing material expenses in the form of job charges paid without deduction of tax u/s-194C*

2. On the facts and in the circumstances of the case, the CIT(A) has erred in deleting the disallowance of sales promotion of Rs.88,85,919/- & selling expenses of Rs.4,19,23,214/- though the assessee failed to produce any details such as address, PAN etc., of the payee.

3. Whether Ld. CIT(A) is correct in deleting the disallowance of sales promotion of Rs.88,85,919/- & selling expenses of Rs.4,19,23,214/- without appreciating the fact that on the both the expenses, tax was liable to be deducted at source which the assessee failed to do while making such payment under provisions of section 40(a)(ia)?

Mr. Niraaj Kumar, Ld. CIT-DR appearing on behalf of Revenue and Sri Somnath Banerjee, Ld. Advocate appearing on behalf of assessee.

2. First issue raised by Revenue in this appeal is that Ld. CIT(A) has erred in deleting the disallowance of expenses for an amount of Rs.4,04,12,991/- towards packing material expenses in the form of job charges paid without deduction of Tax under section 194C of the Act.

3 Briefly stated facts are that assessee is a Limited Company and is into the business of manufacturer of coconut oil, spices, mustered oil and grocery items. The assessee-company does its business through a network of distributorship throughout India. During the course of assessment proceedings, the AO found that the assessee has incurred expenses of Rs.4,04,12,991/- on the purchase of packaging material. These packaging materialswere made and designed at the instruction of the assessee by the party. The assessee placed the order for the supply of printed materials as per specification like size, labels, colour, design, particular type of paper, specific content etc.with the exclusive right of ownership on such materials. From the available records and information the AO held that this transaction of printing the packaging material is a work within the meaning of the explanation III to section 194C of the Act and there exist a work contract between the parties for the supply of the requisite materials and it is not a case of simple purchase of material because a particular type of work is involved. In support of his claim,

the AO has referred the Circular issued by CBDT No. 715 dated 08.08.1995 wherein the question No-15 clearly states that Sec. 194C of the Act would apply in respect of supply of printed material as per prescribed specification. The AO also contended the several case laws in support of his claim. Accordingly, AO has disallowed the expenses for the violation of Sec. 194C of the Act and added to the income of assessee. Aggrieved, assessee preferred appeal before Ld. CIT(A). Before Ld. CIT(A) assessee has submitted that the expenses on the packaging material was for the contract of sale and not for contract of job work. In most of the cases these packaging material were sold by the parties after realizing the excise duty, vat wherever applicable and there is no element of job work. The materials were also not supplied by the company and hence no TDS was deducted. The assessee also submitted the CIT(A) order where such transactions were regarded as contract for sale against the order of D.C.I.T. TDS in its own case of the assessee for the F.Y. 1996-97, 1997-98 and 1998-99. However, the CIT(A) has disregarded the order of the AO by observing that there exist no contract for the job work and it was a simple case of purchase of packaging material. The CIT(A) has relied upon several judgments in support of his decision such as Hon'ble ITAT "A" Bench, Kolkata dated 6.8.2010 in the case of ITO vs. S.T. Printing Works, BDA Ltd. Vs. ITO reported in 281 ITR 99(Bom) the Hon'ble Bombay High court, CIT Vs. Dabur India Ltd. reported in 283 ITR 197(Delhi) the Hon'ble Delhi High court etc.

Aggrieved, Revenue preferred appeal before the Tribunal.

4. We have heard rival contentions and perused the materials available on record. Before us Ld. DR supported the order of AO and cited the case lawState of Maharashtra v. Sarvodya Printing Press Fine Art (1999) 9 SCC 65 wherein it was held that supply of printed material was a works contract.

Whereas Ld. AR submitted that the circular No. 681 dated 08.03.1994 in the contest of Sec. 194C of the Act, wherein in terms of clause(b) of sub-clause (6) of clause (7) it is mentioned that where, however, the contractor undertakes to supply any article or thing fabricated according to specification given by the Government or any other specified person and the property in such article or thing passes to the Government or such person only after such article or thing is delivered, the contract will be a contract for sale and as such outside the purview of this Section.

5. After careful consideration and examination of the submissions made by both the parties. The Ld. AR of the assessee has submitted two paper books running into pages from 1 to 415 and 1 to 355 respectively. We find that the as per the AO, the assessee has violated the provisions of section 40(a)(ia) viz a viz section 194C of the Act as there exist a works contract for the Job work. However the assessee claims that there is contract for sale hence the question of TDS does not arise. In the case the assessee has submitted sample bills to AO at the time of assessment proceedings and the AO, on careful scrutiny of the bills, finds that there exist a work contract so held the transactions a "work" as described in explanation III to section 194C of the Act. accordingly. However the sub-clause (iv)of the Explanation to Section 194C of the Act reads as under:-

(iv) "work" shall include-
(a) advertising;
(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
(c) carriage of goods or passengers by any mode of transport other than by railways'
(d) catering;
(e) manufacturing or supplying a product according to the requirement or specification of a customer by using materials purchased from such customer,

but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer.]

So the definition as defined by the Act clearly shows that the present transaction does not fall in the category of the work because here the material was not supplied by the assessee for the printing of packaging materials. In several cases the different tribunals and court has held the such transactions as contract for sale and out of the preview of section 194C of the Act. some of them are enumerated here. In the case law of ITO Vs S.T. Printing Press where Hon'ble ITAT Bench, Kolkata dt. 06-08-2010 has held that the materials were not supplied by the assessee, hence there is no contract with reference to any work to attract the provision of section 194C in the case of *BDA Ltd. Vs ITO* reported in 281 ITR 99 (Bom), The Hon'ble Bombay High Court, on the issue involved has held as under :

> *"That when the printing work was being carried out in the premises of M, though as per the specifications of the assessee, the supply was limited to the quantity specified in the purchase order, there was nothing on record to show that, all other ancillary costs like the labels, ink, papers, screen-printing, screens, etc., were being supplied by the assessee to M. In the facts of this case, the supply of printed labels by M to the assessee was a 'contract of sale' and it could not be termed as "work contract". Hence, the provisions of section 194C were not applicable."*

The Similar view was taken by the Hon.ble Delhi High Court in the case of *Dabur India Limited* (supra) and head note reads as under:-

> *"Deduction of Tax At Source – Deduction from payment to contractor – Sale or Works Contract – Agreement for supply of corrugated boxes with labels printed on them – agreement for sale – Section 194C Not Applicable – Income Tax Act, 1961."*

In the case of Tuareg Marketing Pvt. Ltd. Vs ACIT reported in 122 TTJ 343 (Delhi) it was held by the Hon'ble ITAT has held as under:-

> *"In the case of Tuareg marketing Pvt. Ltd. Vs. ACIT reported in 122 TTJ 343 (Delhi) it was held by the Hon'ble ITAT, Delhi that where the manufacturing activity was carried out at the risk of contract manufacturer or supplier, the manufacturer purchased required raw material on his own and purchases the goods as per specifications of the assessee buyer, the ownership of the goods passes from the manufacturer to the assessee when the goods were supplied or delivered to the assessee, the manufacturer was forbidden from affixing*

> *the assessee's trade mark on the goods supplied to the outsider, and the supplier was also liable to Assessment Year sales tax and other taxes on the goods supplied by it to the assessee purchaser. The combined effect of these conditions would go to show that it is a case of simple purchase of goods and not a contract for works. Supply of outsourced manufactured goods by the contract manufactured constitutes an outright sale and cannot be treated as contract of works within the scope of section 194C and, therefore, consequently the assessee was not liable to deduct tax at source from the purchase price of gods paid by the assessee to the contract manufacturers or the suppliers."*

Second in the case of ITO Vs. Ambica Agencies ITA No. 2055/Kol/2008 dated 12.06.2009 where it was held by the Hon'ble ITAT 'B' Bench which reads as under:-

> *"that provisions of section 194C would apply only in relation to work contacts and labour contracts and would not cover contracts for sale of goods. If a manufacturer purchases material on his own and manufacturer a product as per the requirement of a specific customer, it is a case of sale and not a contract for carrying out any work. The fact that the goods manufactured were according to the requirement of the customer does not mean or imply that any work was carried out on behalf of that customer."*

So from the aforesaid judicial pronouncement, it is clear that a work does not include where supply of a product according to requirements or specification of a customer by using materials purchased from a person other than the customers. Hence, the provision of Sec. 194C does not attract to the present case. The case cited by the Ld. DR is not applicable as it was decided in the context of the provisions of Bombay Sales Tax Act 1959 and it has no nexus with the provisions of section 194C of the Act and consequently there was no application of provisions of section 40(a)(ia) of the Act. Hence, this ground of Revenue's appeal is dismissed.

6. Coming to Revenue's grounds No. 2 and 3, wherein Revenue is in appeal. In this ground of appeal, the AO has made the disallowances of the expenses of sales promotion of Rs. 88,85,919/- and selling expenses of Rs.4,19,23,214/- on two reasons :-

1) genuineness of the expenses
2) violation of section 40(a)(ia) viz a viz section 194C of the Act,

Consequently stating that Ld. CIT(A) has erred in deleting the disallowance made by the AO. In this case AO has found that assessee has debited a sum of Rs.4,19,23,214/- as selling expenses and Rs.88,85,919/- of sale promotion expenses under head 'selling and distribution of Rs.24,38,51,825/- as per Schedule-17 forming part of the profit and loss account for the year ended 31st March, 2008. Firstly we take up the matter of the genuineness of the expenses claimed by the assessee. The AO calls upon assessee to explain the said transaction. Before AO Ld. AR stated that these expenses are kinds of incentive to promote sale by the distributors. In this connection the assessee has merely provided names along with amount of incentive given to various parties. The assessee could not provide any base for the payment incentive. On what basis these selling expenses are paid to the distributors and what is target fixed for achieving sales. Hence the AO has disallowed the expenses for not getting the satisfactory reply from the assessee and recorded the following reasons for the disallowance:-

1) Genuineness of the incentive payment with regard to the manner of working of the incentive and genuine distributors for the purposes of the business. .
2) Rendering of services by the distributors.
3) Business expediency
4) The expenditure incurred wholly and exclusively for the business purpose.
5) The nexus between the expenditure and sales has not been established.

Now we take up the other reason for the disallowing of the expenses under section 40(a)(ia) read with section 194C of the Act.

7. During the course of assessment proceedings, the AO found that the assessee gets the products sold through a network of dealers on PAN India basis. The transactions of sale and purchase between the dealers/ distributors and the assessee were carried out not independently with their exist relationship of principal and of agent. The assessee is a principal and the dealers are the agents. The Ld. AO has regarded the assessee and dealer/distributor relationship more of a principal and agent on the basis of his study about the transaction between the parties as mentioned below:-

1) The dealer has to sell the goods as per the instruction of the assessee.
2) The dealers do not enjoy the full independence and there is a restriction by the assessee such as price, distribution of goods etc.
3) The products can be sold as per the convenience and the requirement of the assessee.
4) The distributors/ dealers are merely acting as an entity to generate the invoice to give this a colour of a simple purchase/ sale transactions.
5) The dealers/distributors cannot do anything apart from the powers and rights delegated to them.
6) The facts of principal and agent gets established where the payments have been made to the dealers of the assessee.
7) The profit margin was fixed by the assessee in relation to the products.
8) The transaction has been given the nomenclature of purchase-sale transaction although it was merely the transaction of principal and agent.
9) Assessee company carried out programs, meetings, seminar with the dealers and also reviews performances which is not definitely a simple purchase/sale relationship.

On the basis of above the AO concluded that the provisions of section 194H read with section 40(a)(ia) attracts to it and the assessee has violated the provisions of the TDS. Accordingly the AO has disallowed the expenses and has added in the income of the Assessee. The AO has also cited various case

laws in support of his claim. Aggrieved, assessee preferred an appeal before Ld. CIT(A). Before Ld. CIT(A) Ld. AR of the assessee demonstrated that all the requisite details such two paper book, company circular for the working of incentives, distributors-name-address-VAT etc., as desired by the AO time to time were submitted. In relation to incentives to the distributors, there was no financial transaction between the parties but only credit notes were provided to such distributors who achieved the target which they can redeem against future purchases. There was no transaction between the parties of principal and agent but all the transaction were of principal to principal basis. The distributor makes full payment upfront for the value of invoice raised for the sale of appellant products. The appellant does not take back the unsold stock of its product. On the basis of aforesaid discussions the CIT(A) has directed the AO to delete the addition made by him. Aggrieved, Revenue is in appeal before us.

8. We have the heard the rival parties and perused the materials available on record. The Ld DR has submitted that the distributors to whom the target incentives was provided were not genuine parties as the assessee has not provided the complete address. In the absence of the address, the AO could not send the notices to any of the parties under section 133(6). The Ld DR also submitted that the transaction between the parties in relation to target incentives was subject to TDS under section 194H of the Act and the assessee has violated the same, so it should be brought to tax as per the provision of section 40(a)(ia) of the Act. Finally the Ld. DR vehemently supported the view of the AO. On the contrary, Ld. AR supported the view of the CIT(A).

9. After the careful examination we find that the AO has disallowed the expenses on the ground of genuineness and violation of the provisions of section 40(a)(ia). It has been noted that the Ld. AO recorded the transaction not genuine in the absence of the complete address of the distributors. But the

AO did not issue even a single notice to any of the party out of the list provided at the time of assessment under section 133(6) of the Act. So it was not appropriate on the part of the AO to conclude the parties not genuine. Besides the AO has also not appreciated the volume of the business viz a viz the PAN India dealer network. With regard to the violation of the provisions of section 194H read with section 40(a)(ia), the AO held such transaction as of principal and agent. From the aforesaid submission of the assessee, it is clear that the transaction was of a purchase and sale. There was no monetary transaction between the parties for the target incentive. Only the credit notes were provided only to the distributors who have achieved the target which they can redeem at the time of subsequent purchases. So we are of the opinion that the transaction is out of the purview of the TDS provision. At the end, we find no infirmity in the order of the CIT(A), hence the grounds of Revenue's appeal dismissed.

10. **In the result, Revenue's appeal is dismissed.**

Order pronounced in the open court 28 /09/2015

Sd/- Sd/-
(Mahavir Singh) (Waseem Ahmed)
(Judicial Member) (Accountant Member)
Kolkata,
*Dkp
दिनांकः- 28/09/2015**कोलकाता** ।

आदेश की प्रतिलिपि अग्रेषित / Copy of Order Forwarded to:-

1. अपीलार्थी / Appellant-DCIT, Cir-10, P-7, Chowringhee Square, 3rdFl, Kolkata-69
2. प्रत्यर्थी / Respondent-Shalimar Chemical Works Ltd. 92E, Alipore Rd., Kol-27
3. संबंधित आयकर आयुक्त/ Concerned CIT Kolkata
4. आयकर आयुक्त- अपील / CIT (A) Kolkata
5. विभागीय प्रतिनिधि,आयकर अपीलीय अधिकरण,**कोलकाता**/ DR, ITAT, Kolkata
6. गार्ड फाइल / Guard file.

By order/आदेश से,

/True Copy/

उप/सहायक पंजीकार
आयकर अपीलीय अधिकरण,
कोलकाता ।