IN THE INCOME TAX APPELLATE TRIBUNAL "B" BENCH, MUMBAI

BEFORE SHRI R.C. SHARMA, AM
AND SHRI MAHAVIR SINGH, JM

ITA No. 1945/Mum/2013
(Assessment Year: 2009-10)

Deputy Commissioner of Income-tax-10(1), Mumbai.455, Aayakar Bhavan, 4th floor, M. K. Marg, Mumbai-400 020.	Vs.	Mahanagar Gas Ltd. MGL House, Block No. G-33, Bandra Kurla Complex, Bandra (East), Mumbai-400 051. (PAN:AABCM4640G
(Appellant)		(Respondent)

Appellant by : Shri Sanjiv Jain, DR
Respondent by : S/Shri A. V. Sonde & P.P. Jayaraman

Date of hearing: 31.03.2016
Date of Pronouncement: 15.04.2016

O R D E R

PER MAHAVIR SINGH, JM:

This appeal by revenue is directed against the order of CIT(A)-21, Mumbai in Appeal No. CIT(A)-21/IT/356/2011-12 vide order dated 14.12.2012. Assessment was framed by Addl. CIT-10(1), Mumbai u/s. 143(3) of the Income Tax Act, 1961 (hereinafter referred to as "the Act") for AY 2009-10 vide his order dated 16.12.2011.

2. The first issue in this appeal of revenue is against the order of CIT(A) deleting the disallowance of expenses on account of employee's expenses of secondment for non-deduction of TDS by invoking the provisions of section 40(a)(ia) of the Act. For this, revenue has raised following ground no.1:

> *"1. (i) allowing the secondment expenses on which tax was not deducted at source and deleting the addition made on this account by the AO u/s.40(a)(ia) to the tune of Rs.1,93,46,000/- and in not appreciating that*

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non-deduction of TDS certificate was not obtained by the assessee company from the appropriate TDS authority for the year under consideration.

1. (ii) in ignoring that factually the assessee company was well aware of the TDS provisions of the Ac that "the non-deduction of TDS certificate should have been obtained u/s.197 for the current year as well; and instead wrongly relying on the decision Bombay High Court in the case of CIT Vs. Kotak Securities Ltd. (appeal no. 3111 of 2009)."

3. Briefly stated facts are that the AO during the course of assessment proceedings noticed from Schedule M forming part of P&L Account that the assessee has debited a sum of Rs.193.46 lacs on account of secondment charges under the head personal cost but no TDS has been deducted on the same. The AO applying the provisions of section 40(a)(ia) of the Act on this secondment charges disallowed the same by stating that no TDS has been deducted on the same. Aggrieved, assessee preferred appeal before CIT(A), who allowed the claim of the assessee by relying on the decision of coordinate bench of ITAT Bangalore in the case of IDS Software Solutions (India) Pvt. Ltd. Vs. ITO (International Taxation) (2009 122 TTJ 410 (Bang) and also the decision of Hon'ble Bombay High Court in the case of CIT Vs. Kotak Securities Ltd. in Appeal No. 3111 of 2009. Aggrieved, revenue came in appeal before Tribunal.

4. We have heard rival submissions and gone through facts and circumstances of the case. The facts relating to the above issue are that the assessee has incurred the secondment charges of employees seconded by Gail & British Gas to work with the assessee. The assessee produced joint venture agreement in respect to secondment charges namely with Gail & British Gas. It was explained that there was no mark up in the payments made to them and according to Ld. Counsel, this is clear from secondment agreement. There is also a letter from British Gas which clearly states that all the taxes due in India of the employees seconded to the assessee i.e. Mahanagar Gas Ltd. have been deducted from salary paid to secondees and paid to the Govt. of India. Ld. counsel for the assessee drew our attention to pages 23 and 24 wherein declaration made by British Gas is that taxes due of secondee employees have been paid by them in

India and relevant declaration is enclosed at pages 23 and 24 of the assessee's paper book. Ld. counsel for the assessee also drew our attention to secondment agreement enclosed at pages 25 to 38 of the assessee's paper book and particularly at page 35 of assessee's paper book. It is clarified that the IPR rights will remain with British Gas and for this purpose the secondment agreement was entered into. He referred to relevant clauses 16(1) and 16(2), which reads as under:

> *"16.1. Save as provided in Article 16.2 all specifications, reports, drawings, patents, copyright, designs and other technical information which are the property of British Gas shall remain in the ownership of British Gas and there shall be no transfer or licence of such property except as may be otherwise agreed in writing between the parties, or as provided under the Technology Transfer Agreement.*
>
> *16.2. for the avoidance of doubt the parties agree that during the Secondment any invention, design, copyright or other intellectual property made by a Secondee alone shall be owned by JV C, provided that British Gas shall be entitled to a royalty-free non-exclusive licence to utilize such invention, design, copyright or other intellectual property."*

5. Ld. counsel for the assessee, first of all, stated that the above employees are not the employees of assessee Mahanagar Gas Ltd. but employees of British Gas and they are working with assessee only in view of secondment agreement. It was also explained that as per joint venture agreement GAIL and British Gas have agreed to second, therefore, employees to the joint venture company i.e. Mahanagar Gas Ltd. on secondment basis and under secondment agreement certain employees have been seconded to the assessee. It was explained before us that since the employers were seconded for limited time of 2 to 3 years, the remuneration payable to these seconded employees were being paid by British Gas or GAIL recoverable from assessee on cost to cost basis. It was also explained that the nature of secondment agreement explaining the duties of second employees, their liabilities towards assessee and reimbursement of actual cost of remuneration, benefits and disbursement

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by assessee to the joint venture partners. It was explained that these are reimbursements. Another argument taken by Ld. counsel for the assessee that the employee's remuneration was allowable to tax in India then there would be tax deduction obligation on the employer who was responsible for making payment to the employees. In the present case, there was subsisting employer employee relation between British Gas and expatriate. British Gas was also person responsible for making payment to expatriate and application for deducting tax at source from salary was on British Gas. Ld. counsel for the assessee made a categorical statement that British Gas has deducted TDS on these remunerations paid to seconded employees and also deposited in the treasury of the Govt. of India. The TDS on salary payment to expatriate seconded employees to assessee have been given certificate to assessee stating the above fact which is available in the paper book of the assessee. All taxes have been paid by British Gas and second time TDS cannot be deducted on the same amount. For this, Ld. counsel for the assessee drew our attention to CBDT Circular No. 720 dated 30.08.1995 clarifying that any sum payable shall be liable for deduction of tax only under one section. The relevant circular is enclosed at assessee's paper book pages 126, which reads as under:

> *"1120. Payment of any sum shall be liable for deduction of tax only under one section.*
>
> 1. *It has been brought to the notice of the Board that in some cases persons responsible for deducting tax at source are deducting such tax by applying more than one provision for the same payment. In particular, it has been pointed out that the sums paid for carrying out work of advertising are being subjected to deduction of tax at source under section 194C as payment for work contract as also under section 194J as payments of fees for professional services.*
> 2. *It is hereby clarified that each section, regarding TDS under Chapter XVII, deals with a particular kind of payment to the exclusion of all other sections is this Chapter. Thus, payment of any sum shall be liable for deduction of tax only under one section. Therefore, a payment is liable for tax deduction only under one section."*

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6. Now we go through the case law cited by the Ld. counsel for the assessee in the case of CIT Vs. Kotak Securities Ltd. (2012) 340 ITR 333 (Bom), wherein it has been held as under:

> *"31. The object of introducing section 40(a)(ia), as explained in the Central Board of Direct Taxes Circular No. 5, dated July 15, 2005—See [2005] 276 ITR (St.) 151), is to augment compliance with the TDS provisions in the case of residents and curb bogus payments. Moreover, though section 194J was inserted with effect from July 1, 1995, till the assessment year in question that is the assessment year 2005-06 both the Revenue and the assessee proceeded on the footing that section 194J was not applicable to the payment of transaction charges and accordingly, during the period from 1995 to 2005 neither the assessee has deducted tax at source while crediting the transaction charges to the account of the stock exchange nor the Revenue has raised any objection or initiated any proceedings for not deducting the tax at source. In these circumstances, if both the parties for nearly a decade proceeded on the footing that section 194J is not attracted, then in the assessment year in question, no fault can be found with the assessee in not deducting the tax at source under section 194J of the Act and consequently, no action could be taken under section 40(a)(ia) of the Act. It is relevant to note that from the assessment year 2006-07 the assessee has been deducting tax at source while crediting the transaction charges to the account of the stock exchange though not as fees for technical services but as royalty. It is further relevant to note that it is not the case of the Revenue that on account of the failure on the part of the assessee to deduct tax at source, the Revenue has suffered presumably because, the stock exchange has discharged its tax liability for the assessment year in question. In any event, in the facts of the present case, in view of the undisputed decade old practice, the assessee had bona fide reason to believe that the tax was not deductible at source under section 194J of the Act and, therefore, the Assessing Officer was not justified in invoking section 40(a)(ia) of the Act and disallowing the business expenditure by way of transaction charges incurred by the assessee.*
>
> *32. Accordingly, we hold that the transaction charges paid by the assessee to the stock exchange constitute "fees for technical services" covered under section 194J of the Act and, therefore, the assessee was liable to deduct tax at source while crediting the transaction charges to the account of the stock exchange. However, since both the Revenue and the assessee were under the bona fide belief for nearly a decade that tax was not deductible at source on payment of transaction charges, no fault can be found with the assessee in not deducting the tax at source in the assessment year in question and consequently disallowance made by the Assessing Officer under section 40(a)(ia) of the Act in respect of the transaction charges cannot be sustained. We make it clear that we have arrived at the above conclusion in the peculiar*

> *facts of the present case, where both the Revenue and the assessee right from the insertion of section 194J in the year 1995 till 2005 proceeded on the footing that the assessee is not liable to deduct tax at source and in fact immediately after the assessment year in question, i.e., from the assessment year 2006-07 the assessee has been deducting tax at source while crediting the transaction charges to the account of the stock exchange."*

7. We also find that the issue is covered by the decision of ITAT, Bangalore bench in the case of IDS Software Solutions (India) (P) Ltd. Vs. ITO (International Taxation) (2009) 122 TTJ 410 (Bang), wherein the facts discussed as regards to where the assessee entered into a 'secondment agreement' with a US Company and obtained the services of an employee and the question arose whether the reimbursement by the assessee to the US Company of the salary paid by the US Company was chargeable to tax as "fees for technical services" . It was held that though the US Co was the employer in a legal sense but since the services of the employee had been seconded to the assessee and since the assessee was to reimburse the emoluments and it controlled the services of the employee, it was the assessee which for all practical purposes was the employer. Accordingly, the salary reimbursed to the US Co was not chargeable to tax. Though the person deputed by the US Co was a technical person, the consideration paid under the secondment agreement was not "fees for technical services" because the fact that the seconded employee was responsible and subservient to the payer (assessee) and was required to also act as officer or authorized signatory or nominee of the assessee made it inconsistent with an agreement for providing technical services.

In view of the above facts and circumstances, we dismiss this issue of revenue's appeal.

8. The second issue in this appeal of revenue is against the order of CIT(A) deleting the addition of compensation from customers made by AO on estimate basis. For this, revenue has raised following ground no.2:

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"2. Deleting the addition of Rs. 30 lacs on estimated basis on account of compensation from customers without appreciating the facts that the assessee is following mercantile system of accounting, the compensation receivable from the customers is required to be accounted on accrual basis."

9. At the outset, ld. counsel for the assessee stated that this issue has already been remitted back to the file of AO in the immediate preceding year exactly on identical facts by Tribunal in assessee's own case in ITA No. 6832/Mum/2011 for Asst. Year 2008-09 vide order dated 27.02.2013 and on similar line if the issue is remitted back to the file of the AO that will suffice the matter. On query from the bench, ld. Sr. DR has not objected to the stand of the assessee. Hence, we direct the AO to decide the issue in term of the principles laid down in the order passed in ITA No. 6832/Mum/2011 for Asst. Year 2008-09 vide order dated 27.02.2013. This issue of revenue's appeal is allowed for statistical purposes.

10. In the result, appeal of revenue is partly allowed for statistical purposes.

Order pronounced in the open court 15th April, 2016.

Sd/-
(R.C. SHARMA)
ACCOUNTANT MEMBER

Sd/-
(MAHAVIR SINGH)
JUDICIAL MEMBER

Mumbai, Dated 15th April, 2016
JD. Sr. P.S.
Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. CIT(A) -21, Mumbai
4. CIT- , Mumbai
5. DR, "B" Bench ITAT, Mumbai
6. Guard file.

By Order

(Asstt. Registrar)
ITAT, Mumbai

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