$~09 & 21

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

Date of decision: 25th August, 2014

\+ **ITA 359/2012**

CIT ..... Appellant
Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

versus

OPERA GLOBAL PVT LTD ..... Respondent
Through Mr. Ved Jain and Mr. Pranjal Srivastava, Advocates.

\+ **ITA 511/2012**

COMMISSIONER OF INCOME TAX ..... Appellant
Through Ms. Suruchi Aggarwal, Sr. Standing Counsel.

versus

OPERA GLOBAL PVT LTD ..... Respondent
Through Mr. Ved Jain and Mr. Pranjal Srivastava, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE V. KAMESWAR RAO

SANJIV KHANNA, J. (ORAL)

These two appeals by the Revenue pertain to assessment years 2006-07 and 2008-09, and impugn orders dated 13th January, 2012 and 30th September, 2011, passed by the Income Tax Appellate Tribunal ('Tribunal', for short). The appeals relate to disallowance under Section 40(a)(ia) of the Income Tax Act, 1961 ('Act' for short) in

respect of charges paid to clearing and forwarding agents. T amount involved in the assessment year 2006-07 is Rs.14,57,703/- and Rs. 77,69,537/- and in the assessment year 2008-09, the amount involved is Rs.48,61,509/-.

2. For the assessment year 2006-07, the respondent-assessee had filed return declaring a loss of Rs.2,311/-. The Assessing Officer held that 2% tax at source should have been deducted on the aforesaid charges under Section 194C and, therefore, the entire expenditure of Rs.14,57,703/- and Rs. 77,69,537/- was disallowed. Thus, addition of Rs.92,27,420/- was made.

3. In the assessment year 2008-09, the respondent-assessee had declared income of Rs.19,06,365/- during the previous year, but after setting off brought forward losses, the total taxable income was declared as 'Nil'. The assessee had declared book profits of Rs.23,63,480/- under Section 115JB of the Act. In the order relating to the assessment year 2008-09, again the entire expenditure of Rs 48,61,509/- was disallowed holding that there was failure to deduct tax at source under Section 194C of the Act. Accordingly, the income as declared was enhanced by the said amount.

4. Section 194C was inserted by Finance Act, 1972 to mandate deduction of tax at source, on payments made to a contractor for carrying out any work including supply of labour. Tax was to be

deducted by the stipulated payer at the rate of 1 or 2 per cent.

5. The expression 'carrying out any work' or the word 'work' was interpreted by the Delhi High Court, for the purpose of the said Section, in ***S.R.F. Finance Ltd. Vs. Central Board of Direct Taxes and Ors*** [1995] 211 ITR 861, to exclude professional services. It was observed, the said expression and word was wide enough to include any kind of work which could be undertaken by another, but was restricted to the work which was to be carried out. Therefore, it would not include brokerage paid to the broker who procured or secured fixed deposits from third parties as the said broker was not carrying out any work but had procured money for fixed deposits. The broker worked for himself and got paid.

6. In ***Birla Cement Works vs. CBDT***, [2001] 248 ITR 216, question arose before the Supreme Court, whether deduction under Section 194C was mandated when payment was made to transporters and whether the said payments were for "carrying out any work". It was held that the expression 'any work' was wider and should not be confined to a mere 'work contract', but, it would not include payment made to the transport contractor before Explanation III was added to the said Section w.e.f. 1st July, 1995. Further, Explanation III was not retrospective.

7. As Explanation III is applicable to the assessment years in

question, we deem it appropriate to reproduce the said Explanati along with relevant portion of Section 194C of the Act, as on 1st April, 2008:-

> 194C:- 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—
>
> (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 ; or

(k) any individual or a Hindu undivided family, or an association of persons or a body of individuals, whether incorporated or not, other than those falling under any of the preceding clauses 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 contractor, 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 :

Provided that no individual or a Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.

(2) Any person (being a contractor and not being an individual or a Hindu undivided family), responsible for paying any sum to any resident (hereafter 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 per cent. of such sum as income-tax on income comprised therein.

x x x x x

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.

x x x x x

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.

(3) No deduction shall be made under sub-section(1) or sub-section (2) from--

(i) the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor or sub-contractor, if such sum does not exceed twenty thousand rupees :

Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds fifty thousand rupees, the person responsible for paying such sums referred to in sub-section (1) or, as the case may be, sub-section (2) shall be liable to deduct income-tax under this section :

x x x x x x x

8. Explanation III in clause (c) states that the “work”, for the

purpose of Section 194C, shall also include carriage for goods a passengers by any mode of transport other than railways.

9. In this context, we would like to refer to Circular No. 715 dated 8th August, 1995 issued by CBDT explaining Revenue's point of view with reference to amended Section 194C w.e.f. 1st July, 1995. Question No's. 6 and 7 are relevant for the purpose of understanding whether tax at source was required to be deducted in the present case. The said questions and opinions/answers given by CBDT in the said circular read as under:

> "Question 6: Whether payment under a contract for carriage of goods or passengers by any mode of transport would include payment made to a travel agent for purchase of a ticket or payment made to a clearing and forwarding agent for carriage of goods?
>
> Answer : The payments made to a travel agent or an airline for purchase of a ticket for travel would not be subjected to tax deduction at source as the privity of the contract is between the individual passenger and the airline/travel agent, notwithstanding the fact that the payment is made by an entity mentioned in section 194C(1). The provisions of section 194C shall, however, apply when a plane or a bus or any other mode of transport is chartered by one of the entities mentioned in section 194C of the Act. As regards payments made to clearing and forwarding agents for carriage of goods, the same shall be subjected to tax deduction at source under section 194C of the Act.
>
> Question 7 : Whether a travel agent/clearing and forwarding agent would be required to deduct tax at source from the sum payable by the agent to an airline or other carrier of goods or passengers?
>
> Answer : The travel agent, issuing tickets on behalf of the

> airlines for travel of individual passengers, would not be required to deduct tax at source as he acts on behalf of the airlines. The position of clearing and forwarding agents is different. They act as independent contractors. Any payment made to them would, hence, be liable for deduction of tax at source. They would also be liable to deduct tax at source while making payments to a carrier of goods."

10. A reading of the aforesaid questions and answers would indicate that payment made to a travel agent or airline for purchase of the air ticket for travel was not required to be subjected to deduction of tax at source. However, in case of a chartered flight or bus etc., provisions of Section 194C would be attracted. Payment made to clearing and forwarding agents for carriage of goods would be subjected to tax at source under Section 194C of the Act. A perusal of answer to question No.7 clarifies that travel agents issuing tickets on behalf of airlines for travel of individual persons would not be required to deduct tax at source, but in case of clearing and forwarding agents, who act as independent contractors, payment made to them would be liable for deduction of tax at source.

11. The Tribunal in the orders has held that the bills, subject matter of the dispute were for reimbursement of the air freight charges paid to airlines. Air freight charges would not include commission, handling or other charges, which were payable for the services rendered by the clearing and forwarding agents. For the said services, separate bills

were issued and tax at source was deducted under Section 194C. It not the case of the Revenue that TDS had to be deducted on air freight paid to airlines. The payment towards air freight was required for exporting the goods as the respondent assessee was an exporter and the consignor. Delhi High Court in ***Commissioner of Income Tax Vs. Hardarshan Singh***, (2013) 350 ITR 427, has held that on applying principle of privity of contract, mere reimbursement of charges would not require deduction of taxes at source.

12. The findings of the Tribunal being factual and the Revenue having preferred these appeals challenging the said findings, by the order dated 23rd September, 2013 passed in ITA 359/2012, it was inter alia directed :-

> "Learned counsel for the appellant has filed two charts along with copies of sample invoices. Initially, she had submitted that MSS-I invoices submitted by the respondent were incorrect and no break up was given. However, we find that MSS-I invoices have been also filed by the appellant themselves.
>
> Learned counsel for the respondent has drawn our attention to the assessment order and referred to paragraph 8 and 9 thereof. In paragraph 9, the assessing officer has mentioned that the expenses amounting to Rs.1240288/- were claimed under the head clearing and forwarding and list of 31 parties was furnished. Payments to 30 parties were below the amount on which TDS was required to be deducted. In respect of one party, the assessee had furnished a certificate issued by the Department that no TDS was required to be

deducted. The assessing officer thereby did not make any disallowance on the said payments.

The submission of the respondent is that addition Rs.4861509/- made by the assessing officer was towards freight charges on export outwards as per the heading of paragraph 8 of the order. Freight charges were reimbursed and there was no element of commission or service charges. Clearing or forwarding agencies who were paid service charges etc were covered by paragraph 9.

Learned counsel for the appellant submits that this is not correct and the amount mentioned in paragraph 8 includes the commission and other service charges.

The appellant will file an affidavit of the Commissioner that the amounts mentioned in paragraph 8 as per the assessment order and the records, includes the commission or service charges other than freight charges. The said affidavit will be filed within a period of two weeks.

Documents filed by the appellant are returned to be filed along with affidavit. The Commissioner will also state whether the invoices with regard to Rs.1240288/- were on record and filed before the assessing officer and it will be stated whether the invoices of freight charges and clearing and forwarding agents were issued by the same party."

13. It is clear from the said order that the Assessing Officer in paragraph 9 of the assessment order for the assessment year 2008-09 had accepted that on Rs.12,40,288/- paid to clearing and forwarding agents, tax at source was deducted and paid, but on payment of Rs.48,61,509/-, no tax at source was deducted. The Tribunal had

accepted that this amount was towards reimbursement of air freig charges paid to airlines and did not include work/service charges paid to the clearing and forwarding agents, which were to the tune of Rs. 12,40,288/- on which TDS had been deducted.

14. Commissioner of Income Tax has filed affidavit dated 21st December, 2013, in which he has accepted that 14 out of 15 parties mentioned in paragraph 8 of the assessment order also find mention in paragraph 9. Paragraph 9 refers to of 31 parties and relates to payment of Rs.12,40,288/- to the persons to whom clearing and forwarding charges or fee had been paid on which tax at source was deducted. A perusal of paragraph 4 of the Tribunal's order would reveal that the parties had raised separate bills, which were reimbursed, as it was paid to the airlines for export of goods. In other words, the factual findings of the Tribunal are correct and the plea and stand taken by the Revenue is incorrect and wrong.

15. Similar directions were issued to the Commissioner of Income Tax to file an affidavit in ITA 359/2012. In the affidavit of the Commissioner of Income tax, relating to Assessment Year 2006-07, it is stated that 41 parties had raised invoices on account of freight charges and 31 parties on account of clearing and forwarding charges. 14 parties were common. Certain invoices were not available on record.

16. We are not inclined to accept prayer of counsel for the revenu of remand, on issue relating to matter of facts. Assessment years are 5 and 7 years old. Assessing Officer should have conducted the said exercise earlier.

17. On the second amount of Rs 14,57,703/- relating to Assessment Year 2006-07, the finding of the Commissioner of Income Tax (Appeals) and Tribunal is that none of the said parties were paid in excess of the stipulated amount of Rs 50,000/- and hence payments were not required to be subjected to TDS under section 194C(5) of the Act. The finding is factual and no details and particulars are filed to show that the finding is incorrect or perverse.

18. In view of the factual findings recorded by the Tribunal, affirming the decision of the Commissioner of Income Tax (Appeals), we hold that there is no merit in the present appeals and the same are dismissed.

SANJIV KHANNA, J.

V. KAMESWAR RAO, J.

AUGUST 25, 2014
NA