**IN THE INCOME TAX APPELLATE TRIBUNAL,
KOLKATA 'D' BENCH, KOLKATA**

**Before Shri P.M. Jagtap, Accountant Member and
Shri S.S. Viswanethra Ravi, Judicial Member**

**I.T.A. No. 684/KOL./2016
Assessment year: 2011-2012**

Assistant Commissioner of Income Tax,.....Appellant
Circle-1, Burdwan,
Aayakar Bhawan, Court Compound,
Burdwan-713 101

-Vs.-
Sri Gobinda Gupta,.....Respondent
Borehat, Nutanganj,
Dist. Burdwan-713 101
[PAN: AHBPG 7660 A]

Appearances by:
Shri Prem Narayan Khandelwal, FCA, for the assessee
Shri Arindam Bhattacharjee, Addl. CIT, D.R., for the Department

Date of concluding the hearing : December 04, 2017
Date of pronouncing the order : December 06, 2017

O R D E R

Per Shri P.M. Jagtap, Accountant Member :

This appeal is preferred by the Revenue against the order of ld. Commissioner of Income Tax (Appeals), Burdwan dated 20.01.2016 and the solitary issue involved therein relates to the deletion by the ld. CIT(Appeals) of the disallowance of Rs.32,06,445/- and Rs.3,58,000/- made by the Assessing Officer under section 40(a)(ia) on account of payment of carriage inward charges and transport charges respectively without deduction of tax at source.

2. The assessee in the present case is an individual, who is engaged in the business of wholesale trading of pulses and other cereals. The return of income for the year under consideration was filed by him on 29.09.2011 declaring total income of Rs.11,91,052/-. In the profit & loss a/c filed along with the said return, a sum of Rs.42,29,997/- was debited by the assessee on account of carriage inward expenses. During the

course of assessment proceedings, the said expenses were verified by the Assessing Officer and on such verification, he found that the assessee was liable to deduct tax at source from the payments made on account of carriage inward charges and transport charges aggregating to Rs.35,64,445/- as per the provisions of section 194C. Since the assessee had not complied with the said requirement, the Assessing Officer invoked the provisions of section 40(a)(ia) and made a disallowance of Rs.35,64,445/- in the assessment completed under section 143(3) vide an order dated 24.02.2014.

3. Against the order passed by the Assessing Officer under section 143(3), an appeal was preferred by the assessee before the ld. CIT(Appeals) and after considering the submissions made by the assessee as well as the material available on record, the ld. CIT(Appeals) deleted the disallowance made by the Assessing Officer under section 40(a)(ia) for the following reasons given in his impugned order:-

> *"I have carefully examined .all the material on record and the facts and circumstance surrounding the instant case. I have also examined the books of account, bills/vouchers produced before me. I find merit in the submissions of the appellant. It is clear from even a plain reading of section 194C of the Act that for the operation of this section, there is a prerequisite of a contractual relationship between the payer and the payee. This contract can have many forms, including an oral or even an implied one. But one ingredient that is absolutely imperative for the application of this section is the existence of a contractual relationship between the two involved parties. If this ingredient is absent, then the said section cannot be invoked.*
>
> *It is another settled principle of law that the person who asserts a proposition has to be the one to prove it. So, if an AO believes that a particular section is to be invoked because it is applicable in any case, then the onus of proving the applicability of that section lies with the AO. This is not the case of an assessee having to prove the elements of his return of income and his balance sheets where the onus lies at the door of the assessee who has made these assertions. In case, the AO disagrees with any of the elements of the returned income in the sense of the applicability, in the opinion of the AO, of any particular section or sections of the Act, then the responsibility of proving that the said section is applicable beyond doubt, lies with the AO.*

In the instant case, the appellant has submitted a set of books of account along with supporting material to show that there did not exist a necessity for the application of section 194C of the Act. The AO has disagreed with it. Therefore, now the onus has shifted to the AO to prove that section 194C was indeed applicable in the appellant's case. This can be done by establishing a contractual relationship between the appellant and the transporters. This has however not been done. The AO has not established that the transporters were working at the behest of the appellant. He has not established that it was the appellant who was making the payments to the transporters as part of an agreement - explicit or implied - between the appellant and the transporters. He has not established that the accounting practice outlined by the appellant which explained, consistently that the transportation costs were part of the purchase price and that the accounting entry of transporters was only a matter of business expediency and that no direct relationship existed between the transporter and the appellant - was wrong or from which income of the appellant could not be determined. Thus, the basic ingredients of section 194C had not been established and therefore there was no question of applying the rest of the provisions of the section. This is from the point of view of the AO.

Now, coming to the explanation offered by the appellant himself. He has pointed out that the transporters had to be appointed by the sellers themselves. This holds a certain reasonableness and therefore credibility in that since there are several sellers in far flung areas who would be sending their goods, definitely at times of selling of such commodities - since these sales are seasonal - when there would be rush by all purchasers to acquire these commodities - all at the same time, it would be reasonable to expect that the seller would be the ones who would pick up any transporter then available to dispatch the goods. The appellant, since he is getting these goods from several sellers, cannot be expected to have contracts with transporters in all the cases. The preponderance of probability is towards the sellers appointing the transporters. This has also been borne out by the fact that in some cases, it was found by the AO himself that the appellant had sent advance freight charges to some of the sellers of goods. If it was the appellant who would have been the one who had contracted the transporter, these advances would have been sent to the transporter and not the seller of the goods. These ingredients were overlooked by the AO while passing his order. In the case of other transporters also, the same business model would apply as this is the only logical and reasonable one. It is found that the appellant was in receipt of goods from transporters who had brought these goods at the behest of the sellers and the appellant paid the entire amount as purchase price of the goods. Later, the appellant made appropriate entries in the books for his own business purposes, and these entries were made consistently - the books of the appellant have been duly audited. The ratios of the decisions

relied upon by the appellant also point towards the same proposition.

In view of the above discussion and the fact that no contractual relationship existed between the appellant and the transporters, and respectfully abiding by the ratios of the decisions cited by the appellant, it is held that section 194C was not applicable in this case. The ground therefore is allowed".

Aggrieved by the order of the ld. CIT(Appeals), the Revenue has preferred this appeal before the Tribunal.

4. We have heard the arguments of both the sides and also perused the relevant material available on record. The ld. D.R. has submitted that the disallowance made by the Assessing Officer under section 40(a)(ia) on account of transport and carriage inward charges is deleted by the ld. CIT(Appeals) on the ground that there was a failure of the Assessing Officer to dislodge the case made out by the assessee that the provisions of section 194C were not applicable in his case. He has contended that if at all there was such failure on the part of the Assessing Officer, the ld. CIT(Appeals) should have given an opportunity to the Assessing Officer to establish that there was a contractual relationship between the assessee and the transporters attracting the provisions of section 194C. We are unable to accept this contention of the ld. D.R. As rightly submitted by the ld. counsel for the assessee, a specific contention was raised on behalf of the assessee before the Assessing Officer during the course of assessment proceedings itself that the transport charges in question were paid by the suppliers and the same were subsequently reimbursed by the assessee. It is thus clear that the stand that there being no contract between the assessee and the concerned transporters, the provisions of section 194C were not applicable, was taken by the assessee before the Assessing Officer and the onus to rebut the same was shifted to the Assessing Officer. He, however, failed to discharge the said onus and proceeded to make a disallowance under section 40(a)(ia) on the ground that the relevant freight charges were finally debited in the assessee's account. In these facts and circumstances, if the matter is restored to the file of the Assessing Officer for giving an opportunity to the Assessing Officer to

rebut the stand of the assessee as sought by the ld. D.R., it will result in giving a second innings to the Assessing Officer, which is not permissible. Moreover, the claim of the assessee that the transport charges were initially paid by the suppliers and the same were subsequently reimbursed by the assessee is duly supported by the relevant documentary evidence in the form of bills raised by the suppliers, wherein the transport charges are separately charged by the suppliers to the assessee. It is thus duly established by the assessee on evidence that there was no contract between him and the concerned transporters and there was no requirement of deduction of tax at source as per the provisions of section 194C. We, therefore, find no infirmity in the impugned order of the ld. CIT(Appeals) deleting the disallowance made by the Assessing Officer under section 40(a)(ia) on account of transport charges by holding that the provisions of section 194C are not applicable and upholding the same, we dismiss this appeal filed by the Revenue.

5. In the result, the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 6th day of December, 2017.

Sd/-	**Sd/-**
(S.S. Viswanethra Ravi)	**(P.M. Jagtap)**
Judicial Member	**Accountant Member**

Kolkata, the 6th day of December, 2017

Copies to : *(1)* ***Assistant Commissioner of Income Tax, Circle-1, Burdwan, Aayakar Bhawan, Court Compound, Burdwan-713 101***

2) ***Sri Gobinda Gupta, Borehat, Nutanganj, Dist. Burdwan-713 101***

(3) *CIT(Appeals), Burdwan,*
(4) *CIT- , Burdwan,*
(5) *The Departmental Representative*
(6) *Guard File*

TRUE COPY

By Order

Senior Private Secretary,
Head of Office/DDO,
Income Tax Appellate Tribunal
Kolkata Benches, Kolkata

Laha/Sr. P.S.