IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITA No. 9 of 2014

Reserved on: 16.6.2014

Date of decision: June 25, 2014

M/s Palam Gas Service ….. Appellant.

Vs.

Commissioner of Income Tax …. Respondent.

Coram

The Hon'ble Mr. Justice Mansoor Ahmad Mir, Chief Justice.

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?Yes

For the Appellant : Mr. Ajay Vaidya, Advocate.

For the Respondent : Mr. Vinay Kuthiala, Senior Advocate, with Mr. Diwan Singh Negi, Advocate.

Tarlok Singh Chauhan, Judge

The assessee has preferred the present appeal under Section 260-A of the Income Tax Act, 1961 (for short 'Act') against the order of the Income Tax Appellate Tribunal, Chandigarh Bench 'B', Chandigarh (hereinafter referred to as 'ITAT') passed in ITA No. 1043/Chd/2012 dated 27.11.2013, Assessment Year 2006-07.

2. The appellant-assessee is engaged in the business of purchase and sale of LPG cylinders under the name and style of M/s Palam Gas Service at Palampur. During the course of assessment proceedings, it was noticed by the Assessing Officer (hereinafter referred to as 'AO') that the main contract of the assessee for carriage of LPG was with the Indian Oil Corporation, Baddi. The assessee had received the total freight payments from the IOC Baddi to the tune of ₹ 32,04,140/-.

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[1] *Whether reporters of Local Papers may be allowed to see the Judgment ?Yes*

The assessee had, in turn, got the transportation of LPG done through 3 persons, namely Bimla Devi, Sanjay Kumar and Ajay to whom he made the freight payment amounting to ₹20,97,689/-. The A.O. observed that the assessee had made a sub-contract with the given three persons within the meaning of section 194C of the Act, and, therefore, he was liable to deduct tax at source from the payment of ₹ 20,97,689/-. On account of his failure to do so, the said freight expenses were disallowed by the A.O. as per the provisions of Section 40 (a) (ia) of the Act.

3. Against the order of A.O., the assessee preferred an appeal before the Commissioner of Income Tax (Appeals), Shimla, H.P., (hereinafter referred to as 'CIT'), who vide its order dated 17.8.2012 upheld the order dated 30.11.2011. The matter thereafter came up in appeal before the ITAT which too met with the same fate.

4. It is in this background that the appellant is now before us and has challenged the order passed by the A.O., CIT and ITAT as being against the facts and circumstances of the case besides being based merely on conjectures and surmises. It is further contended that in this case the provisions of Sections 147/148 were not applicable as the audit objection was against the well settled position of law. The further case of the appellant is that the other provisions of the Income Tax Act, particularly Section 40 (a) (ia) and Section 194C of the Act have been completely misconstrued by the authorities below.

5. We have heard Mr. Ajay Vaidya, learned counsel for the appellant and Mr. Vinay Kuthiala, Senior Advocate, assisted by Mr. Diwan Singh Negi, learned counsel for the respondent and have also gone through the records carefully.

6. Section 40 (a) (ia) of the Act reads as under:

"**Amounts not deductible.**

*"**40**. Notwithstanding anything to the contrary in sections 30 to [38], the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-*

(a) in the case of any assessee –

(1) any interest (not being interest on a loan issued for public subscription before the 1st day of April, 1938), royalty, fees for technical services or other sum chargeable under this Act, which is payable, -

(A) outside India; or

(B) in India to a non-resident, not being a company or to a foreign company,

on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:

***Provided** that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.*

Explanation.- For the purpose of this sub-clause,-

(A) "royalty" shall have the same meaning as in Explanation 2 to clause (vi) of sub-section (1) of section 9;

(B) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(ia) any interest, commission or brokerage, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200:

***Provided** that where in respect of any such sum, tax has been deducted in any subsequent year or, has been deducted in the previous year but paid in any subsequent year after the expiry of*

the time prescribed under sub-section (1) of section 200, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

Explanation.- For the purposes of this sub-clause,-

(i) "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to section 194H;

(ii) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vii) of sub-section (1) of section 9;

(iii) "professional services" shall have the same meaning as in clause (a) of the Explanation to section 194J;

(iv) "work" shall have the same meaning as in Explanation III to section 194C".

7. Section 194C of the Act as prevailing at the relevant time reads as follows:

"**Payments to contractors and sub-contractors.**

"194C.(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-

(a) the Central Government or any State Government; or

(b) any local authority; or

(c) any corporation established by or under a Central, State or Provincial Act; or

(d) any company; [or]

(e) any co-operative [society; or]]

(f) any authority, constituted in India by or under any law, engaged either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both; or

(g) any society registered under the Societies Registration Act, 1860 (21 of 1860) or under any law corresponding to that Act in force in any part of India; or

(h) any trust; or

(i) any University established or incorporated by or under a Central, State or Provincial Act and an institution declared to be a University under section 3 of the University Grants Commission Act, 1956 (3 of 1956); [or]

[(j) any firm,]

shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, [deduct an amount equal to-

(i) one per cent in case of advertising,

(ii) in any other case two per cent,

of such sum as income tax on income comprised therein.]

(2) Any person (being a contractor and not being an individual or a Hindu undivided family) responsible for paying any sum to any resident (hereinafter in this section referred to as the sub-contractor) in pursuance of a contract with the sub-contractor for carrying out, or for the supply of labour for carrying out, the whole or any part of the work undertaken by the contractor or for supplying whether wholly or partly any labour which the contractor has undertaken to supply shall, at the time of credit of such sum to the account of the sub-contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to one percent of such sum as income tax on income comprised therein.

*[**Provided** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the sub-contractor, shall be liable to deduct income tax under this sub-section.]*

[Explanation I. – For the purposes of sub-section (2), the expression "contractor" shall also include a contractor who is carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and the Government of a foreign State or a foreign enterprise or any association or body established outside India.]

[Explanation II]. – For the purposes of this section, where any sum referred to in sub-section (1) or sub-section (2) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

[Explanation III.] – For the purposes of this section, the expression "work" shall also include -

(a) advertising ;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods and passengers by any mode of transport other than by railways;

(d) catering.]"

8. It may be noticed that even before the authorities below the specific case of the appellant was that the provision of Section 194C(2) is not applicable to the appellant's case as the payments were made by him under an independent contract between him and the truck owners. Therefore, according to him his case fell within the purview of Section 194C (1) of the Act and imposed no liability of TDS on the appellant being an individual. It was also submitted that no findings had been recorded by any of the authorities with respect of there being any oral or written agreement between the assessee and the three parties for the carriage of LPG. He had further maintained that his case was that since the hiring was not a result of any written or oral contract, the payments made in consequence of such hiring to the transporters or to the truck owners directly were also not a result of any written or oral contract and it was so because the liability fastened upon the transporter (contractor) having entered into contract with the parties for transporting the goods, therefore, could not have been fastened either on to the transporter or the truck owners from whom the trucks had been hired.

9. The other argument which had been raised by the appellant before the authorities below was that the payments made by him could not be disallowed under Section 40 (a) (ia) because the same had been paid and were not payable.

10. All these submissions of the appellant had been duly considered by the three authorities below and in fact the Assessing Officer had duly provided an opportunity to the assessee to explain as to why the freight payments made to the sub-contractors should not be disallowed by invoking the provisions of Section 40 (a) (ia) of the Act. In response to this query, the assessee had duly admitted in writing

that *"……the tender for carriage of LPG was in the name of the assessee……. I would like to bring in your kind notice that all three persons are regular income-tax payers, having PANs and have duly declared truck income in their return of income. There was no loss of revenue by not deducting the tax".* In fact, the appellant also admitted that the three persons to whom the freight was paid were none other than his family members with Bimla Devi, being his wife and Sanjay and Ajay being his sons.

11. The plea of the appellant that his case does not fall within the ambit of Section 194C (2) of the Act or that he had not got the transportation work carried out as a sub-contract through his family members in respect of the tender for carriage of LPG in his name was not taken before the Assessing Officer. It was during the course of the appellate proceedings that this plea was raised before the CIT. Therein the main thrust of the appellant was that his case did not fall within the purview of Section 194C (2) but fell within the purview of Section 194C (1). Thus, the sum and substance of the appellant's case now was that the freight payments made by him were under an independent contract between him and the truck owners/ transporters and thus covered under Section 194C (1) and not under Section 194C (2).

12. The CIT as also the ITAT found this submission of the appellant to be not tenable as it was admitted fact that the tender for carriage of LPG from IOC Baddi was in the name of the appellant himself and that he had hired the trucks from the aforesaid three persons for the purpose of carrying out the work undertaken by him as a 'Contractor' from the IOC, Baddi. While insofar as the transportation work carried out by the said three persons is concerned, the appellant had no liability to

provide anything such as the drivers, fuel, accessories etc. rather the truck owners had incurred all the expenses related to the transportation of the LPG and the appellant had made the payment to them not on the basis of individual trips of the trucks but for the entire deal work. The nature of transportation between the appellant and the three persons was self explanatory as the appellant had himself submitted that the payments were made under an independent contract between him and the truck owners. On such basis, the authorities below recorded a pure finding of fact that there did not exist any explicit agreement between the assessee and the three truck owners.

13. Now as far as the question of applicability of Section 194C (1) or Section 194C (2) is concerned, it was found that since the freight charges were being paid by the appellant to the three persons in respect of the sub-contract under Section 194C (2) following the appellant's own contract with IOC, Baddi, it was evident that the appellant was trying to take undue benefit of the amendment brought about in Section 194C (1) w.e.f. 1.6.2007 by taking the plea that the transaction with the three truck owners was in the nature of a contract.

14. The learned counsel for the appellant then placed reliance upon the judgment of this Court in ***ITA No. 39 of 2005*** titled ***Commissioner of Income Tax*** *vs.* ***M/s Ambuja Darla Kashlog Mangu Transport Co-Op. Society and other connected matters decided on 20.10.2009*** to contend that his case was squarely covered by the said judgment whereby this Court had held that Section 194C (2) of the Act was not attracted in cases of Co-operative Societies which was getting its work executed through its members, who were the truck owners. We are afraid that the fact situation obtaining in the aforesaid case is absolutely

different from this case apart therefrom the ratio of the said judgment is not applicable to the present case. M/s Ambuja Darla case (supra) related to a co-operative society created by the transporters themselves with a view to enter into contract with the Companies. The Companies then entered into contract for transportation of the goods and material with the Society. The Society there was nothing more than a conglomeration of the truck owners themselves and had been created for the benefit of the truck operators, while the society itself did not do the work of transportation. It is in such circumstances that the provisions of Section 194C (2) were held to be not attracted to the fact situation obtaining in that case which would be clear from the following observations of this Court:

> *11. Section 194C(1) deals with payments made to the Contractor which in this case would mean the payment made by Companies which entered into contract of transportation with the assessees. Admittedly the Companies deducted tax at source in terms of Section 194C(1). The entire amount received by the assessee from the Companies after deductions was paid to the members of the truck operators who had carried the goods after deducting a nominal sum as "parchi charges". The question which arises is whether the members are sub-contractors or not.*
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> *12. The main contention of the Revenue is that since the assessee has a separate juristic identity and each of the truck operators who are members of the assessees have separate juristic identity they are covered with the meaning of Section 194C(2). It is urged on behalf of the Revenue that since the assessee being a person is paying a sum to the member truck operator who is a resident within the meaning of the Act, TDS is required to be deducted. This argument does not take into consideration the heading of the Section noted hereinabove and the entire language of Section 194C(2) which clearly indicates that the payment should be made to the resident who is a sub contractor. The concept of Sub Contract is intrinsically linked with Section 194C(2). If there is no sub contract then the person is not liable to deduct tax at source even if payment is being made to a resident.*

13. *To understand the nature of the contract, it would be relevant to mention that in the present cases the assessee Societies were created by the transporters themselves. The transporters formed the societies or Unions with a view to enter into a contract with the Companies. The Companies enter into contract for transportation of goods and material with the Society. However, the society is nothing more than a conglomeration of the truck operators themselves. The assessee societies have been created only with a view to make it easy to enter into a contract with the Companies as also to ensure that the work to the individual truck operators is given strictly in turn so that every truck operator has an equal opportunity to carry the goods and earn income. The society itself does not do the work of transportation. The members of the Society are virtually the owners of the society. It may be true that they both have separate juristic entities but the fact remains that the reason for creation of the Society was only to ensure that work is provided to all the truck operators on an equitable basis. A finding of fact has been rendered by the authorities that the societies were formed with a view to obtain the work of carriage from the Company since the Companies were not ready to enter into a contract with the individual truck operators but had asked them to form a society.*

14. *Admittedly, the society does not retain any profits. It only retain as nominal amount as "parchi charges" which is used for meeting the administrative expenses of the society. There is no dispute with the submission that the Society has an independent legal status and is also contractor within the meaning of Section 194C. It is also not disputed that the members have a separate status but there is no sub-contract between the society and the members. In fact if the entire working of the society is seen it is apparent that the societies have entered into a contract on behalf of the members. The society is nothing but a collective name for all the members and the contract entered by the society is for the benefit of the constituent members and there is no contract between the society and the members.*

15. *For the foregoing reasons we are of the considered view that Section 194C(2) of the Act is not attracted and the assessee Society(s) is not liable to deduct tax at source on account of payments made to the truck owners who are also members of the society. The questions of law accordingly decided in favour of the assessees and against the Revenue."*

Therefore, the reliance placed by the learned counsel for the appellant on judgment of this Court on M/s Ambuja Darla's case (supra) is totally misplaced.

15. Lastly, insofar as the plea taken by the appellant that no disallowance can be made under Section 40 (a) (ia) as the freight charges had been paid and were not payable. Suffice it to state that the provisions of Section 40 (a) (ia) of the Act were applicable not only to the amount which were shown as outstanding on the closing of the relevant previous year, but to the entire expenditure which became liable for payment at any point of time during the year under consideration and which was also paid before the closing of the year as rightly held by the authorities below.

16. All the aforesaid findings recorded by the learned authorities below are pure findings of fact which normally cannot be interfered with in the present appeal save and except if the findings of the Court on a fact is vitiated by reasons of having relied upon conjectures, surmises and suspicion not supported by any evidence on record or partly upon evidence and partly upon inadmissible evidence or the findings recorded can be termed to be in any manner perverse. None of the aforesaid conditions are qualified so as to call for interference in the present appeal.

17. The appeal raises no question of law much less substantial question of law and accordingly the same is not worth admission and is therefore dismissed, so also the pending application.

(Mansoor Ahmad Mir),
Chief Justice

June 25, 2014
(GR)

(Tarlok Singh Chauhan),
Judge.