

(2012) 03 DEL CK 0241
In the Delhi High Court
Case No : ITA 1719 of 2010

CIT

APPELLANT

Vs

Rishikesh Buildcon Pvt. Ltd.

RESPONDENT

Date of Decision : 21-03-2012

Acts Referred:

Income Tax Act, 1961 — Section 194C, 194C(2), 260A, 40

Citation : (2012) 206 TAXMAN 567

Hon'ble Judges : Sanjiv Khanna, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Sanjeev Rajpal, for the Appellant; Chandra Shekhar, Saurabh Upadhyay, Manoj Agarwal and Ms. Meghna De, for the Respondent

Final Decision : Disposed Off

Judgement

Sanjiv Khanna, J.—By order dated 10th March, 2011, the following substantial questions of law were framed :

(i) Whether ITAT was correct in law in deleting the addition of Rs. 1.50 crore made by the AO invoking the provisions of Section 40(a)(ia) read with Section 194C of the Act?

(ii) Whether ITAT was correct in law in holding that there was no relationship of contractor and sub-contractor between the assessee and M/s Rishikesh Properties Limited?

The present appeal filed by the Revenue u/s 260A of the Income Tax Act, 1961 ("Act", for short) pertains to assessment year 2006-07.

2. The respondent-assessee, Rishikesh Buildcon Pvt. Ltd., is a group company, who along with other two group companies namely, Rishikesh Properties Pvt. Ltd. and Rupa Promoters Pvt. Ltd. were awarded contracts by PGF Ltd.

3. During the course of assessment proceedings in the case of the assessee, it was noticed by the Assessing Officer that the assessee had claimed that it had

carried out work worth Rs. 4.92 crores for PGF Ltd. but the TDS certificate issued by PGF Ltd. was only in respect of Rs. 4.55 crores.

4. In response to the queries, the assessee vide letter dated 5.12.2008 stated as under :

1. Please refer to point 1 of your letter dated 25.11.2008 stating deduction on TDS payment of Rs. 4,55,00,000/- where as the actual total of payment made for TDS would come to Rs. 6,42,00,000/- . Due to some oversight the figure was mentioned as Rs. 4,55,00,000/- which is regretted. However, if the payments made are totaled it would be Rs.(sic.) 6,42,00,000/- . It is apparent from the records and could be rectified. So out of the total TDS on Rs. 6,42,00,000/- a contract work for Rs. 4,92,00,000/- was carried out by self and a work of Rs. 1,50,00,000/- was handed over to Rishikesh Properties Pvt. Ltd. As the case of this company is also in scrutiny and with your good self the same may please be accounted for in Rishikesh Buildcon Pvt. Ltd. and removed from Rishikesh Buildcon Pvt. Ltd. i.e. (Rs. 6,42,00,000-Rs.4,92,00,000/). So the position is correct. The TDS on Rs. 1,50,00,000/- was not deducted for the two reasons.

1. It is apparent that TDS was deducted on a total sum of Rs. 6,42,00,000/- which includes the work of Rs. 1,50,00,000/- given by us to other company.

2. The nature of work of Rs. 1,50,00,000/- given to Rishikesh Properties was that of supervision only. Hence, no TDS deducted by us.

5. The Assessing Officer, after examining the reply, held that the assessee had failed to deduct tax at source on Rs. 1.5 crores which was paid to Rishikesh Properties Pvt. Ltd. as was mandated and required by Section 194C and therefore, the provisions of Section 40(a)(ia) were attracted. It was also recorded by the Assessing Officer that the assessee had raised bills to PGF Ltd. for work of Rs. 6,46,93,646/- whereas the TDS certificate submitted by the assessee was for Rs. 4,55,00,000/- . During the course of hearing, the assessee had submitted that it had actually done work for Rs. 6.42 crores. Thus, there was a difference of Rs. 1.5 crores, which it stated, had been undertaken and carried out by Rishikesh Properties Pvt. Ltd., the sub-contractor.

6. The first appellate authority on appeal filed by the assessee deleted the said addition for the reasons set out, which read as under:

7.4 I have considered the submissions of the A/R of the appellant and the facts brought out in the assessment order by the A.O. that the assessee has paid a sum of Rs. 150,00,000/- to M/s Rishikesh Properties as sub-contractor for carrying out the work without deducting TDS under the relevant provisions of the Act, therefore the Ld. A.O. had proceeded to disallow the amount of Rs. 150,00,000/- by invoking the provisions of Section 40(a) of the I.T. Act read with section 194C(2). However the A/R of the assessee has argued before me that only expenses which have been claimed by the assessee in profit & loss account can be disallowed under the provisions of section 40(a) of the Act if the

deduction of TDS under relevant provisions of the I.T. Act has not been made. The A/R of the assessee has further argued that the Ld. A.O. though has invoked provisions of section 40(a) but the said payment has not been a part of expenses claimed by the assessee in its books of account as such the disallowance was uncalled for.

7. At this stage we may mention that the aforesaid reasoning is not convincing and has to be rejected. The assessee had submitted that it had paid Rs. 1.5 crores to Rishikesh Properties Pvt. Ltd., the sub-contractor. It was claimed as an expense. The reasoning given by the CIT(Appeals) is that this amount was not treated as an expense by the assessee in the profit and loss account and therefore, there cannot be any disallowance u/s 40(a)(ia). If this is correct, then the entire amount, as stated by the assessee in the letter dated 5.12.2008, of Rs. 6.42 crores was to be treated as income and Rs. 1.5 crores could not be treated as an expense. The result would have been the same, whether any disallowance was made u/s 40(a)(ia) of the Act or not.

8. The Revenue preferred further appeal before the Tribunal, which has been dismissed by the impugned order dated 18.12.2009. The relevant reasoning given by the Tribunal reads as under:

5.4 We have perused the orders of authorities below and arguments of Ld. DR. From the table referred in para 4.4 above it is noticed that the total receipts by the assessee is amounting to Rs. 6,42,00,000/- out of which payment of Rs. 1,50,00,000/- pertains to M/s. Rishikesh Properties. This does not relate to the total contract value of Rs. 4,92,00,000/- . The assessee claimed expenses against the receipts declared of Rs. 4,92,00,000/- which was contract value with the assessee company. Thus Rs. 1,50,00,000/- does not form part of the total expenses claimed by the assessee. During the appellate proceedings it has been clarified that payment of Rs. 1,50,00,000/- was not made as a part of sub-contractual agreement and there is no evidence in the form of any contractual agreement which was filed by the assessee company or the client. In fact payment of Rs. 1,50,00,000/- was neither forming part of the contract receipts declared by the respondent in the books of account nor Rs. 1,50,00,000/- was claimed as an expenditure. The provisions of section 40(a)(ia) are applicable only as evident from the language that "amounts which are not deductible" relate to an "amount payable to a contractor or sub-contractor for carrying out any work (including supply of labour for carrying out any work)". And such amount has to be claimed in computing the income chargeable under the head "profits and gain of business and profession".

Thus firstly it has to be expenditure payable to a contractor or a sub-contractor for carrying out any work. In the present case payments has not been made by the respondent assessee to M/s. Rishikesh Properties Pvt. Ltd. for carrying out any work for it as sub contractor, secondly it is claimed as an expenditure under the head "profits and gain of business and profession". In fact Rs. 1,50,00,000/- paid by the respondent assessee to M/s. Rishikesh Properties for the work done

by them assigned to them by the same company i.e. M/s. PGF Limited. Thus it is an expenditure in the books of account of M/s PGF Ltd. for carrying out work for them and they are claiming this expenditure in order to declare their profit or loss as per P & L Account but not assessee company who made payment due to wrong payment made to them belonging to M/s. Rishikesh Properties (P) Ltd. We have already dealt similar issue in the case of Rishikesh Properties (P) Ltd. in ITA No. 2061/D/09 wherein total contract receipts were declared of Rs. 4,25,00,000/- for the work assigned to them by M/s. PGF Limited which includes Rs. 1,50,00,000/- also. Thus same receipt can not form part of another for the same work assigned by same company. From the perusal of the facts stated in other two cases namely Rishikesh Properties (P) Ltd. and Rupa promoter (P) Ltd. it is found that all these companies made contract with M/s PGF Ltd for development work at Chennai. All the working directors were common. The promoter directors were also same or relatives. The total contract made by the M/s PGF Limited with the respondent assessee amounted to Rs. 4,92,00,000/- while a separate contract was made with M/s. Rishikesh Properties by M/s. PGF Limited amounting to Rs. 4,25,00,000/- . Rs. 1,50,00,000/- paid by the respondent assessee was forming part of Rs. 4,25,00,000/- and not linked with Rs. 4,92,00,000/- declared by the respondent assessee. Since it is neither forming part of the receipts in the profit and loss account nor forming part of an expenditure claimed by it, provisions of section 40(a)(ia) and section 194C are not attracted. The same would be applicable when there is a relation of a contractor a sub-contractor for making payments for carrying out any work for them but not otherwise. The assessing officer has not looked into this aspect which was examined by the CIT (A).

We, therefore, do not find any reason to interfere with the finding of the CIT (A) and fully agree that provisions of section 40(a)(ia) are not applicable in this case. The CIT (A) was justified in deleting the addition of Rs. 1,50,00,000/- . As respondent has not claimed it as an expenditure. This itself clarify the position of non-applicability of section 40(a)(ia) of the income tax Act.

9. As the aforesaid paras refer to paragraph 4.4 of the order and for the sake of convenience we reproduce para 4.4 of the order passed by the Tribunal in entirety:

4.4 We find that the issue has not been considered in proper perspective. Similar confusion has also arose in appeals by revenue in two other group cases which were also heard together with this appeal. To understand the controversy it is worthwhile to tabulate the work done by all the three group companies together. The same is tabulated below:

ITA No.

Name of Contractor (Assessee)

Work as per assessee

Work as per contractee PGF Ltd. (Rs. In lacs)

Diff.

2061/09

Rishikesh Properties Pvt. Ltd.

425

225

+200

2062/09

Rishikesh Buildcon Pvt. Ltd.

492

642

-150

2060/09

Rupa Promoters Pvt. Ltd.

485

535

-50

Total

1402

1402

Nil

From the above table it is clear that all these group companies did contract work for same client namely M/s. PGF Ltd. Whereas total contract work done by all these three companies and total contract work as confirmed by M/s. PGF Ltd. do not differ, in individual cases the amount of work differs. However, the value of work done by each company can be better appreciated on the basis of expenses incurred by such companies for their respective share of work. The AO has not doubted the expenses incurred by each company. Therefore, corresponding work done by them cannot be rejected. The confusion further arose due to payments accounted by client and TDS made thereon. When we are concerned with computation of income, the same has to be on the basis of contract work done by each company and expenses incurred by them. The tax is deducted on basis of payments made but TDS is not the criteria to compute the income. Thus due to discrepancy in deducting tax at source by the client, the income cannot vary.

It is also seen that all the receipts for contract work done is accounted for and it is not case of revenue that the total receipt is not accounted by three companies taken together.

There is no sub-contracting also. All the three assessee herein are direct contractors and have incurred then respective expenses for work executed by them. As stated earlier, the confusion or difference arose due to difference in payment made by client or tax deducted thereon rather than value of total work executed and as accounted by all the three assessee put together.

10. We may mention here that the observations made in para 4.4 were on a different context and in respect of the addition of Rs. 1,46,96,698/- made by the Assessing Officer on account of the bills raised by the assessee before its incorporation for work done for PGF Ltd. In para 4.4, the Tribunal has held that whether or not the assessee had done any work was to be judged and ascertained with reference to the work actually performed and the bills raised and not with reference to the TDS certificates, which has been issued by PGF Ltd. to the assessee. The Tribunal, therefore, distinguished between the amount mentioned in TDS certificates and the quantum of bills raised and the work actually done on the basis of which income of the assessee was to be assessed. We may record here that in the table mentioned above, PGF Ltd. had stated that the assessee had carried out work of Rs. 6.42 crores. This is in conformity and tallies with the figure which the assessee has mentioned in the letter dated 5.12.2008.

11. The Tribunal while deleting the addition made u/s 40(a)(ia) of the Act has made out altogether a new case and accepted the stand of the assessee that they had not paid Rs. 1.50 crores and the said work was not sub-contracted by them to Rishikesh Properties Pvt. Ltd. This was not the case of the assessee before the Assessing Officer and is clearly contrary to the averments in the letter dated 5.12.2008, which has been quoted above. The said letter is quoted in the assessment order itself. Further, the Tribunal has held that Rishikesh Properties Pvt. Ltd. was directly awarded work, which includes work worth Rs. 1.50 crores by PGF Ltd. However, how the said factual finding has been recorded has not been indicated and elucidated. In para 4.4 quoted above, the Tribunal has recorded that the work, as per PGF Ltd., awarded to the assessee was Rs. 6.42 crores. This includes Rs. 1.50 crores. The Tribunal has not adverted to the letter dated 5.12.2008 and the admissions/statements made therein. The effect of the said letter and whether the assessee can change its stand has not been considered and examined by the Tribunal. Failure to consider the relevant and material evidence, which has been referred to by the Assessing Officer, can in a given case result in perversity and unreasonable findings, which are contrary to law. In view of the aforesaid position, we find that the order of the Tribunal is perverse and this Court should interfere with the said order. On the question of perversity we may refer to the decision of the Supreme Court in the Dhirajlal Girdharilal Vs. Commissioner of Income Tax, Bombay, , wherein it has held:

It is well established that when a court of fact acts on material, partly relevant and partly irrelevant, it is impossible to say to what extent the mind of the court was affected by the irrelevant material used by it in arriving at its finding. Such a finding is vitiated because of the use of inadmissible material and thereby an issue of law arises.

12. In, *Excise & Taxation Officer-cum-Assessing Authority v. Gopi Nath & Sons* 1992 Supp. SCC (2) 312, it has been held as:

7. ... if a finding of fact is arrived at by ignoring or excluding relevant material or by taking into consideration irrelevant material or if the finding so outrageously defies logic as to suffer from the vice of irrationality incurring the blame of being perverse, then, the finding is rendered infirm in law.

13. In view of the aforesaid observations, we answer the two substantial questions of law mentioned above in negative that is in favour of the Revenue and against the assessee. However, we pass an order of remit to the Tribunal to decide the appeal afresh. The Tribunal will also take into consideration the reply of the assessee dated 5.12.2008. It will be open to the Tribunal to consider and refer to the books of accounts etc. to ascertain the correct factual position. To cut short any delay, it is directed that the parties will appear before the Assistant Registrar, Tribunal on 23rd April, 2012 when a date of hearing will be fixed. The appeal is disposed of with no order as to costs.