(2013) 11 KL CK 0061

In the High Court Of Kerala

Case No : IT Appeal No. 85 of 2012

Three Star Granites (P) Ltd. APPELLANT

Vs

Assistant Commissioner of Income Tax RESPONDENT

Date of Decision : 26-11-2013

Acts Referred:

Citation : (2014) 266 CTR 326

Hon'ble Judges : K.M. Joseph, J;C.K. Abdul Rehim, J

Bench : Division Bench

Judgement

K.M. Joseph, J.—The appeal is filed under s. 260A of the IT Act impugning the order passed by the Tribunal by which the Tribunal has found that the tax has to be deducted at ten per cent under s. 194-I of the Act and agreed with the AO that the provisions contained in s. 194C are not applicable. As regards the contention that s. 40(a)(ia) is applicable only in case of non-deduction of tax and not for short deduction of tax, the matter was remitted back to the AO. The AO on processing the return of the assessee for the year 2007-08, took the view that as the assessee has deducted tax under s. 194C instead of s. 194-I, the payments are hit by s. 40(a)(ia) and, therefore, were disallowed. The appeal before the CIT(A) was dismissed. According to the appellant, it is a company which is engaged in mechanised manufacturing and sale of granites. It has engaged the services of the contractor for loading and unloading and transportation of granites, both crushed and uncrushed within its mining area and outside. During the year, the appellant deducted tax at 2.24 per cent According to the learned counsel for the appellant, the finding of the Tribunal that s. 194C does not apply, is not correct. He would also contend that there was no need for the Tribunal to remand the matter relating to s. 40(a)(ia). He relies on the following case law:

(i) In Hindustan Lever Ltd. Vs. Commissioner of Income Tax, , the Delhi High Court was dealing with a case where the assessee was a well known manufacturer of consumer goods. It hired godowns on rent and also engaged

C&F agents. The Court affirmed the findings of the Tribunal that s. 194-I could only be applied when the immovable properties are let out and none of the heads of payments made to C&F agents by the assessee is a head of payment by way of rent in favour of assessees.

(ii) In an unreported judgment in Tax Case Appeal Nos. 15 to 20 of 2006, Commissioner of Income Tax Vs. Singapore Airlines Ltd., rendered by the High Court of Madras, the Court held as follows:

21. As rightly pointed out by the learned senior counsel appearing for the assessee, the payment contemplated under the Explanation is for the use of the land under a lease, sub-lease or tenancy. This means, what is contemplated under the said definition is a systematic use of land specified for a consideration under an arrangement which carries the characteristics of lease or tenancy. Going by the logic of the said provisions, we feel that a mere use of the land for landing and payment charged, which is not for the use of the land, but for maintenance of the various services, including the technical services involving navigation, would not automatically bring the transaction and the charges within the meaning of either lease or sub-lease or tenancy or any other agreement or arrangement of a nature of lease or tenancy and rent. As far as the runway usage by an aircraft is concerned, it could be no different from the analogy of a road used by any vehicle or any other form of transport. If the use of tarmac could be characterised as use of land, so too the use of a road would be a use of land. We do not think that for the purpose of treating the payment as rent, such use would fall under the expression ''use of land''. Thus, going by the nature of services offered by the Airport Authority of India for landing and parking charges thus collected from the assessee herein, we do not find any ground to accept that the payment would fit in with the definition of ''rent'' as given under s. 194-I of the IT Act.

That was a case where the question arose in the following facts:

The assessee is an international airlines. In the course of the assessment proceedings, for the asst. yrs. 1997-98 to 1999-2000, the assessee claimed that the charges paid to International Airport Authority towards landing and parking charges would not come within the definition of "rent as defined under s. 194-I, Explanation, of the IT Act and hence, the liability to deduct tax at source under s. 194-I or under s. 194J of the IT Act in respect of payment of navigation charges did not arise at all.

(iii) In Commissioner of Income Tax (TDS) Vs. Shree Mahalaxmi Transport Co., the assessee was engaged in transporting of building materials. It gave a subcontract of the transportation of goods. The sub-contractor took the dumpers on rent. Payment was made by the assessee to the sub contractor. The Court agreed with the Tribunal in finding that the payment made by the assessee was towards the contract and not for renting machinery and hence s. 194-I was not applicable and instead, s. 194C was applicable.

(iv) In Commissioner of Income Tax (TDS) Vs. Swayam Shipping Services (P.) Ltd., , the assessee carried out freight and transportation works contracts with three transporters who transported the goods belonging to the assessee and its clients to various places through their vehicles. The assessee had given sub-contracts for transportation. It was held that s. 194C is applicable.

(v) The appellant also drew our attention to the judgment of a Division Bench of this Court in Central Board of Direct Taxes Vs. Cochin Goods Transport Association, . That was a case where the question which was posed was whether a transport contract for mere carriage of goods without loading and unloading facility would amount to "any work" within the meaning of s. 194C(1). The contention of the assessee was that a mere contract of transport without loading and unloading facility will not amount to carrying out "any work" under s. 194C(1). The Court took the following view:

There is nothing in sub-s. (1) of s. 194C of the IT Act, 1961, to hold that a contract to carry out a work or a contract to supply labour to carry out a work should be confined to works contracts and that the words ''any work'' occurring in the sub-section mean any work and not a ''works contract''. Therefore, a transport contract simpliciter (i.e. a transport contract for mere carriage of goods without loading and unloading facility) would amount to carrying out "any work" within the meaning of s. 194C(1) of the Act and, therefore, deduction of tax at source at the rate of two per cent, from the amounts credited to the account of the contractor has to be made by a person responsible for paying any sum for the transport contract.

(vi) In Birla Cement Works Vs. Central Board of Direct Taxes, , the apex Court was dealing with a case where the cement manufactured by the petitioner was being transported to various destinations with the assistance of approved transport operators company. The appellant did not deduct any tax under s. 194C for payments made. The Court held as follows:

Sec. 194C of the IT Act, 1961, which provides for deduction of tax at source from payments to contractors and sub-contractors, prior to the insertion of Expln. Ill therein w.e.f. 1st July, 1995, was not applicable to transport contracts, i.e., contracts for carriage of goods. This interpretation, which is one of two possible interpretations as to whether contracts for carrying of goods would or would not come within the ambit of the expression ''carrying out any work'' in that section, which favours the assessee and which has been acted upon and accepted by the Revenue for a long period, should not be disturbed except for compelling reasons. Further, there are no compelling reasons for holding that Expln. Ill was clarificatory in nature or retrospective in operation.

Soon after the insertion of s. 194C in the IT Act, 1961, w.e.f. 1st April, 1972, Circular No. 86, dt. 29th May, 1972 [F. No. 275/9/72-ITJ-I, was issued by the CBDT stating that the provisions of that section would apply only in relation to ''works contracts'' and ''labour contracts'' and would not cover a contract for the sale of goods. Another Circular No. 93, dt. 26th Sept., 1972, was issued clarifying that s. 194C would not apply to transport contracts. Right from 1st April, 1972, according to the understanding of the Department, s. 194C was not applicable to payments made in respect of transport contracts, till the issue of a fresh Circular No. 681, dt. 8th March, 1994 [(1994) 117 CTR (St) 229], withdrawing the earlier circulars and issuing fresh guidelines directing that s. 194C would apply to all types of contracts for carrying out work including transport contracts, because of certain observations of the Supreme Court in The Associated Cement Company Ltd. Vs. The Commissioner of Income Tax, Bihar, Patna and another, . The question whether the expression ''carrying out any work'' would include therein the carrying of goods or not was not in issue in that case and that decision has not been correctly understood by the CBDT. Circular No. 681 dt. 8th March, 1994, which was made applicable w.e.f. 1st April, 1994, to the extent that it related to transport contracts is invalid.

2. Per contra, the learned counsel for the Revenue would submit that the contract has been considered by the authorities including the Tribunal. It was a clear case of a contract which provided for payment of hire charges. The appellant took the machineries on lease and he paid charges for the same and, therefore, it is a clear case of s. 194-I being attracted. The decisions cited were distinguished by the learned counsel for the Revenue.

3. We are of the'' view that there is no merit in the contentions of the appellant. Sec. 194-I, inter alia, provides for deduction of income tax from rent paid for the use of any machinery or plant or equipment. The Explanation defines the word "rent" as follows:

Explanation.--For the purposes of this section,--

(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,--

(a) land; or

(b) building [including factory building); or

(c) land appurtenant to a building (including factory building); or

(d) machinery; or

(e) plant; or

(i) equipment; or

(g) furniture; or

(h) fittings,

whether or not any or all of the above are owned by the payee.

The relevant terms of the agreement which have been set out by the Tribunal also, which are relevant read as follows:

2. The parties hereto agree that this agreement shall be a composite contract for hire of vehicles to be used for loading, unloading and transport of the products of the party of the second part and the entire agreement shall be deemed to be an indivisible contract.

3. The control, custody, ownership and possession of all the vehicles under hire shall remain at all times with the party of the first part and it is expressly understood by and between the parties hereto that the party of the second part will have only the right to use the vehicles and there is no transfer of right to use the vehicles.

4. The party of the first part shall provide the drivers, cleaners and other staff required for the running and operation of the vehicles and the costs relating to the personnel shall be his own to the exclusion of the party of the second part.

Clause 17 of the agreement reads as follows:

17. In consideration of the hire of the vehicles subject to the aforesaid conditions, the party of the second part hereby agrees to pay the party of the first part, hire charges at the rates mentioned herein below:

(a) Hitachi Excavators : R.400 per hour of use;

(b) Hitachi Excavator with Backhoe : Rs. 650 per hour of use;

(c) L&T Excavator : Rs. 250 per hour of use;

(d) Tata tipper : Rs. 500 per day of use not exceeding 18 hours

(e) Tata tipper : Rs. 750 per day of use not exceeding 18 hours.

(f) Leyland tipper : Rs. 1,250 per day of use not exceeding 18 hours.

(g) Leyland taurus : Rs. 1750 per day of use not exceeding 18 hours;

(h) Nissan : Rs. 400 per day of use not exceeding 18 hours.

(i) Mazda : Rs. 750 per day of use not exceeding 18 hours.

(j) Mahindra Jeep : Rs. 2563.35 per day of use not exceeding 18 hours.

4. Thus, under the agreement, it was stated to be a composite agreement for hire of vehicles and to be used for loading and unloading and transport of the products. The party of the first part (the owner of the vehicles) was to retain the custody, ownership and possession of the vehicles. The vehicles were to be driven and operated by the persons who were to be paid by the owner. Further, cl. (17) provides for the hire charges. As correctly found by the Tribunal, the agreement does not require the owner of the vehicle to do any work at all. It is the assessee who makes use of the vehicles, and the equipment. He pays hire

charges on the basis of the number of hours of use and thus clearly the appellant is not justified in contending that s. 194C applies. It appears that under s. 194C, it is not necessary that there should be a works contract. Sec. 194C contemplates work being done, including supply of labour for carrying out the work. Sec. 194C, sub-s. (i), read as follows for the assessment year:

Payments to contractors and sub-contractors.--(1) Any person responsible for paying any sum to any resident (hereinafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and various bodies which are mentioned.

"Work" is defined as including carriage of goods or passengers by any mode of transport other than by railways. Therefore, the contention of the appellant would appear to be that insofar as the material which are goods are carried in the vehicles, it amounts to carrying out the work. The'' Tribunal has returned the finding that what is involved is hire charges paid for the goods taken on hire. What the appellant is permitted to do with the vehicles alone is mentioned in cl. (2) of the contract which we have already extracted. All those works are done by the appellant. No work within the meaning of s. 194C is actually done by the owner. In such circumstances, we find no merit. No doubt, the drivers, etc. are paid for by the owner.

5. Equally without merit is the contention of the learned counsel for the appellant that for attracting s. 194-I, there must be a lease or other arrangement relating to immovable property. The argument is based on the provisions contained in the Explanation which we have already extracted. The Explanation defines the word "rent". According to him, the words "lease", "sub-lease" and "tenancy" are used. The further words "such agreement or arrangement" draw their colour from the words "lease, sub-lease and tenancy" and since cls. (a), (b) and (c) refer to land, building including factory building or land appurtenant to a buildings including factory buildings respectively, the argument runs that by lease, sub-lease, tenancy or other agreement or arrangement, unless it relates to immovable property, the payment of any amount, call it rent or otherwise, would not bring it within the definition of rent under s. 194-I, even if it is for the use of machinery. He would submit that even it is machinery, in other words, unless it be that machinery assumes the character of immovable property under the Transfer of Property Act, the payment of any rent in respect of machinery which is not immovable property would not bring it within the meaning of "rent" under the Explanation.

6. We are of the view that there is no merit at all. Sec. 194-I specifically contemplates liability with any person paying rent to deduct income tax at the rate of ten per cent for the use of any machinery or plant or equipment. (As far as the assessment year in question is concerned, the rate of tax was increased to ten per cent).

7. We are of the view that there is no basis for confining the effect of the words "other agreement or arrangement for the use of "either separately or together" in regard to the machinery, only if it is part of immovable property. The legislative intent is clear, in that, it intends liability to deduct tax in respect of "any machinery or plant or equipment". The machinery need not be the machinery annexed or immovable property otherwise under the Transfer of Property Act. We see no reason to dilute the width of the words "any machinery" contained in sub-s. (i) with the aid of the Explanation defining the word "rent". The Explanation in the circumstances cannot have the effect of confining the words "any machinery" as only machinery which is immovable property. We also take note of the words "either separately or together". Therefore, we reject the said contention. We find the reliance placed on the answer given by the IT Department under the Right to Information Act that the tax had been deducted at 2.06 per cent under s. 194C even after 13th July, 2006 in respect of payment made to transport contractors for transportation services, is misplaced. We are called upon to decide the legal aspects and are not to be deflected by the alleged practice attributed to the IT Department. Further more, we are concerned with the actual facts of this case.

8. The further question which arises for our consideration is whether the Tribunal ought to have remanded the matter relating to s. 40(a)(ia) for consideration of the AO. According to the learned counsel for the appellant, the deduction under s. 40(a)(ia) has been declined by the AO for even the amount which the appellant has deducted on the basis that the payments come within the ambit of s. 194C is disallowed. According to him, even assuming that the case falls under s. 194-I, at least the amount which the appellant has deducted under s. 194C should be allowed to be deducted from his total income as per law. In this connection he drew our attention to the judgment of the Calcutta High Court in Commissioner of Income Tax, Kolkata-XI Vs. M/s. S.K. Tekriwal, : Therein, the Calcutta High Court held as follows:

Here in the present case, the assessee has deducted tax under s. 194C(2) and not under s. 194-I, but there is no allegation that this TDS is not deposited with the Government account. Sec. 40(a)(ia) refers only to the duty to deduct tax and pay to Government account, there is nothing in the said section to treat the assessee as defaulter where there is a shortfall in deduction. And if there is any shortfall due to any difference of opinion, the assessee can be declared to be an assessee in default under s. 201 but no disallowance under s. 40(a)(ia) is allowed. No substantial question of law is involved.

9. Learned counsel for the Revenue would submit that the matter was only remanded and there is no finding and this Court may not interfere. We are of the view that while it is true that there is no finding rendered by the Tribunal, but at the same time, we feel that there is no basis for the Tribunal to have remanded the matter back to the AO. The Tribunal ought to have considered the matter by itself and rendered a finding. In such circumstances, in regard to the question

relating to s. 40(a)(ia), we set aside the direction of the Tribunal remitting the matter back and direct the Tribunal to render its findings and dispose of the appeal insofar as it relates to the question of deductibility of the amount paid under s. 40(a)(ia). Thus, while we answer question of law Nos. 1 to 3 against the appellant and in favour of the Revenue, we remit the matter back to the Tribunal by setting aside the direction of the Tribunal remanding the matter back in relation to s. 40(a)(ia) for consideration of the question under s. 40(a)(ia). The appeal is thus partly allowed.