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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 16th October, 2014

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ITA 437/2014

COMMISSIONER OF INCOME TAX-IV Appellant
Through Mr. Kamal Sawhney, Sr. Standing
Counsel.

Versus

M/S HIMALYA INTERNATIONAL LTD. Respondent
Through

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE JAYANT NATH

SANJIV KHANNA, J.

The present appeal by the Revenue relates to assessment year 2005-06 and the challenge is to the deletion of addition of Rs.4,07,92,581/- out of addition of Rs.4,33,78,000/- made by the Assessing Officer. As the findings recorded by the Income Tax Appellate Tribunal (Tribunal, for short), affirming the decision of the first appellate authority-Commissioner of Income Tax (Appeals) [C.I.T (Appeals)], are factual in nature, the challenge is on the ground that the conclusion formed in the impugned order dated 14th March, 2014, is



perverse.

2. We have gone through the assessment order. The respondent-assessee was engaged in the business of manufacture, food processing and infotech. The respondent-assessee had exported processed vegetable products to the United States of America (USA) and had entered into an agreement with M/s. Global Reliance Inc., USA. Copy of the said agreement was placed on record before the Assessing Officer, who observed it to be a self-serving document on the ground that the agreement was neither registered nor executed on a stamp paper. M/s Global Reliance Inc., USA was closely associated with the assessee. He also observed that the assessee in the return of income had shown 'business expenses' amounting to USD 343347 equivalent to Rs.1,51,07,247/-, but in support of the claim had only filed certificate of an auditor from USA and had furnished and relied upon the confirmations/certificates given by M/s. Global Reliance Inc. The Assessing Officer, on examination of the profit and loss account, noticed that the assessee had claimed the following amounts as "USA office expenses":-

"	(in Rs.)
1 Ocean freight	12881000
2 Duties	4385000
3 Warehousing expenses	1183000
4 Road freight USA	9822000
5 Selling and administrative expenses	15107000
Total	<u>43378000</u>
	”



The Assessing Officer held that these “expenses” were in nature of post sale expenses and, therefore, did not pertain to the assessee. Evidence placed on record by the assessee to show that the expenses were actually incurred, were not satisfactory or substantive. Thus, the aforesaid expenditure of Rs 4,33,78,000/- was disallowed.

3. The C.I.T (Appeals) substantially reversed the said findings after noticing and recording the factual matrix in detail. He observed that the assessee had appointed M/s. Global Reliance Inc., New Jersey, USA, as a consignee agent, who were dealing with the exports made by the assessee from India. He examined the documentations placed on record and referred to the remand report submitted by the Assessing Officer. Name, address and other details of M/s Global Reliance Inc., a company registered and incorporated in the USA were placed on record. On the question of ocean freight, it was stated that the same was verified by APEDA, which had granted subsidy of Rs.3,60,70,000/- towards ocean freight. The custom duty, it was stated, was paid to the custom department in the USA and stood proved from the documents. It is noticeable that the C.I.T (Appeals) has referred to the custom duty receipt, which was placed on record with the name of payer as “M/s. Global Reliance Inc”. The warehousing, selling and administrative expenses were actually incurred by the consignee. In respect of selling, administrative and other incidental expenses, it was stated that



M/s. Global Reliance Inc was paid at the rate of 9.05% of the to sales made in the USA as per the agreement. The road transport receipts, in which carrier's name was recorded as "M/s. Global Reliance Inc", were relied upon. With regard to warehousing expenses, the C.I.T(Appeals) observed that some of the invoices, were in the name of "M/s. Global Reliance Inc" and some were in the name of "Transatlantic Marketing" (Associate of M/s Global Reliance Inc.). The documents duly and affirmatively supported the assessee's claim.

4. The C.I.T(Appeals) elucidated that the respondent-assessee had a 100% export oriented factory at Paonta Sahib, Himachal Pradesh. The entire production from the said factory was exported to the USA. Exports were made in sealed containers from the factory. The net realisable value, after deduction of all the expenses incurred, was declared. In support of the exports, Forms ARE-I, filed by the assessee, with the customs and excise authorities were placed on record. The said forms mentioned the notional value of goods, which was the estimated realizable value after deduction of expenses relating to ocean freight, road transport, custom duty, warehousing expenses etc. Reference was made to the remand report dated 28th October, 2010, regarding the export sales. The justification for entering into the contract with M/s. Global Reliance Inc., as stated, was that the latter



was functioning and operating in the USA and the respondent-assessee had availed of their services. As per the agreement, the assessee had to pay 9.05% of the total sales made by the consignee. With regard to certificate of Certified Public Accountant (CPA), it was held that the same was called for by the assessing officer and on his insistence certificate of one Stanley Osur, CPA of the USA was furnished to show the expenses incurred by M/s. Global Reliance Inc. during the relevant period. Break-up of the said expenses were duly mentioned in the certificate.

5. The aforesaid findings have been accepted by the Tribunal.
6. Keeping in view the aforesaid position, this court vide order dated 1st September, 2014, brought to the notice of the Revenue that the findings recorded by the appellate authorities including the Tribunal appeared to be factual in nature. It was highlighted that the respondent-assessee had filed documents in the form of invoices, bills etc., which were produced and accepted. Counsel for the appellant-Revenue had taken time to examine the matter.
7. We find that the Revenue has not placed on record invoices, bills etc. It has not indicated and highlighted as to why and for what reason, the factual finding is perverse.
8. Having examined the reasons given in the assessment order and factual position and detailed discussion by the C.I.T(Appeals),



affirmed by Tribunal, which has been noticed above, we do not think that findings recorded by the appellate authorities can be treated and regarded as perverse. We also record that the C.I.T(Appeals) had sustained addition of Rs.25,85,419/- out of addition of Rs.4,33,78,000/- made by the assessing officer, noticing that the assessee had not been able to produce bills and invoices for the said amount. The said addition has been sustained by the Tribunal. The C.I.T(Appeals) has also referred to the fact that in the preceding assessment years, the assessing officer did not dispute identical agreements and had accepted them.

9. During the course of hearing, learned counsel for the appellant-revenue drew our attention to ground (b) raised in the present appeal to the effect that the assessee had not deducted TDS on the payments, which as per the version of the assessee, were contractual payments. In other words, the learned counsel for the appellant-Revenue submits that Section 40(a)(ia) of the Act would be applicable. We notice that the aforesaid section and provision was neither invoked by the Assessing Officer nor by the first appellate authority. However, we find that before the Tribunal, the Departmental Representative did raise the contention that TDS provisions would be applicable. The aforesaid contention was rejected by the Tribunal, relying upon decision of the Supreme Court in the case of *GE India Technology Centre P. Ltd. Vs.*



Commissioner of Income Tax, (2010) 327 ITR 456 (SC), on t
ground that M/s Global Reliance Inc. was not liable to pay tax under
the provisions of the Act and, therefore, the assessee was not liable to
deduct tax at source. It appears that the Departmental Representative
had invoked and relied on Section 195 of the Act. Before us the
revenue, as per the grounds of appeal, seeks to rely upon Section 194C
of the Act. It is clear that application of Section 194C of the Act was
not pleaded before the Tribunal.

10. As far as Section 195 is concerned, the same would not be
applicable as it is apparent that M/s. Global Reliance Inc. did not have
any business operations in India and they were functioning and
operating in the USA. From the order of the Tribunal, it does not
appear that the Revenue had relied upon deeming provisions under
Section 9 of the Act to hold that M/s. Global Reliance Inc. was covered
and should be taxed in India in respect of the said income and,
therefore, the TDS under Section 195 of the Act should have been
deducted. Moreover, specific sub-section which could be applicable
was not stated and adverted to. Possibly reliance was placed on sub-
clause (i) to section 9(1), relating to business connection. Even in the
grounds of appeal before us, no reliance has been placed on the
provisions of Section 9 of the Act.

11. In these circumstances, we are not inclined to issue notice in the



present appeal and the same is dismissed.

SANJIV KHANNA, J.

JAYANT NATH, J.

OCTOBER 16, 2014
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