
(2012) 03 DEL CK 0629
In the Delhi High Court
Case No : ITA 1713 of 2010

CIT

APPELLANT

Vs

Rupa Promoters Pvt. Ltd.

RESPONDENT

Date of Decision : 21-03-2012

Acts Referred:

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

Citation : (2012) 3 AD 597 : (2012) 210 TAXMAN 52

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.—This appeal filed by the Revenue u/s 260A of the Income Tax Act, 1961 ("Act", for short) in the case of Rupa Promoters Pvt. Ltd. pertains to assessment year 2006-07. Having heard the counsel for the parties, we frame the following substantial question of law:

(i) Whether the Income Tax Appellate Tribunal was right in deleting the addition of Rs. 50 lacs made by the Assessing Officer by invoking provisions of Section 40 (a)(ia) read with Section 194C of the Income Tax Act, 1961? (ii) Whether the Income Tax Appellate Tribunal was right in holding that M/s PGF Ltd. had directly given a contract to Rishikesh Properties Pvt. Ltd.?"

2. As we have heard counsel for the parties on merits, we proceed to decide the aforesaid questions.

3. The assessee, Rishikesh Buildcon Pvt. Ltd. and Rishikesh Properties Pvt. Ltd. are group companies with common shareholders and directors. Another company namely, PGF Ltd. had awarded work to the three group companies including the assessee.

4. During the course of assessment proceedings in the year in question, it was noticed that PGF Ltd. had issued certificates of tax deduction at source in respect of work for an amount of Rs. 4.85 crores. However, as per details filed by the assessee before the Assessing Officer, the assessee had carried out work worth Rs. 5.35 crores. Vide letters dated 14.11.2008 and 25.11.2008, the assessee was asked to explain the discrepancy.

5. In response to the said queries, the assessee filed a reply dated 5.12.2008. The relevant portion of the said reply reads as under:

1. Please refer to point 1 of your letter dated 25.11.2008 in which figures of TDS Certificate mentioned is wrong. The actual TDS Certificate (original copy of which has already been submitted to you) is for the work of Rs. 5,35,00,000/- and the work carried out by us is Rs. 4,85,00,000 as appearing in our P & L account because the work amounting to Rs. 50,00,000/- was given to Rishikesh Properties Pvt. Ltd. (which company is also under scrutiny with your good se/f (sic.)). Due to the following two reasons we have not deducted any tax at source on the amount of Rs. 50,00,000/- .

1. It is apparent that TDS was deducted on a total sum of Rs. 5,35,00,000/- which includes the work of Rs. 50,00,000/- given by us to other company.

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

6. We may notice here that one of the queries, which had been raised by the Assessing Officer earlier was why the assessee had not deducted TDS from Rs. 50 lakhs for work, which was sub-contracted and paid to Rishikesh Properties Pvt. Ltd.

7. After receiving the aforesaid reply, the Assessing Officer recorded that there was failure on the part of the assessee to deduct TDS on the payment made to Rishikesh Properties Pvt. Ltd. and provisions of Section 40(a)(ia) read with Section 194C were attracted. This amount of Rs. 50 lakhs was disallowed and added to the income of the assessee. We may record here that the Assessing Officer in the assessment order has mentioned that no documentary evidence in form of agreement between the assessee and Rishikesh Properties Pvt. Ltd. was furnished during the course of assessment proceedings. The Assessing Officer had made another addition of Rs. 41,10,527/- noticing certain discrepancies between the bills received by PGF Ltd. and the stand of the assessee. We are not, however, concerned with the said aspect as this is not a subject matter of present appeal.

8. On appeal filed by the assessee, the first appellate authority deleted the said disallowance observing 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. 50,00,000/- (sic.) to M/s Rishikesh (sic.) 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. 50,00,000/- by invoking the provisions of Section 40(a) of the I.T. Act read with section 194C(2). However the AIR (sic.) 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. In this regard that the A/R of the assessee argued before me that the Ld. A.O has erred in disallowing the sum of Rs. 50,00,000/- (sic.) which merely represented payment to M/s Rishikesh Properties wrongly received from M/s PGF Ltd. by the assessee. In this regard that the A/R of the assessee argued before me that the Ld. A.O has erred in disallowing the sum of Rs. 50,00,000/- which merely represented payment to M/s Rishikesh Properties wrongly received from M/s PGF Ltd. by the assessee.

9. At this stage we may merely record that the reasoning given by the Commissioner of Income Tax (Appeals) is unsustainable and cannot be accepted. We have quoted above the letter dated 5.12.2008 written by the assessee to the Assessing Officer. In the said letter they have stated that they had done work worth Rs. 5.35 crores for PGF Ltd. They had further stated that they had made payment of Rs. 50 lakhs to Rishikesh Properties Pvt. Ltd., a sub-contractor. In case aforesaid amount of Rs. 50 lakhs was not shown as expense in the books of accounts, certainly the assessee was not required to deduct tax and also could not have claimed this amount as an expenditure. Disallowance, therefore, made by the Assessing Officer was certainly then justified, whether it could be sustained u/s 40(a)(ia) or otherwise is immaterial.

10. Revenue preferred a further appeal before the Income Tax Appellate Tribunal (Tribunal, for short) and by the impugned order the Tribunal has upheld the order of the CIT (Appeals). We reproduce below the reasoning given by the Tribunal on the said issue:

7.3 We have pursued (sic.) the orders of authorities below and the arguments of Ld. DR. As noted by us in para 6.4 above the confusion arose due to the difference in accounting of work done by the client and payment made therefore. The assessee has neither sub contracted any work nor any payment for work executed on its behalf has been made. Each company has executed their part of the contract and incurred their own expenses. The value of contract work executed and accounted as income is only in respect of client M/s. PGF Ltd. only and not for any other group company. Similarly expenses recorded are only for contract work of client PGF Ltd. and not by way of sub contract to associate company.

7.4 From the table referred in Para 6.4 above it has been noticed that the total

contract work carried out by the assessee amounting to Rs. 4,85,00,000/- only and the payment of Rs. 50,00,000/- does not relate to the total contract value of Rs. 4,85,00,000/- . The assessee claimed expenses against the receipts declared of Rs. 4,85,00,000/- only. Thus Rs. 50,00,000/- does not form part of the total receipts declared by the assessee. During the appellate proceedings it has been clarified that payment of Rs. 50,00,000/- made to M/s. Rishikesh Properties was not made as a part of any sub-contractual agreement and there is no evidence in the form of any contractual agreement which was required to be filed by the assessee company. In fact payment of Rs. 50,00,000/- paid to M/s. Rishikesh Properties was not forming part of the receipts declared by the respondent and nor Rs. 50,00,000/- was claimed as an expenditure paid to any sub-contractor or otherwise as per books of accounts of the assessee. The provisions of section 40(a)(ia) are applicable only, as evident from the language that "amounts which are not deductible" which 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 an expenditure payable to a contractor or a sub-contractor for carrying out any work while in the present case payment has not been made by the respondent assessee to M/s. Rishikesh Properties Pvt. Ltd. for carrying out any work nor it is claimed as an expenditure under the head "profits and gain of business and profession". In fact Rs. 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 Ltd. in ITA No. 2061/D/09 wherein total receipts were declared of Rs. 4,25,00,000/- for the work assigned to them by M/s PGF Limited which includes Rs. 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 Rishikesh Buildcon (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.

We therefore find that the total contract value assigned made by the M/s. PGF Limited to the respondent assessee amounted to Rs. 4,85,00,000/- while a separate contract was made with M/s. Rishikesh Properties by M/s. PGF Limited only amounting to Rs. 4,25,00,000/- which was also running almost at the same time and with the same management as directors who are working on behalf of both the companies are common. It is only due to some confusion cheques have been issued in the name of the assessee company by M/s. PGF Ltd. instead of

issuing in the name of Rishikesh Properties Ltd. belonging to the same management. Due to this respondent has not declared the receipt as income and paid the amount to M/s. Rishikesh Properties Ltd. which was not claimed as expenditure. We find that Rs. 50,00,000/- paid by the respondent assessee was forming part of Rs. 4,25,00,000/- and not linked with Rs. 4,85,00,000/- declared by the respondent assessee. Since it is neither forming part of the receipts in 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 or a sub-contractor for making payments for carrying out any work for it 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. 50,00,000/- . Interestingly AO made an addition u/s 40 (a) (ia) for an expenditure not claimed by assessee respondent. This section relate to disallowance of an expenditure claimed but not making addition for an amount not claimed at all. This itself clarify the position of non-applicability of section 40 (a) (ia) of the income tax Act.

11. As the aforesaid paragraphs, refer to para 6.4, we reproduce the said paragraph also for the sake of completeness :

6.4 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 of 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 assessees put together.

12. A perusal of the table mentioned in 6.4 shows that PGF Ltd. had stated that the assessee was awarded work of Rs. 5.35 crores. This was in conformity with and as per the stand of the assessee before the Assessing Officer in the letter dated 5.12.2008. The Tribunal in para 6.4 held that they would not like to go by

the TDS certificates but would like to go by actual work recorded in the books of accounts of the assessee. The sum total of the work awarded to three companies was Rs. 14.2 crores. There was difference of Rs. 2 crores in the stand of the assessee and the two group companies and the figures as per PGF Ltd., which has been referred to and mentioned in the column under the heading "Difference". While examining the said issue we may only note that the Tribunal did not refer to the admission and averments made by the assessee in letter dated 5.12.2008. Further, when it came to the failure of the assessee to deduct TDS, the Tribunal went on a different reasoning and made out an entirely new case, which was not made out before the Assessing Officer. In the reasoning given by the Tribunal, it has been observed that the PGF Ltd. had awarded a contract to Rishikesh Properties Pvt. Ltd. amounting to Rs. 4.25 crores. This obviously is contrary to the stand of PGF Ltd., who had stated that they have awarded work of Rs. 2.25 crores to Rishikesh Properties Pvt. Ltd. and Rs. 5.35 crores to the assessee. It is also contrary to the stand of the assessee in the letter dated 5.12.2008.

13. On the basis that the assessee was awarded work worth Rs. 4.85 crores, the Tribunal has held that the assessee had not made a payment of Rs. 50 lakhs to Rishikesh Properties Pvt. Ltd. and therefore, provisions of Section 40 (a)(ia) were not attracted. It is apparent that there is an inherent contradiction between the findings recorded by the Tribunal and the findings recorded by the Assessing Officer with reference to the letter of the assessee dated 5.12.2008, which had not been adverted to by the Tribunal. Letter dated 5.12.2008, which was quoted in the assessment order has not been considered. The admission or the statement made in this letter by the assessee has not been given due consideration or examination. The books of accounts of the assessee have also not been examined and referred to. In fact, PGF Ltd had made a contrary submission and had given their own figures with regard to the work awarded to the three companies but this has been ignored while examining the question of TDS deduction. The Tribunal may be correct that each company is required to account for the work done by them and accordingly, liable to pay the tax on the profits earned and this was not dependent upon the TDS certificates, which were issued to them. However, when the question of deduction of TDS arises, different questions and aspect arise. If there is violation of Section 194C, then Section 40 (a)(ia) may be attracted and the expenditure incurred on which tax has not been deducted is to be disallowed as per the terms of the said section. This is different and has to be examined independently. In these circumstances, we find that the order passed by the Tribunal is perverse as it fails to take into consideration the relevant material and facts. The issue/question has not been examined in the appropriate and proper prospective. 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.

14. In, H. B. Gandhi v. Gopi Nath and Sons , 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.

15. In view of the aforesaid reasoning, we answer the substantial questions of law in the negative and in favour of the Revenue and against the respondent-assessee. However, we remit the matter to the Tribunal for a fresh decision. The Tribunal will examine the entire question once again and will also take into consideration the reply of the assessee dated 5.12.2008 and the explanation, if any, of the assessee on the said aspect. To cut short any delay, it is directed that the parties will appear before the Assistant Registrar, Tribunal on 24th April, 2012 when a date of hearing will be fixed. The appeal is disposed of with no order as to costs.