ITAT JAIPUR BENCH

Coram: R.P. TOLANI, J.M. AND T.R. MEENA, A.M.
ITO (Appellant) vs. Tulsi Ram Modi (Respondent)
IT Appeal No. 960 (JP.) of 2011
Date of Order: 31 October, 2014

ORDER

This is an appeal filed by the Revenue against the order of the learned Commissioner (Appeals)-II Jaipur dated 2-8-2011 for the assessment year 2008-09 wherein the Revenue has raised following grounds:-

"(i) holding that there was no alleged oral contract between the assessee and these persons whereas conduct of the parties and continuity of the transactions clearly prove that there existed a oral contract between the assessee and these specialized workers to whom specific tasks were assigned to do a specialized particular type of work.

(ii) holding that provisions laid down under section 40(a)(ia) of IT Act are applicable only for the amount which remains payable at the end of the period and it is not applicable to the amount actually paid during the year whereas as per intention and spirit of the legislature, the disallowance has to be made where TDS was not made as prescribed.

(iii) deleting the addition made by the assessing officer by considering the payment to these persons were less than Rs. 20,000 on each occasion whereas aggregate payment made to the sub-contractors at the year end was exceeding Rs. 50,000."

2.1 Brief facts of the case are that the assessee is a Prop. of M/s. Riddhi Siddhi Industries and he is engaged in sales of aluminum sections/ profiles/profiles, glass sheets, wooden/ gypsum boards etc. According to assessee installation of fitting of such material in customers premises is done by employing the casual laborers by the assessee. During the course of assessment proceedings, the assessing officer was of the view that the amounts paid by the assessee to the casual laborers were liable for TDS under section 194C(3). According to assessing officer assessee became the contractor and the casual workers became the sub-contractor and on payment to such sub-contractors assessee ought to have deducted TDS @ 1 per cent. Due to non-deduction and payment of such TDS, the amounts paid by the assessee in this behalf were disallowed under section 40(a)(ia) of the Act.

2.2 Before the learned Commissioner (Appeals) in first appeal, the assessee made the following submissions:-

"(a) The assessee had been awarded work orders from his clients and it was stipulated that the assessee could not further sub-contract the work. The work order from M/s. Next Retail India Ltd. which contributed nearly 70 per cent of total turnover of assessee , had laid won that the work was to be completed within 25 days from the date of receipt of that work order by the appellant. Further, the work was to be completed by the appellant himself only and in no case the same could be sub-contracted to any agency/ contractor/sub-contractor. It was categorically mentioned that if it was noticed that the work had been further sub-contracted, the assigned work would be immediately suspended and 25 per cent deduction would be made from the final billed amount.

(b) The assessing officer had examined all the payment vouchers for disbursement of wages. The skilled worker/ team leader, in whose name, the ledger account had been opened, had also signed vouched and received the wages on daily basis alonwith the other labourers. The workers had confirmed their engagement with the appellant on daily wages basis by filing confirmation letters.

(c) The wages are calculated on the basis of number of days multiplied by daily wage rate of 100, Rs. 125, Rs. 150 and Rs. 200 etc. as evident from the payment vouchers. None of the team leader/skilled worker had raised any bill or submitted any measurement sheet or given details of work done by him. They were paid at flat rates on the basis of number of days. It conclusively established that there existed not even an

oral contract between the assessee and team leaders/ skilled workers as alleged by the assessing officer.
(d) The ledger accounts of team leaders/ skilled workers were opened for convenience as it saved the assessee from the hassle of opening of hundred of account of individual labourers. The main contention of the appellant is that though the payments were made to the specified persons termed as team leader or skilled workers, but the above mentioned payments were on account of a group of persons working alongwith these team leaders/ skilled workers.
(e) The allegation of the assessing officer that vouchers produced by the assessee were in the nature of an afterthought only, was totally preposterous. The Auditors had mentioned in next audit report (Para 9(b)) while reporting the list of books of accounts examined by them that the vouchers were being maintained manually. The Auditors had also verified these vouchers in the course of tax audit as confirmed in their letter dated 8-1-2011 wherein it was stated that in the course of audit of payment vouchers by them, it was noticed that the assessee had made payment of 'labour charges' to different labourers engaged on daily basis. The appellant could not have fabricated these vouchers subsequent to tax audit and that too during assessment proceedings when these vouchers had been specifically examined by them.
(f) The assessing officer has alleged that there existed employer-employee relationship between the assessee and labourers, there would have been PF / ESI registration. However, the construction workers working at a construction site are not covered under ESI Act, 1948. It is applicable to workers working within a factory and that too is limited for a period during which they are working within a factory. None of the State Governments have extended the scheme to construction workers since they are mostly migratory.''

2.3 To support his contentions, assessee relied on following case laws.
(1) *CIT v. Mrinalini Biri Mfgg. Co. Ltd. (1992) 105 CTR 327 (Kol.)*
(2) *Samanwaya v. Asstt. CIT (2009) 34 SOT 332 (Kol.)*
(3) *CIT v. Bhagwati Steels (2010) 326 ITR 108*
(4) *CIT v. United Rice Land Ltd. (2010) 322 ITR 594*
(5) *Dy. CIT v. Laxmi Protein Products (P) Ltd.*
(6) *Jaipur Vidyut Vitran Nigam Ltd. v. Dy. CIT (2009) 123 TTJ 888 (Jaipur)*
(7) *CIT v. Mother India Refrigerator Industries (P.) Ltd. (1985) 155 ITR 711*

2.4 Learned Commissioner (Appeals) vide detailed order, deleted the addition by holding:-
(i) that the provisions of section 194C and section 40(a)(ia) of the Act were not applicable.
(ii) besides the section 40(a)(ia) of the Act was applicable to the amount outstanding at the end of the year in view of the ITAT special Bench decision in the case *Merilyn Shipping & Transports v. Asstt. CIT (2012) 136 ITD 23* and ITAT Jaipur Bench decision in the case of *Jaipur Vidyut Vitran Nigam Ltd.* (supra)

2.5 Aggrieved, the Revenue is before us.

2.6 The learned DR contends that reliance placed by the learned Commissioner (Appeals) on the cases of *Merilyn Shipping & Transports* (supra) (SB) and *Jaipur Vidyut Vitran Nigam Ltd.* (supra) is no more valid inasmuch as the Special Bench decision in the case of *Merilyn Shipping & Transports v. ACIT* (supra) has been reversed by the Hon'ble Calcutta High Court. On merits it is contended that assessee explained only to the effect that the casual workers were not the sub-contractors and working on the basis of oral contracts for wages. The non-maintenance of PF / ESI record by the assessee also indicates that they were not employees and were sub-contractors. Looking at the specific tasks executed by them i.e. wooden work, installation of profile glass sheets, panels etc; they cannot be held as casual laborers, therefore, there is no merit in the learned Commissioner (Appeals)'s findings in this

behalf. Asessee has not maintained even any wages account and impugned payments have been routed through senior labourer's accounts which also indicates that there was another agency involved in execution of work and disbursement of payments. All these facts, clearly indicate that the alleged casual laborers were actually subcontractors were involved in the execution of the work and payments made to them were liable for TDS under section 194C. The explanation given by the assessee has been rightly held by assessing officer to be an after thought to cover up the default. The contracts works were continuous in nature and even an oral contract is covered under section 194C of the Act. In the audit report submitted under section 44AB of the Act in column no. 27(a) of form 3CD, the assessee's Chartered Accountant has made a mention that no TDS is deducted and paid during the year for the payment made to labour charges. If the payment for casual workers were made then the assessee's own C.A, would have not given this remarks. The order of the assessing officer is relied on.

2.7 The learned Counsel for the assessee in reply contends that:-

(i) Though the SB judgment in the case of Merilyn Shipping Co has been reversed by Honble Calcutta high Court, however the subsequent amendment brought in section 40(a) (ia) is prospective in nature. Thus in the relevant period the Merilyn Shipping judgment is applicable.

(ii) As provided by the contract with M/s Next Retail India assessee was expressly debarred from employing any sub contractor. Thus the possibility of employing a sub contractor is ruled out at threshold itself. Assessee cannot be assumed to have worked in a manner to jeopardize his main source of income i.e. contract with the principal.

(iii) Assessee explained before assessing officer that assessee had to install such glass panels on orders received from customers scattered over various places. His own supervising own team would hire casual labourers to complete the work by oral contract for job to job. This makes it very clear that they were not subcontractors of any typeand work on hire and fire basis. The payments of wages were made to them through one of their selected senior workman in order to avoid the workload of paying and accounting for each labourer. This fact is clear from the payment pattern which is in multiple of days at the rate of Rs. 100 to 125 per day. This has not been disputed.

(iv) Audited record doesn't have mentioned of payment on the basis of square foot/meter basis.

(v) It has not been controverted that PF and ESI is payable to workers of a factory and not the casual labourers, therefore, the adverse inference drawn by assessing officer in this behalf is misplaced.

(vi) There is no continuity of work qua the each contract, in as much as with completion of any order assesses obligation came to end with finishing of one installation. Thus the assumption of continuing contract between the assessee and labourers of that site is misplaced. For new site fresh terms will be set depending on the nature, size, distance and intricacies of work.

(vii) There is no observation by auditors that there was any sub contract which attracted liability to pay TDS on such wages. They have only mentioned that there is no TDs payment on wages. A simple statement of harmless fact cannot be assumed by the assessing officer as conclusion of liability for TDS.

2.8 We have heard the rival contentions and perused the material available on record. From the facts mentioned above it clearly emerges that by main contract with Principal Next Retail India assessee was barred by hiring any subcontractor. We are unable to subscribe to the assessing officers view that as the labourers were orally employed or the salaries were disbursed through senior workman constitute adverse facts to lead to a conclusion that assessee hired subcontractors to complete the work. Similarly no adverse inference can be derived from auditors remark as it is only statement of fact about wages and in any case auditors vague remarks cannot be construed as a conclusive statement. This is the job of assessing officer to peruse the facts, circumstances and material in entirety and not to resort

to piece meal observations. In view of the above, we find no infirmity in the order of Commissioner (Appeals) holding that assessee was not liable to deduct TDS under section 194 C, his order on merits is upheld. Since we hold that there is no liability under section 194C there is no violation of section 40 a (ia), there is no need to adjudicate about the Merylin shipping issue.

3.0 In the result revenue appeal is dismissed