

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

**Before Shri Pramod Kumar (Accountant Member),
and Shri Mahavir Singh (Judicial Member)**

I.T.A. No.: 199/ Kol. / 2010
Assessment year: 2006-07

**Deputy Commissioner of Income Tax
Circle 9, Kolkata**

.....Appellant

Vs.

Kamal Mukherjee & Co (Shipping) Pvt Ltd
8/1 Loudon Street, 1st floor
Kolkata 700 001 [PAN :AABCK0867D]

.....Respondent

Appearances by:

Niraj Kumar, *for the appellant*

Samir Chakraborty and Abhijit Biswas, *for the respondent*

Date of concluding the hearing : February 10, 2012

Date of pronouncing the order : February 17, 2012

O R D E R

Per Pramod Kumar:

1. By way of this appeal, the Assessing Officer has challenged correctness of learned Commissioner (Appeals)'s order dated 18th November 2009, in the matter of assessment under section 143(3) of the Income Tax Act, 1961) for the assessment year 2006-07..

2. Grievances raised by the Assessing Officer, as set out in the memorandum of appeal in the form of questions, are as follows:

1. For that, on the facts and in the circumstances of the case, whether the learned CIT(A)-VIII, Kolkata is correct in treating

that there is no contractual relationship between assessee and Calcutta Dock Labour Board.

2. For that, on the facts and in the circumstances of the case, whether the learned CIT(A)- VIII, Kolkata, is correct in treating the section 194 C of the Income Tax Act is not applicable in the case of payments to Calcutta Dock Labour Board.

3. The issue in appeal lies in a very narrow compass of material facts. The assessee is engaged in the business of rendering stevedoring and CFS (container freight station) services. During the course of assessment proceedings, the Assessing Officer noted that the assessee has made payments aggregating to Rs 2,22,58,795, on account of stevedoring expenses, to Calcutta Dock Labour Board (CDLB, in short) , but neither the assessee deducted any tax at source from these payments, nor did the assessee furnish any 'no deduction certificate' issued by the income tax department in favour of the CDLB. The Assessing Officer did take note of the assessee's explanation that as CDLB is a government body, and, therefore, no tax is required to be deducted from the payments to CDLB. He, however, rejected the said explanation by stating that "**...it has been observed in the case of Vishakhapatnam Dock Labour Board that no deduction certificate has been issued to them by the income tax department and same was produced to the different parties for no deduction of tax**" and, "**thus, in my opinion, if Vishakhapatnam Dock Labour Board treats itself as a non government body, then Calcutta Dock Labour Board is also a non government body, and, as such, contention of the assessee is not acceptable**". The Assessing Officer then proceeded to observe as follows:

"Calcutta Dock Labour Board's main function is to provide labour to stevedores. Hence, it is required to deduct TDS u/s 194 C, if any payment is made to Calcutta Dock Labour Board. If assessee failed to deduct TDS, then section 40(a)(ia) will be applicable. In the instant case, assessee had not deducted any TDS from payment to Calcutta Dock Labour Board. As a result, amount paid to Calcutta Dock Labour Board is disallowed under

section 40(a)(ia) of the Act, and added to the income of the assessee”

4. It was in this backdrop that the Assessing Officer proceeded to disallow entire payment of Rs 2,22,58,795 made to CDLB, and converted returned income of Rs 1,49,775 into assessed income of Rs 2,24,08,570. Aggrieved, assessee carried the matter in appeal before the CIT(A). As set out in the statement of facts before the CIT(A), the assessee's basic contention was that **“as per the provisions of the Calcutta Dock Labour Workers (Regulation of Employment) Scheme 1970, the company is a ‘registered employer’ and for working in any vessel and/ or other related work, it is required to employ the workers enlisted with Calcutta Dock Labour Board, and pay the said Board the legitimate dues of the ‘registered workers’ for carrying out of various work relating to assessee’s business”**. It was thus contended that **“ Calcutta Dock Labour Board is, therefore, a conduit pipe between a ‘registered employer’ and ‘registered workers’”**. Upholding the grievance of the assessee, and after extensively reproducing from the written submissions filed by the assessee, learned CIT(A) opined as follows:

In this ground , the appellant is disputing Assessing Officer’s (AO’s) action in adding back labour payments made to Calcutta Dock Labour Board on the ground that tax has not been deducted at source, *inter alia*, claiming that Section 40(a)(ia) is not applicable to it. The judgment of jurisdictional High Court which has been brought on record by the appellant, to delineate the position of Calcutta Dock Labour Board vis-à-vis the appellant and the workers, states that the Calcutta Dock Labour Board is not an employer of the workers and the workers are employed by the stevedores [Calcutta Dock Labour Board vs. Wages Authority & Ors 1981-92 (86)CWN 113 dated 20.8.1981]. This position is a reiteration of the Hon’ble Apex Court’s judgment in the case of Visakhapatnam Dock Labour Board Vs Stevedores Association & Ors, Vishakhapatnam [1969 CC801]. This judgment further observes that the Dock Labour Board is operating as an agent of stevedores, who are actual employers. Perusal of these two judgments, relevant portions of which have been incorporated above, reveals that there is no

contractual relationship between the appellant and Calcutta Dock labour Board. As such, in my opinion, the provisions of Section 194 C does not apply to the appellant in this case. The disallowance under section 40(a)(ia) of the Income Tax Act is, therefore, deleted.

5. Aggrieved by the relief so granted by the learned CIT(A), the Assessing Officer is in appeal before us.

6. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case in the light of the applicable legal position.

7. We find that there is no dispute that, in view of the specific provisions of Section 40(a)(ia), in situation in which assessee makes any payment to **“a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139”**, the same will not be allowed as deduction in computation of income under the head ‘profits and gains from business and profession’. The contention of the assessee, however, is that the provisions of Section 194 C are not applicable on the facts of this case, and, therefore, disallowance under section 40(a)(ia) cannot be made, and it is this contention which has been accepted by the CIT(A), on the ground that **“the Dock Labour Board is operating as an agent of stevedores, who are actual employers”** and that **“there is no contractual relationship between the appellant and Calcutta Dock labour Board”**. Let us, therefore, begin by examining the application of Section 194 C to the payments in question. Section 194 C is reproduced below for ready reference:

194C - Payments to contractors.

(1) Any person responsible for paying any sum to any resident (hereafter 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 specified person 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 where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,

of such sum as income-tax on income comprised therein.

(2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

(3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (iv) of the Explanation, tax shall be deducted at source—

(i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or

(ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.

(4) No individual or 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.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed ¹⁷[thirty] 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 ¹⁸[seventy-five] thousand rupees, the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income-tax under this section.

(6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

(7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income-tax authority or the person authorised by it, such particulars, in such form and within such time as may be prescribed.

Explanation.—For the purposes of this section,—

(i) “specified person” shall mean,—

- (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 Government of a foreign State or a foreign enterprise or any association or body established outside India; or
- (k) any firm; or
- (l) any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,—
 - (A) does not fall under any of the preceding sub-clauses; and

- (B) is liable to audit of accounts 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;
- (ii) "goods carriage" shall have the meaning assigned to it in the Explanation to sub-section (7) of section 44AE;
- (iii) "contract" shall include sub-contract;
- (iv) "work" shall include—
- (a) advertising;
 - (b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
 - (c) carriage of goods or passengers by any mode of transport other than by railways;
 - (d) catering;
 - (e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer,
- but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer.]

8. A plain reading of this Section makes it clear that "**any person responsible for paying any sum to any resident** (hereafter 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 specified person**" is required to deduction of tax at source under section from the amounts so paid or payable. There is no dispute that the assessee has paid the amounts for "supply of labour" for carrying out work. The impugned relief is, however, given on the basis that the payments have not been made "in pursuance of a contract" between the assessee and CDLB, but the reasoning for coming to this conclusion (i.e. 'Dock Labour Board is operating as an agent of stevedores, who are actual employers ' indicates that there is no contractual relationship between the appellant and

Calcutta Dock labour Board) does not even remotely deal with the question as to how there is no contractual relationship between the assessee and the CDLB. There may not be contract for work, but the CIT(A) still had to deal with the aspects relating to the relationship being treated as contractual relationship for supply of labour . That is where it is difficult to agree with the reasoning adopted by the CIT(A). It is only elementary that a contract need not be in writing; even an oral contract is good enough to invoke the provisions of Section 194 C. As Hon'ble Karnataka High Court has observed in the case of Smt J Rama Vs CIT (236 CTR 105), "**Law does not stipulate the existence of a written contract as a condition precedent for (invoking the provisions of Section 194 C with respect to) payment of TDS**". The CDLB has received payment for supply of labour, and, normally one would proceed on the basis that there was a contract for supply of labour between the assessee and CDLB. The CIT(A)'s stand is that infact CDLB is an agent of the stevedores like assessee before us, and the real employer is the assessee himself, and, according to the learned CIT(A), the authority for this proposition is contained in two judgments cited in his order – namely *Calcutta Dock Labour Board vs. Wages Authority & Ors (supra) and Visakhapatnam Dock Labour Board Vs Stevedores Association & Ors (supra)*. Undoubtedly, these decisions do indicate that there is a workman employer relationship between the dock workers and the stevedores like assessee when they employ those workers, but be that as it may, the fact remains that the assessee has made payments to the CDLB for supply of these workers. As long as the assessee has made payments to the CDLB for supply of labour, even when this labour may be treated as employed by the assessee for all practical purposes, the provisions of Section 194 C are clearly attracted. In such a situation, i.e. when labour hired by the assessee through CDLB is considered to be in assessee's employment, the payments made to CDLB cannot be treated as payments for 'any work' , but nevertheless these payments could still be covered by the provisions of Section 194 C because these are payments made for 'supply of labour'

which are specifically covered by Section 194 C(1). CDLB is an agent of the stevedores like the assessee in the sense that the labour is recruited by the assessee through CDLB, but then this fact does not affect the nature of payment by the assessee to the CDLB which is admittedly in the nature of payment for supply of labour. The reasoning adopted by the learned CIT(A), though somewhat impressive at first glance, is fallacious. There is no cause and effect relationship between workers assigned by the CDLB having employer workman relationship with the assessee, and the payments being made by the assessee to CDLB being not in the nature of 'payment for supply of labour' .

9. In view of the above discussions, in our considered view, the reasoning adopted by the CIT(A) in granting impugned relief is indeed devoid of legally sustainable merits. It does not meet our approval. However, in all fairness, we must point that while the CIT(A) has been fairly generous in reproducing all the submissions of the assessee, remand report by the AO on these submissions, and even assessee's rejoinder to this remand report, he has not dealt with all these submissions. The assessee has made elaborate arguments on as to why the supply of labour by the CDLB cannot be treated as 'in pursuance of a contract' and as to why CDLB cannot be treated as a 'contractor' but there is not even a whisper of a comment on these submissions. As we note these arguments, we must make it clear that since all these aspects have not been examined by the CIT(A), we do not wish to deal with the same on merits, in any manner, at this stage, and nothing stated in this order should be construed as our approval or disapproval of these arguments. Suffice to say that, in our considered view, the CIT(A) has been somewhat superfluous in his approach to the issue, and we are now sending the matter back to him for fresh adjudication in the right perspective.

10. Bearing in mind all these facts, while we deem it fit and proper to vacate the reasoning adopted by the learned CIT(A) in coming to the

conclusion that the provisions of Section 194 C do not apply to the payments to CDLB, we also deem it fit and proper to remit the matter to the file of the CIT(A) to deal with all other contentions raised by the assessee by way of a speaking order, in accordance with law, and after giving a fair and reasonable opportunity of hearing to the assessee. As the matter is being remitted to the file of CIT(A) for fresh adjudication as such, and in the interest of fairness and justice, we make it clear that the assessee will be at liberty to take any such legal and factual plea, other than the plea dealt with us in this order, as he may deem appropriate and the CIT(A) will deal with the same as directed above.

11. In the result, the appeal is allowed for statistical purposes in the terms indicated above. Pronounced in the open court today on 17th day of February, 2012.

Sd/xx
Mahavir Singh
(Judicial Member)

Sd/xx
Pramod Kumar
(Accountant Member)

Kolkata, the 17th day of February, 2012

Copies to :

- (1) The appellant*
- (2) The respondent*
- (3) CIT*
- (4) CIT(A)*
- (5) The Departmental Representative*
- (6) Guard File*

By order etc

*Assistant Registrar
Income Tax Appellate Tribunal
Kolkata benches, Kolkata*