

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**TAX APPEAL No. 1591 of 2011**

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COMMISSIONER OF INCOME TAX - I - Appellant(s)
Versus
PRASHANT H SHAH - Opponent(s)

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Appearance :

MR MANAV A MEHTA for Appellant(s) : 1,
None for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 09/10/2012

ORAL ORDER

(Per : HONOURABLE MR.JUSTICE AKIL KURESHI)

1) Revenue is in appeal against the judgment of the Income Tax Appellate Tribunal (hereinafter to be referred to as "the Tribunal") dated 8th July 2011 raising following question for our consideration:-

"Whether the Appellate Tribunal is right in law and on facts in deleting the addition on account of disallowance of payments u/s.40(a)(ia) of the Act?"

2) We are concerned with Assessment Year 2007-08.

Issue arises in the following factual background:-

2.1) Respondent-assessee is an individual and is engaged in the business of construction in the name of M/s. Sakhi Construction. During the previous year relevant to the assessment year 2007-08, the assessee had made payments to several contractors totaling to Rs.71,00,339/-. The Assessing Officer believing that in terms of section 194C of the Income Tax Act, 1961 (hereinafter to be referred to as "the Act"), the assessee was required to deduct tax at source on such payments and the assessee having not made such payments, held that by virtue of section 40(a)(ia) of the Act, such expenditure should be disallowed. The matter was carried in appeal before the Commissioner (Appeals) by the assessee. The Commissioner (Appeals) turned down the assessee's appeal, upon which he approached the Tribunal. The Tribunal allowed the appeal.

2.2) The Tribunal noted that a contract was awarded to M/s.Petronet LNG Ltd for construction of peripheral and approach roads at LNG terminal, Dahej. The contractor M/s. Petronet LNG Ltd. had entered into a sub-contract with M/s. ANS Construction Ltd.. M/s. ANS Construction Ltd, in turn , entered into another

sub-contract with the respondent-assessee. The work of the assessee, therefore, pertained to construction of peripheral and approach roads. To carry out such work, the assessee had to purchase construction materials such as sand, gravels etc. To transport such construction material at the site at Dahej, the assessee had availed the services of other transporters and made payments to such transporters under the head transport charges, total of which came to Rs.71,00,339/-.

2.3) Noticing that under subsection (1) of section 194C of the Act, clause(k), which pertained to individual or a Hindu Undivided Family or an association of person or body of individual whose total sales, gross receipts or turnover from the business or profession exceed the limits specified in clause (a) and (b) of section 44AB during the financial year immediately preceding the financial year in which the same is credited or paid; the Tribunal held that such provision would not apply to the case on hand since such provision was introduced with effect from 1st June 2007.

2.4) With respect to sub-section (2) of section 194C, the Tribunal discussed the nature of contract between the assessee and the transporters to come to the conclusion that this is not a case of relationship between the contractor and a sub-contractor, where any part of the work which the assessee as a contractor had undertaken to execute, was sub-contracted to the transporters. On such basis, the Tribunal formed an opinion that the provision of section 194C(2) of the Act also would not apply.

3) Learned counsel Mr. Manav A. Mehta for the Revenue submitted that the Tribunal committed a serious error in holding that section 194C(2) of the Act would not apply to the payments made by the assessee to the transporters. He submitted that the assessee had entered into a sub-contract with the transporters. The fact whether such contract was a written or oral would make no difference. Drawing our attention to explanation-3 to section 194C and the decision of Madras High Court in the case of **Central Board of Direct Taxes & Anr. Vs. Saradha Transport & Ors.**, reported in 260 ITR, 297, the counsel contended that the carriage of goods would also be included within

the expression "work" as used in section 194C of the Act.

4) Having thus heard the learned counsel for the Revenue and having perused the orders on record, we may first notice the statutory provisions obtaining at the relevant time. Section 194C, as it stood at the relevant time, reads as under:-

Section 194C. PAYMENTS TO CONTRACTORS AND SUB-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) 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,

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.

(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.

Provided that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) and clause (b) of section 44AB during the financial year immediately preceding the financial year in which the same is credited or paid to the account of the sub-contractor, shall be liable to deduct income-tax under this sub-section.

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.

Explanation II : For the purposes of this section, where any sum referred to in sub-section (1) or sub-section (2) 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.

Explanation III : For the purposes of this section, the expression "work" shall also include

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(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]

Provided further that no deduction shall be made under sub-section (2) from the amount of any sum credited or paid or likely to be credited or paid during the previous year to the account of the sub-contractor during the course of business of plying, hiring or leasing goods carriages, on production of a declaration to the person concerned paying or crediting such sum, in the prescribed form and verified in the prescribed manner and within such time as may be prescribed, if such sub-contractor is an individual who has not owned more than two goods carriages at any time during the previous year.

Provided also that the person responsible for paying any sum as aforesaid to the sub-contractor referred to in the second proviso shall furnish

to the prescribed income-tax authority or the person authorised by it such particulars as may be prescribed in such form and within such time as may be prescribed; or

(ii) Any sum credited or paid before the 1st day of June, 1972; or

(iii) Any sum credited or paid before the 1st day of June 1973, in pursuance of a contract between the contractor and a co-operative society or in pursuance of a contract between such contractor and the sub-contractor in relation to any work (including supply of labour for carrying out any work) undertaken by the contractor for the co-operative society.

Explanation:- For the purpose of clause(i), "goods carriage" shall have the same meaning as in the Explanation to sub-section (7) of section 44AE."

5) We may notice that with effect from 1st June 2007, clause (k) to section 194C(1) was added as under:-

"(k)Any individual or Hindu undivided family or an association of person 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."

6) Section 40(a)(ia), as is well known, pertains to non-availability of deduction when TDS, though

required, has not been deducted or if so deducted, has not been paid. Relevant portion of such provision reads as under:-

"Section 40:- Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession"

(a):- In the case of any assessee:

(ia):- Any interest, commission or brokerage, [rent, royalty,] fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labor 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 during the previous year, or in the subsequent year before the expiry of the time prescribed under sub-section (1) of section 200;"

7) In the present appeal, we are principally concerned with the interpretation of section 194C of the Act as such provision stood at the relevant time. Sub-section (1) of section 194C, required that any person responsible for paying any sum to any resident for carrying out any work in pursuant to a contract between the contractor and entities specified in clause-(a) to (j) would have to, at the time of crediting such sum to the account of the contractor or

at the time of payment in cash or by cheque or draft or any other mode, deduct a specified amount of tax at source. Till clause (k) was introduced in sub-section (1), the category of individual, HUF or AOP was not included. Such amendment was made with effect from 1st June 2007 and obviously, therefore, would not apply to the case on hand. The Tribunal, therefore, correctly came to the conclusion that the case of the assessee was not covered under section 194C(1) of the Act since in the present case the payment was made by the assessee to individuals.

8) Sub-section (2) of section 194C requires that any person, that is, a contractor responsible for paying any sum to any resident sub-contractor in pursuance of a contract with the sub-contractor for carrying out or for supply of labour for carrying out the whole or any part of the work undertaken by the contractor or for supplying any labour, which the contractor had undertaken to supply has to, at the time of credited such sum to the account of sub-contractor, or at the time of payment in cash or in any other manner, deduct TDS at the specified rate.

9) For application of sub-section (2) of section 194C, the requirement is that there is a contractor who has undertaken to carry out any work or supply of labour, a part of such work or supply of labour is executed through a sub-contractor and in pursuance of execution of such work, the payment is being made either in cash or in any other manner or the same is being credited in the account of the sub-contractor. Only under such circumstances, the requirement of deducting tax at source on such payment would arise on the part of the contractor.

10) The Tribunal, upon detailed examination of the nature of relationship between the assessee and the transporter, came to the conclusion that this is not a case of sub-contract. The Tribunal noted that none of the responsibilities of the contractor vis-a-vis the execution of the work were fastened on the transporters. The Tribunal noted that the assessee had indemnified ANS Construction against any legal or financial liability if such liability arises in future out of such contract. The assessee was solely responsible for execution of the work. No part of such liability was fastened on the transporters. The

assessee had only availed of the services of such transporters for carrying out the material to the site. The Tribunal, therefore, concluded and rightly so in our opinion that this was not a case of relationship between the assessee contractor and the transporters in the capacity of sub-contractors.

11) To reiterate, for application of section 194C(2) of the Act what was necessary was a relationship between the contractor and sub-contractor and not merely be hiring of an agency by the contractor during the course of execution of the work. In the present case, such vital requirement of relationship of a contractor and sub-contractor between the assessee and the transporters was missing. The Tribunal, in our view, was perfectly justified in holding that liability to deduct tax at source in the present case do not arise.

12) Relevant portion of explanation-III of section 194C only provides that for the purpose of this section, the expression "work" shall also include carriage of goods and passengers by any mode of transport other than by railways. This explanation

applies both to sub-section (1) as well as sub-section (2) of section 194C. Additionally, the explanation at any rate cannot be pressed in service to bring the case of an assessee within the scope of sub-section (2) of section 194C, if the same is otherwise not includable since the requirement of such sub-section are not fulfilled.

13) In the result, we do not find any error in the decision of the Tribunal. Tax appeal is, therefore, dismissed.

(AKIL KURESHI, J.)

(HARSHA DEVANI, J.)

Vahid

