IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 236 of 2006

TO

TAX APPEAL NO. 238 of 2006

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

and

HONOURABLE MR.JUSTICE K.J.THAKER

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX....Appellant(s)

Versus

CITY GOLD ENTERTAINMENT PVT. LTD.....Opponent(s)

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Appearance:

MRS MAUNA M BHATT, ADVOCATE for the Appellant(s) No. 1

NOTICE SERVED for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE KS JHAVERI**

and
HONOURABLE MR.JUSTICE K.J.THAKER

Date : 28/11/2014

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

1. Being aggrieved and dissatisfied with the impugned order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench (hereinafter referred to as ITAT) dated 30.03.2005 in ITA Nos. 3745/Ahd/2004, 3746/Ahd/2004 & 3747/Ahd/2004 for the Assessment Years 2002-03, 2003-04 & 2004-05 respectively, the revenue has preferred the present Tax Appeals.

2. These appeals were admitted on 07.09.2006 for consideration of the following substantial question of law:

> *"Whether, the Appellate Tribunal was right in law in holding that cinecasting/distribution of movies would be outside the purview of section 194C of the Income Tax Act, 1961 requiring tax deduction at source?"*

3. The assessee firm which runs a multiplex theatre had an agreement with the distributor of certain movies for exhibiting films in the theatre owned by it. The distributor was to get part of the amount collected by the respondent by way of sale of tickets for these movies. The Assessing Officer observed that the said payment would require deduction of tax at source as per section 194C of the Act. Since the same was not deducted it was treated to be in default of section

201(1) and 201(1A) of the Act. On appeal, the CIT (Appeals) held that since the ownership of the print never rests with the exhibitor it cannot be considered as 'any work' as stipulated in section 194C and thereby set aside the orders.

4. On appeal before the ITAT, by impugned order, ITAT has held that no work was carried out by the distributor. Being aggrieved and dissatisfied with the impugned order passed by the ITAT, the revenue has preferred the present Tax Appeals for consideration of the aforesaid substantial question of law.

5. Mr. Manish Bhatt, learned Senior Counsel has appeared with Ms. Mauna Bhatt, learned advocate on behalf of the Department. He submitted that the Tribunal has overlooked that a clarification the fact that section 194C of the Act would apply in relation to payment to a person to arrange advertisement, broadcasting, telecasting etc. He has relied upon a decision of the Apex Court in the case of **Associated Cement Co. Ltd. vs. Commissioner of Income-Tax and Another reported in [1993] 201 ITR 435**, wherein it is held that section 194C(1) had a wide import and covered "any work" which could be got carried out through a contractor under a contract including the obtaining of supply of labour under a contract with a contractor for carrying out any work. The section was not confined or restricted in its application to "works contracts".

6. Having heard Mr. Bhatt, learned Counsel appearing on behalf of the Department and the question posed for consideration by us which is reproduced hereinabove and considering the decision of the Hon'ble Supreme Court in the

case of **Associated Cement Co. Ltd (Supra)**, the question, which is raised in the present appeal is required to be answered in favour of the assessee. The Tribunal in paras 8 to 10 has observed as under:

> "8. We have considered the submissions of Ld. Departmental Representative in the light of material available on record. There is no material on record to raise any doubt about the facts mentioned in the order of the CIT(A) . Therefore, we proceed on the basis that the findings of the learned CIT(A) on facts are undisputed. Main basis for the assessing officer for holding that the assessee was liable to deduct at source under section 194C of the Act is the decision of the Hon'ble Supreme Courtin the case of ACC Ltd. (supra) and also Circular No. 681 of CBDT. We found that the Hon'ble jurisdictional High Court in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra) has considered the decision of the Hon'ble Supreme Court in the case of ACC Ltd. (supra) as well as Circular No. 68 1. After considering the decision of the Hon'ble Supreme Court Their Lordships have quashed the Circular No. 681 issued by the CBDT. Therefore, the assessing officer was wrong in taking cognizance of circular which was purported to be given by the CBDT in accordance with the decision of Hon'ble Supreme Court in the case of Appellate Asstt. Commissioner Ltd The ratio of the decision of the Hon'ble jurisdictional High Court in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra) is that the intendment for professional services or service simplicitor which do not involve contract for carrying out any work itself or a contract for a labour for carrying out such services are not within the purview of section 194C of the Act as it existed at the relevant time. As mentioned earlier, the activity carried on by the assessee is exhibition of film in its theatre which has been supplied by the distributor. The said activity cannot fall within the category of "work" within the ambit of section 194C, as per the

decision of jurisdictional High Court in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra). Now the question will remain that whether such activity falls under the Explanation III to section 194C. The Explanation 171 reads as under:

'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.'

9. The abovementioned Explanation has been inserted by the Finance Act, 1994 w.e.f 1-7-1995. The exhibition of film in theatre is not an activity expressly covered by the Explanation III. Anything which is not expressly covered under the category of work cannot be regarded as "work" by extended meaning of work as described in section 194C of the Act. The following observation of the Hon'ble Gujarat High Court from the decision in the case of All Gujarat Federation of Tax Consultants v. CBDT (supra) (Page Nos. 292-293) support this view.' 'In our conclusion, we are further strengthened by the fact that the Legislature intended to make a separate provision for bringing the service contract and professional service within the purview of the provision relating to tax deduction at source, by the Finance Bill, 1987 which has been quoted above. Once again the Finance Bill, 1995, a similar insertion has been proposed. Had the service rendered by the professionals like, Advocates, chartered accountants, engineers, physicians, architects etc. already been within the scope and ambit of section 194C, the Legislature would not have resorted to this exercise. It cannot be assumed that the Legislature uses or indulges in on exercise for bringing something by way of surplus. Likewise, it may be noticed that the profession/ business of advertising, broadcasting and telecasting including production of programmes for

such broadcasting or telecasting, carriage of goods by railway etc. which are being now been designed to be inserted to be given effect with effect from July 1, 1995. In view of this clear intention of including being effective from a prospective date, it is clearly by indicate of the fact that the proposed amendment is not brought by way of clarification of any existing professions but is intended to bring substantial change in the existing provision. We may not be taken to have construed the existing provision with the aid of the proposed amendment, but we have referred to them only by way of strengthening the conclusion to which we have arrived independently of it.'

10. Therefore, there is no possibility of any assumption that Legislature uses or indulges in exercise for bringing something by way of surplus. The activity mentioned in the Explanation III only can be considered to be as a "work" within the extended meaning of "work". The exhibition of film in the theatre has not been described in the above Explanation, therefore also, there is no case of the revenue, by which it can be held that the assessee was required to deduct tax at source from the payments made by it to the distributor of films. In view of above discussion on facts and laws, we find no merits in the appeals filed by the department and the same are dismissed. “

6.1 Sections 201(1) and 201(1A) and 19(C) of the Act and the explanation thereof are reproduced hereunder:

201. Consequences of failure to deduct or pay

(1) If any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:

Provided that no penalty shall be charged under section 221 from such person, principal officer or company unless the [Assessing] Officer is satisfied that such person or principal officer or company, as the case may be, has [without good and sufficient reasons] failed to deduct and pay the tax.

[(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that subsection does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at [fifteen] per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.]

19. C (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) 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;

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.]

[Explanation III – For the purpose 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 or passengers by any mode of transport other than by railways;

(d) catering;]"

6.2 Considering the facts and circumstances of the case, we are of the opinion that the Tribunal is justified in coming to the conclusion that the exhibition of film in the theatre has not been described in the Explanation, therefore, there is no case of the revenue, by which it can be held that the assessee was required to deduct tax at source from the payments made by it to the distributor of films. The Tribunal has rightly considered the agreement/arrangement between the parties

and in detail discussed the same. We have considered the decision cited by learned Senior Counsel appearing for the revenue, however, the same shall not be applicable on the facts of the present case inasmuch as the distributor gets his share because he has acquired rights of the distribution of the films in the particular area and as no work is carried out by the distributor for which the payment is made. We concurr with the finding of facts by the Tribunal.

6.3 Thus, we feel that the Tribunal has rightly reversed the findings given by CIT(A) which was not borne out from the facts of the case and we confirm the decision of the Tribunal being correct interpretation of the provisions of I.T. Act. The question therefore which was framed is to be answered in the affirmative i.e. the the Appellate Tribunal was right in law in holding that cinecasting/distribution of movies would be outside the purview of section 194C of the Income Tax Act, 1961 requiring tax deduction at source.

7. In view of the above, the question raised in the present appeals is answered in favour of the assessee and against the revenue. Consequently, the impugned judgment and order passed by the ITAT is confirmed. Hence, the present Tax Appeals are dismissed.

(K.S.JHAVERI, J.)

(K.J.THAKER, J)

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