

IN THE HIGH COURT AT CALCUTTA
SPECIAL JURISDICTION (INCOME TAX)
ORIGINAL SIDE

IA NO. GA/2/2021
In
ITAT/179/2021
PRINCIPAL COMMISSIONER OF INCOME TAX, CENTRAL-2, KOLKATA
Vs
M/S. CHANDIMATA MANAGEMENT PVT. LTD.

BEFORE :

THE HON'BLE JUSTICE T.S. SIVAGNANAM

And

THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA

Date : 28th March, 2022.

Appearance:
Mr. Vipul Kundalia, Adv.
Mr. Anurag Ray, Adv.
... for the appellant.

Mr. Subhas Agarwal, Adv.
... for the respondent.

The Court : This appeal by the revenue filed under Section 260A of the Income Tax Act, 1961 (the Act, for brevity) is directed against the order dated 21st August, 2019 passed by the Income Tax Appellate Tribunal, 'B' Bench Kolkata (the Tribunal) in ITA No.2387/Kol/2017 for the assessment year 2009-10.

The revenue has suggested the following substantial questions of law for consideration:

- a) Whether the Income Tax Appellate Tribunal is justified in law by deleting the disallowance made by the Assessing Officer u/s 40(a)(ia)?

- b) Whether the Income Tax Appellate Tribunal is justified in law in considering the contractual payment made by the assessee as payment for purchase of soil?
- c) Whether in view of the legal position of the instant case, the order passed by the Learned Income Tax Appellate Tribunal 'B' Bench overlooking the merits and findings of the order of Assessing Officer and the CIT (Appeals) and the conclusion arrived by the Learned Tribunal is perverse in law?

We have heard Mr. Vipul Kundalia, learned standing counsel appearing for the appellant/revenue and Mr. Subhas Agarwal, learned counsel appearing for the respondent/assessee.

The revenue is before us being aggrieved by order passed by the Tribunal reversing the concurrent findings recorded by the Assessing Officer and the Commissioner of Income Tax (Appeals)-21, Kolkata [CIT(A)]. The issued raised before us is whether the Tribunal was justified in deleting the disallowance made by the Assessing Officer under Section 40(a)(ia) of the Act. The facts leading to the filing of the present appeal are as follows.

The assessment for the year under consideration was completed under Section 143(3) of the Act by order dated 18th December, 2011. The Commissioner of Income Tax, Central-II, Kolkata (CIT) invoked his powers under Section 263 of the Act on two grounds of which we are concerned only with regard to the issue relating to disallowance under Section 40(a)(ia). The CIT was of the view that as per the provisions of Section 40(a)(ia) any amount payable to a contractor or sub-contractor for carrying out any work on which tax is deductible at source under Chapter XVIII B

and if such tax is not being deducted during the previous year or tax has been deducted but not paid to Government account on or before the due date specified in Sub-section(1) of Section 139, such sum shall not be allowed as deduction in the computation chargeable under the head “profit and gains of business or profession”. Further, the CIT points out that documents/details relating to deduction of tax at source is not available in the assessment records and the recipients of the contract payment have also not furnished any clarification regarding deduction of tax at source in terms of the provisions of the Act. Therefore, the CIT was of the view that this has resulted in underassessment of income to the extent of Rs.11,02,88,000/-. Accordingly, a show cause notice dated 6th March, 2014 was issued and the assessee also filed a written submission stating that all necessary details had been submitted before the Assessing Officer during the course of assessment and the amounts paid were for purchase of soil and it is not a works contract and, therefore, they are not liable to deduct tax under Section 194C and consequently, the provisions of Section 40(a)(ia) will not apply. The CIT after considering the submissions of the assessee held that on perusal of the assessment records the Assessing Officer has not examined the issue as to whether the payments were contractual in nature and hence whether tax should have been deducted at source under Section 194C of the Act. The CIT also faulted the Assessing Officer for not having applied his mind to the essential issues under the said head. Therefore, he came to the conclusion that the assessment is erroneous and prejudicial to the interest of the revenue, consequently set aside the assessment and directed the Assessing Officer to redo the

assessment de novo after examining the issue regarding the nature of payments as to whether they were for works contract or were on account of purchase of material as claimed by the assessee. Pursuant thereto, the Assessing Officer took up the assessment for de novo consideration and held that from the perusal of the ledger accounts submitted by the recipients of the accounts mentioned, they had received the entire contractual amount through cheques and recognized the transaction in their accounts as “contractual and other income”. Further, in their profit and loss accounts the recipients of the contract had recognized the supply of the soil to the assessee company as contractual revenue and not considered the supply of soil as sale of goods or material. Therefore, the said issue was decided against the assessee.

On perusal of the assessment order dated 31st March, 2015, we find that in the hearing on 8th December, 2014 the assessee was asked to explain why addition should not be made on the basis of failure to deduct tax at source as per law and further notices were issued under Section 133 (6) of the Act to the parties to obtain documents and other related papers/evidence for which no reply was received by the Assessing Officer. Further, the Assessing Officer pointed out that the assessee has to bring on record the evidences to enable the Assessing Officer to ascertain as to the nature of the transaction and that the assessee has not submitted any substantial evidence to support his claim that tax need not be deducted at source. Thus, the Assessing Officer concluded that in the absence of the evidence the sum of Rs.10,62,50,000/- has to be disallowed and added to the total income of the assessee under Section 40(i)(a) of the Act. Aggrieved

by such order, the assessee preferred appeal before the CIT(A). Before the appellate authority, the assessee contended that the expenditure was made for purchase of soil from the third parties and the assessee entered into agreement to supply soil to fill up the land and consideration was paid to four third parties, the details of which were furnished along with their submissions as Annexure-A. The assessee also referred to the agreement, a copy of which was also filed as Annexure-B. Further, the assessee stated that the Assessing Officer himself was not clear about the treatment of such expenditure while passing the assessment order and which is evident from the language used in the assessment order. Further, the Assessing Officer was well informed by the confirmations from the parties who had submitted reply in response to the notices issued under Section 133(6) of the Act that they had supplied only soil to the assessee and received payment through account payee cheques. Further, it appears from the statements of the parties from whom soil had been purchased by the assessee that such parties have categorized such supply under the head 'sales' only and the audited profit and loss account for the year ended 31st March, 2009 of those companies could be referred to show that they have categorized such supply as sales. Copies of audited balance sheet as at 31st March, 2009 along with the profit and loss account for the year ended 31st March, 2009 is enclosed as Annexure-E. Further, it is submitted that by mistake the categorization of purchase/sale of soil has been categorized as contractual income in Schedule 8 of the financial statement of the assessee company for the year ended 31st March, 2009. Therefore, the assessee contended that it is not a case where tax has to be deducted at source. The CIT(A)

after considering the submissions has rendered his finding in paragraphs 6 of the order dated 18th October, 2017. It is recorded by the CIT(A) that he has called for and examined the assessment record from which it is not seen that assessee has paid huge sums to certain parties for alleged supply of soil at various sites and the payments have been made against alleged purchase. However, neither before the Assessing Officer nor in the appeal the assessee named a single site where such alleged purchased soil was supplied. Further, it would be a normal feature that in purchase of such enormous quantities of whatever item there would be sundry creditors/debtors outstanding at the end of the year. However, the examination of the balance sheet shows that such items of normal business are conspicuous by their absence. Further, the CIT(A) observed that the Assessing Officer was brought on record by way of evidence from the financial statements of the assessee that these were contractual obligations and the assessee was required to deduct tax at source. Further, the CIT(A) also pointed that in the profit and loss accounts the recipients of the contract had recognized the supply of soil to the assessee company as contractual revenue and not considered the supply of soil as sale of goods or material. Thus, the CIT(A) agreed with the findings of the Assessing Officer.

With regard to the contention of the assessee that there occurred mistake in the categorization of purchase/sale of soil in Schedule 8 of the financial statements, the CIT(A) rejected such an argument to be an afterthought to cover the deficiency of not having deducted tax at source. Further, the Assessing Officer has considered the replies given by the

parties and has given a specific finding that they are also reporting the same as contractual revenue in their financial statements. The agreement for sale produced by the assessee was rejected as fabricated documents as not even one site is mentioned in any of the documents and if the sites were mentioned enquiry could have been done by the concerned authorities. On the same ground the billing invoices were also considered to be fabricated and created to give a colour that the transactions are genuine. On the above grounds, the CIT(A) confirmed the order passed by the Assessing Officer. The Tribunal by the impugned order has reversed the concurrent findings on facts rendered by the Assessing Officer and the CIT(A). On perusal of the order passed by the Tribunal, we find that the Tribunal holds that on perusal of the assessee's details including the payee's account, they have nowhere recognized the impugned payments to be contractual sums. In this regard, reference was made to pages 22 to 54 of the assessee's paper book which, according to the Tribunal, reveals the clinching position. Therefore, the Tribunal concludes that Section 194C would not stand attracted.

We are conscious of the legal position that the Tribunal is the last fact-finding authority in the hierarchy of the authorities provided under the Act. Thus, the Tribunal would be justified in appreciating and re-appreciating the documents and information available on the file of the Assessing Officer as well as the CIT(A). However, when the Tribunal seeks to interfere with the concurrent finding on facts, the least that is expected is to assign sufficient reasons for arriving at such conclusions. We have in the previous paragraphs indicated the findings on fact recorded by the Assessing Officer

and the CIT(A) with a view to show that there should have been no consideration as to how those findings recorded by the Assessing Officer and the CIT(A) are patently erroneous, contrary to facts, warranting interference. On reading of paragraph 4 of the impugned order, we find that the Tribunal has not rendered any such finding. The Tribunal has perused certain pages from the paper book filed by the assessee and in its opinion those documents clinch the position. There is no satisfaction recorded by the Tribunal as to how those documents would exonerate the assessee for not having deducted tax at source. The Tribunal does not set aside the findings of the CIT(A) who has come to the conclusion that certain documents produced by the assessee were fabricated and concocted. Thus, we are of the view that a thorough exercise was called for in the matter, more particularly when the Tribunal seeks to upset the concurrent findings on fact. Therefore, the order passed by the Tribunal calls for interference.

For the above reasons, the appeal is allowed. The order passed by the Tribunal is set aside and the matter is remanded to the Tribunal for fresh consideration to hear the parties and pass a speaking and reasoned order on merits and in accordance with law.

We make it clear that we have not expressed any opinion on the merits of the matter and whatever findings we have recorded above are only to justify our ultimate conclusion that the matter requires to be re-heard by the Tribunal afresh. Consequently, the substantial questions of law are left open.

We grant liberty to the assessee and the revenue to raise all contentions, both factual and legal, before the Tribunal.

In view of the above, the connected application being IA No.GA/2/2021 is disposed of.

(T.S. SIVAGNANAM, J.)

(HIRANMAY BHATTACHARYYA, J.)