

## IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 2434 of 2010

TO

TAX APPEAL NO. 2437 of 2010

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE KS JHAVERI

SD/-

and

HONOURABLE MR.JUSTICE G.R.UDHWANI

SD/-

|   |                                                                                                                                               |     |
|---|-----------------------------------------------------------------------------------------------------------------------------------------------|-----|
| 1 | Whether Reporters of Local Papers may be allowed to see the judgment ?                                                                        | YES |
| 2 | To be referred to the Reporter or not ?                                                                                                       | NO  |
| 3 | Whether their Lordships wish to see the fair copy of the judgment ?                                                                           | NO  |
| 4 | Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ? | NO  |

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

Versus

LGE &amp; C PATEL J V....Opponent(s)

Appearance:

MR SUDHIR M MEHTA, ADVOCATE for the Appellant(s) No. 1

MR MANISH J SHAH, ADVOCATE for the Opponent(s) No. 1

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

and

**HONOURABLE MR.JUSTICE G.R.UDHWANI**

Date : 11/08/2016

COMMON ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE KS JHAVERI)

Since the appeal arises out of the common order passed by the ITAT, they are being heard and disposed of by this common oral judgment.

2. By way of this group of appeals, the department has challenged the order of the tribunal whereby the tribunal has reversed the order passed by the CIT (A) and AO.

3. Tax Appeal No.2435 of 2010 and Tax Appeal No.2436 of 2010 challenges the order passed by the ITAT dated 16/04/2010 in ITA No.3179/Ahd/2007 for assessment year 2004-05 and ITA No.3180/Ahd/2007 for assessment year 2005-06 respectively and came to be admitted on the following questions of law:

*“(A) Whether in law, the Appellate Tribunal is justified in holding that the JV was no more in existence after 02.09.2002 and hence income should be taxed in the individual hands of the members of the JV without considering the fact that the JV continues to exist and the assessee filed the return of income for A.Y. 2003-2004 in the capacity of JV and offered the income for taxation in JV only and subsequent payments from the NHAI were also received by the JV only?”*

*“(B) Whether in law, the Appellate Tribunal is justified in holding that the credit of prepaid taxes should be given in the individual hands of the members of the JV without*

*considering the fact that the JV continues to exist and hence income and credit of taxes, relating to such income should be given in the hands of JV only?"*

4. Whereas, Tax Appeal No.2434 of 2010 arising out of the order dated 16/04/2010 passed by the ITAT in ITA No.773/Ahd/2010 for assessment year 2005-06 against the penalty and came to be admitted on the following question of law:

*"(A) Whether in law, the Appellate Tribunal was right in deleting the penalty u/s 271(1)(c) following the decision of the Apex Court in the case of CIT v/s Reliance Petro Products, reported in 322 ITR 158(SC), in granting relief to the assessee, without considering the fact that ratio of this decision is not squarely applicable to the facts of the case of the assessee?"*

5. Tax Appeal No.2437 of 2010 also arising out of the order dated 16/04/2010 passed by the ITAT in ITA No.772/Ahd/2010 for assessment year 2004-05 against the penalty and ordered to be heard with this group of matters.

6. Learned Counsel appearing for the appellant – department has taken this Court to the findings recorded by the AO as well as the CIT (A) and contended that the once the joint venture was in existence on 02/09/2002, merely on paper resolution it cannot be believed that it is dissolved.

6.1 Learned Counsel for the appellant –

department has contended that the AO concluded that on principles of consistency and genuineness there is no justification for PEL to disclose its share of income in its company return of income. As per AO, the change in quantum of execution of work inter se between the members of the AOP (JV) will not affect the source of income generated being out of execution of contract with NHAI. He has contended that the AO asserted that the appellant itself has not disputed the existence of AOP and the income derived from the execution of Surat Manor toll way Project awarded to it by NHAI and thereby the AO concluded that the income of PEL arising out of the contract required to be added in the income of the AOP on principles of consistency.

6.2 Learned Counsel for the appellant has taken this Court to the findings of CIT (A), more particularly, paragraph Nos.7.3, 8.2, 10.3, 12.3 and 13.2 and contended that the said findings are just and proper and the tribunal need not require to interfere with the same.

6.3 After making the above submissions, learned Counsel for the appellant has contended that the appeal may be allowed and questions may be answered in favour of the assessee.

7. On the other hand, Mr.Manish J Shah, learned Counsel for the assessee has contended that the basis on which the expenses were allowed, in fact it was

added in the income as profit. He has further contended that the view taken by the tribunal is just and proper and the tribunal has considered the detail material in its order and he has placed reliance on the following paragraphs of the order passed by the tribunal:

*"9. We have considered the rival submissions and perused material on record. In our considered view there is no case for interference in the order of authorities below. It is not disputed that receipt and expenditure prior to 2-9-02 and pertaining to two members have been clubbed together to form income and expenditure account of the joint venture. But thereafter, vide agreement dt. 2-9-02 LGE&C has completely withdrawn itself from Association and transferred all the work to PEL. In this regard we refer to some more provisions of agreement dt. 2-9-02 to highlight the arrangements between the two members.*

*"Whereas, both LGE & C and Patel are jointly and severally liable for the performance of the Contract toward the Employer, and, for the effective and efficient execution of the Contract Work., the parties hereto, by mutual consent, divided the Contract Work approximately in proportion of 75% LGE&C and 25% Patel. Under the agreement, both parties has performed their respective scope of Work by developing its own resources. Patel shall take over, execute and complete the remaining works of LGE&C portion of 75% and all additional works to the original contract with the Employer under the Contract as well as works originally earmarked for Patel.*



(1) Patel shall complete all the works including additional works within October, 2003 and, shall be solely responsible therefore, if not completed. LGE&C shall not assume any responsibility, liability, obligation or duty with regard to the remaining works of LGE&C and any additional works. Patel shall assume any and all responsibilities for the technical and commercial risks including profit and loss from the execution and completion of the works mentioned above and shall indemnify LGE&C and hold LGE&C harmless from and against, and shall defend against, any and all claims including claims by the Employer), losses and damages of every kind made or accrued for the balance works and additional works.

(2) LGE&C will demobilize from the site and not deploy any of its employees in site. Provided, however, that, if LGE&C thinks fit to its sole discretion, LGE&C may let its employee(s) visit the site and, in such case, Patel will provide proper support. However the costs of the same will not be borne by Patel. Patel shall, at regular interval, in every month, send LGE&C's Head Office a copy of Monthly Progress Report, Statement of Interim Payment Application, approved or certified Statement thereof and any Other material and information which are requested by LGE&C or related to LGE&C's interest.

(3) \*\*\*

(4) \*\*\*

(5) \*\*\*

(6) \*\*\*

10. A reading of the above clauses of agreement dated 2-9-02 clearly provides that LGE&C shall not have any responsibility, liability, obligation, or duty towards revenue work transferred to PEL which shall indemnify LGE&C against such liability/obligation or loss. LGE&C will remove itself from the site. However Patel will permit the employees to LGE&C to visit the site but the cost thereof shall not be borne by Patel. Patel will receive all the dues from NHAI and receipts from NHAI will be to Patel's account. LGE&C would be paid some compensation of Rs.2.6 crores for transfer to remaining portion of work to Patel, which would be paid at the end of the contract by Patel.

11. Thus, after withdrawal of LGE&C from the association, no association of persons survived even though legally joint venture continued to exist till the completion of the work. Merely because joint venture is existing, it does not necessarily lead to inference that association of person for the purposes of being taxed under Income tax Act would also be existing. Joint venture and Association of person are two distinct legal concepts. An AOP can be a joint venture but all joint ventures need not necessarily be AOP. It is because joint venture is a concept for accounting purposes and for sharing legal responsibility vis-a-vis third parties But AOP is a concept under I.T. Act and is listed in section 2(31)(v) of the Act. For an AOP to exist there are two import ingredients to be satisfied one is that they should

come together to work and secondly they should have intention to earn income from such work. Even though LGE&C and Patel are together but after 2-9-02 they did not have common interest to earn income from this venture. Once LGE&C decides to withdraw from work then his interest in earning income from the work ceased to exist. Once a party to the Joint venture ceases to have interest in earning income from the joint venture then AOP comes to an end. Joint venture may continue to exist even after AOP ceases to exist. For assessing the income in the hands of AOP or in the status of Body of Individual 2 conditions must be satisfied.

- (i) There must be joint venture.
- (ii) Object of the joint venture must be to earn income.
- (iii) There should be volition on the part of each member to associate and remain associated to earn income.

The word associate means to join in common purpose or to join in an action. The expression association of persons used in the Income tax assessment means the association in which two or more persons join in a common purpose and the object of each is to produce income profit or gains. Two or more persons to the association must jointly affect the transaction with a common purpose of producing income in a joint venture and both the persons as such play important role in connection with the carrying on of the operation of the business of the joint venture. However, there cannot be a universal formula to find out whether AOP is existing or not. What facts or how many of them or of what nature, are necessary to enquire into, come to the conclusion that there is an association of persons. It



depends upon the particular facts and circumstances of the case as to whether conclusion of existence of association of persons can be drawn or not. It is held by Hon'ble Punjab & Haryana High Court in CIT vs. Sehgal Oil & General Mills (2008) 303 ITR-102(P&H) where emphasis was laid down on volition on the part of the members of the association as an essential ingredient. Voluntarily combining together for a certain purpose i.e. to earn income is considered as essential ingredient, of AOP being an existence. In that case, a firm was constituted by S, main partner and his sons. It continued up to A.Y. 1981-82 as per the last partnership deed which was executed on December 28, 1968. The main source of income of the assessee firm was from the shares held by S in the firm LE. Subsequently, firm LE was converted into Private Ltd. Company named LV and shares held by S was converted into equity capital on which dividends were received with interest on deposits held in the name of S in LV. S expired on April 11, 1982. It was claimed by the assessee that no business is done thereafter and the firm is to be dissolved by the operation of law on death of S. However, A.O. completed the assessment in the status of AOP in respect of income received from LV by including remaining partners as members of Association. It was held by Hon'ble High Court that there was no act of volition on the part of the rest of the partners of the AOP to continue with a common purpose to produce income, profit and gains. The assessment in the status of AOP was held not valid.

\*\*\*\*

38. In our considered view income after 2-9-2002 really

*belonged to PEL in respect of the work carried out by it after 2-9-2002. Therefore, even if joint venture has declared income from work carried out after 2-9-2002 till 31-3-2003 as its income, it does not prevent the revenue from taxing it in the hands of PEL as it is a right person in whose hands income, after supplementary agreement was executed, could be taxed. We have already held that no AOP continued to be in existence after 2-9-2002 as one member has lost interest in earning income for itself. Unless both the parties have common interest in earning income, no AOP can be said to be in existence. In view of this, if any tax or interest has been paid by joint venture during A.Y. 2003-04 or even after 2004-05, the credit of the same should be transferred to PEL where that income is assessable. Our view is that credit of TDS can be given only in the hands where income there-from is subjected to tax. If accrual of income in respect of the receipts received de-jure by joint venture is shifted to a member of the joint venture through an overriding title, then credit of TDS in respect of such receipts should be considered in the hands of that member of the joint venture in whose hands such income is found assessable. Ground No.5 is accordingly disposed of in favour of the assessee"*

7.1 After making aforesaid submissions, learned Counsel for the assessee has contended that the appeal may be dismissed and questions may be answered in favour of the assessee.

8. Having heard the learned Counsel for the

respective parties and having perused the order passed by the Tribunal, this Court is of the opinion that the view taken by the tribunal is just and proper and this Court is in complete agreement with the findings arrived at by the tribunal as afore-stated. Accordingly, all these appeals preferred by the department deserves to be dismissed and accordingly all these appeals are dismissed. The issues raised in this group of appeals are answered in favour of the assessee and against the department.

(K.S.JHAVERI, J.)

(G.R.UDHWANI, J.)

sompura

