

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 33 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE AKIL KURESHI

&

HONOURABLE MS JUSTICE SONIA GOKANI

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 civil judge ?

ESSAR OIL LTD. - Appellant(s)

Versus

INCOME-TAXOFFICER - Opponent(s)

Appearance :

MR JP SHAH for Appellant

MR MANISH R BHATT Sr Advocate with Mrs MAUNA M BHATT for Opponent

CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI

and

HONOURABLE MS JUSTICE SONIA GOKANI

3rd September 2012

CAV JUDGMENT (Per : HONOURABLE Ms. JUSTICE SONIA GOKANI)

The appellant, in the present Tax Appeal, has challenged the Order of the Income Tax Appellate Tribunal, Rajkot Bench,

Rajkot [**“Tribunal”** for short] dated 28th February 2000 passed in ITA No. 193/Rjt/1999 for A.Y 1998-99. This Court, while admitting the appeal, has framed following question as substantial question of law :

“Whether the appellant was liable to pay the amount of Rs. 77,78,973/= as a defaulter under Section 201 (1) read with Section 194C of the Income Tax Act, 1961 ?”

To briefly state the facts – the appellant was in the process of setting up an Oil Refinery at Vadinar, District-Jamnagar. For the purpose, the appellant entered into three different agreements with Messrs. Essar Projects Limited; viz., [1] for supply of Indian sources equipments & materials; [2] for labour-cum-erections; and [3] for construction of the refinery, for a sum of Rs. 1,100 Crores; Rs. 438 Crores & Rs. 455 Crores respectively.

It was noticed by the ITO that these contracts were allotted to its sister concern viz., Messrs. Essar Projects Limited which had obtained a Certificate u/s. 197(1) of the Income Tax Act, 1961 [**“Act”** for short] for tax deduction at a lower rate on various contract payments to be made to M/s. Essar Projects Limited by Messrs. Essar Oil Limited [*the appellant*]. On account of non-deduction of tax at source; while making

payments during the period from 1st April 1997 to 9th September 1997, objections were raised by the Income Tax Officer, by whom a show cause notice was also issued as to why the assessee-company should not be treated as a defaulter for recovery of dues towards TDS amount. It was adjudicated by the ITO holding that the assessee was in default for not deducting the TDS in payments made to M/s. Essar Projects Limited @ 2% for the period from 1st April 1997 to 9th September 1997. As the total payment made to Messrs. Essar Projects Limited in the given period was to the tune of Rs. 92,20,90,752/=, the TDS deductible @ 2% was Rs. 1,84,41,814/=.

The appellant-Company, while submitting a letter dated 18th May 1998 providing the details of payments made to Messrs. Essar Projects Limited, made a mention of payment made towards procurement of material to the tune of Rs. 72.60 Crores. The I.T.O with regard to the supply of these materials, discussed the issue in its order and held that the circular relied upon by the appellant being Circular No. 8 of 8th March 1994 has been issued after the judgment of the Apex Court in **ACC Limited v. CIT**, after which the scope of Section 194C of the Act has been enlarged by the Finance Act, 1995 w.e.f 1st July 1995. The said Section provides that any person responsible for

paying any sum to any resident [contractor] for carrying out any work in pursuance of contract between the contractor and bodies mentioned therein shall, at the time of credit of such sum to the account of the contractor or payment thereof in cash or by issue of cheque or draft or any other mode; whichever is earlier, deduct an amount equal to 2% of such sum as Income Tax on the income comprised therein. Circular No. 681 stipulates that these provisions shall now apply to all types of contracts for carrying out any work; including the transport contracts, service contracts, advertisement contracts, broadcasting contracts, tele-casting contracts, labour contracts, material contracts and work contracts. The Assessing Officer was also of the opinion that the term "*material contract*" would mean that, "*any contract for supply of materials where the principal contract is for work and labour, and not contract for sale of materials.*"

In the aforementioned background, when the appellant had entered into three contracts on 25th March 1997 with Messrs. Essar Projects Limited, whether one of those particular contracts is a material contract or not was needed to be decided by the Assessing Officer. It also relied upon the judgment of the Apex Court in the case of **Himachal Pradesh v. Associated Hotels of India Limited**, reported in

[(1972)29 STC 474 (SC)] where the Apex Court held that when the principal objective of work undertaken by the payee of the price is not a transfer of chattel qua chattel, the contract is of work and labour.

The Adjudicating authority also made a mention of the judgment of this Court in the case of **All Gujarat Federation of Tax Consultants & Ors. vs. CBDT**, reported in 214 ITR 276 wherein, the Gujarat High Court had followed the decision of the Bombay High Court in the cases, reported in 210 ITR 136 and 209 ITR 660. Conclusively, it held that Section 194 of the Act had been amended to give overriding effect to all these judgments relating to the payments made to the professionals, and accordingly, from all the factual situation, it held that Section 194C would be applicable when the effect of three contracts result into a work contract which includes supply of labour.

The Commissioner [Appeals] relied on Clause 2.3 of the Contract dated 25th March 1997 to opine that the said clause makes it abundantly clear that all the three contracts are essentially a composite contract for the works relating to construction of a refinery at Vadinar, and therefore, the supply of material was to be treated as the works contract. The TDS was deductible from the entire payment made to Messrs. Essar

Projects Limited for the construction of refinery.

When this issue travelled to the Tribunal, it concurred with the findings of the CIT [A] by discussing at length not only the order of CIT [A] but also independently examining the issue and in terms held that there was one composite contract for the purpose of deduction of tax at source under Section 194C and these were not three contracts; as averred by the respondent.

Being aggrieved, *impugned* decision of the Tribunal is challenged by the assessee-respondent, formulating the admitted question as a substantial question of law.

Both the sides raised their rival contentions in support of their respective stands. Before adverting to the submissions of learned sr. counsel Shri J.P Shah and learned sr. counsel Shri Manish Bhatt, relevant provisions of the Act and law laid down on the subject need reproduction.

It would be worthwhile to profitably reproduce Section 194C (1) & Section 197 of the Income Tax Act at this stage.

'194C(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,
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 two per cent
of such sum as income-tax on income comprised
therein."

197. Certificate for deduction at lower rate -

(1) Subject to rules made under sub-section (2A)
where, in the case of any income of any person,

income tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of Sections 192, 193, 194, 194A, 194D, 194-I, 194K, 194L and 195, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income tax at any lower rate or no deduction of income tax application made by the assessee in his behalf, give him such certificate as may be appropriate.

(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income tax at the rates specified in such certificate or deduct no tax, as the case may be.

(3) The Board may, having regard to the convenience of assesseees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which and the circumstances under which, an application may be made for the grant of a certificate under subsection (1) and the conditions subject to which such certificate may be granted and providing for all other matter connected therewith.

In case of **Sarika Estate & Investments Private Limited v. Assistant Commissioner of Income Tax**, reported in 246 ITR 254, in a *writ* petition seeking benefit of Section 197 of the Income-tax Act, 1961, a claim was made *inter alia* that there was no time limit for making an application

under Section 197 of the Income-tax Act, 1961, for issuance of certificates and it was contended further that the authorities had been issuing certificates after payment or crediting amount of interest. This Court held that grant of certificates under Section 197 on applications made after the amount of interest was credited was in violation of the express provisions of law. It was also held that since the certificates had been issued in almost all cases, there would be a class of people, who having applied for the certificate after credit of interest, were under a *bona fide* belief that such practice has come to stay. The Court, therefore, directed CBDT to issue appropriate guidelines in this respect. The Court in that case noted that the Central Board of Direct Taxes had written a letter to the petitioner reiterating that since the certificate was applied for after the amount of interest was credited, the question of issuing certificate for non-deduction of tax at source under Section 197 (1) does not arise and that the grievance of the petitioner was to be treated as settled. In this context, the Court had directed the CBDT to consider whether and under what circumstances such a practice has developed and that, if such practice was not permissible, to decide as to what it should do and issue appropriate guidelines in the matter notwithstanding any individual reply sent to the petitioner.

The Apex Court in case of **Hindustan Coco Cola Beverage Private Limited v. Commissioner of Income-Tax**, reported in [(2007) 293 ITR 226 (SC)] held that since the Department did not challenge the order of the Tribunal recalling its earlier order, that order attained finality and the High Court could not interfere with the final order. In this case, the Assessing Officer held the appellant to be assessee in default for failure to deduct tax at source the warehousing charges payable to Pradeep Oil Corporation. The *plea* of assessee was rejected by the Assessing Officer that the payments were made in the nature of contractual payments on which tax was deducted under Section 194C of the Income-tax Act at the rate of 2 per cent. It held that the warehousing charges were in the nature of rent, as defined in Explanation to section 194-I of the Act and therefore, tax ought to have been deducted at 20 per cent under the said provisions as against deduction of tax at 2 per cent under Section 194C of the Act.

The Assessing Officer therefore levied interest under Section 201(1A) of the Act on the amount of tax alleged to be short deducted. This decision also notes a circular issued by the CBDT to put an end to the controversy and the circular declaring that no payment visualized under Section 201(1) of the Act should be enforced after the tax deductor has satisfied

the officer-in-charge of TDS, that taxes due have been paid by the assessee. It further says that this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the assessee or the liability for penalty under Section 271C of the Act.

In the case between **Commissioner of Income-tax v. Eli Lilly and Co.(India) Pvt. Ltd.**, reported in [2009] 312 ITR 225(SC), the assessee was under obligation to deduct tax at source under Section 192 (1) of the Act and where the assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company, penalty under Section 271C was pleaded as not leviable as reasonable cause was shown for not deducting tax at source. The Apex Court held that the levy of interest under Section 201 [1A] of the Act is mandatory and the absence of liability for tax will not dilute the default. It further says that the liability of deducting tax at source is in the nature of vicarious liability, which pre-supposes existence of primary liability. Interest under Section 201 [1A] read with Section 201 (1) can only be levied when a person is declared an assessee-in-default. The period of default starts from the date of deductibility till the date of actual payment. The payment by the concerned employee can be treated as the

date of actual payment. Accordingly, in cases where tax had not been paid, the Assessing Officer was to recover the shortfall in the payment of tax under section 201 (1). The Court of course fastened liability of penalty under Section 271C on the person who did not have good and sufficient reason for not deducting tax at source; shifting the onus on the person concerned to prove such sufficient and good reasons.

Yet another decision sought to be relied upon is in case of the **State of Himachal Pradesh & Ors. v. Associated Hotels of India Limited**, reported in XXIX STC 474, wherein the Apex Court held the transaction to be essentially one and indivisible, namely, one of receiving a customer in the hotel to stay. It further held that it was essentially one of the services by the hotelier, in the performance of which, and as part of the amenities incidental to the service, the hotelier served meals at stated hours. The revenue, therefore, was held not entitled to split up the transaction into two parts, one of service and the other of sale of food-stuffs and to split up also the bill charged by the hotelier as consisting of charges for lodging and charges for food stuffs served to him, with a view to bring the latter under the Act. The Apex Court further held that, "*..the mere passing of property in an article or commodity during the course of the performance of a transaction does not render it a*

transaction of sale. For, even in a contract purely of work or service, it is possible that articles may have to be used by the person executing the work and property in such articles or materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials. In every case, the court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it. It may in some cases be that even while entering into a contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of material to be used in the course of executing the work or performing the service. In such cases, the transaction would not be one and indivisible, but would fall into two separate agreements, one of work or service and the other of sale.”

In light of aforementioned discussion, the first point that requires to be regarded by this Court is whether the appellant herein entered into contract with Essar Projects Limited – the contractors for the purpose of deduction of tax at source under the provision of Section 194C of the Act for establishing of a refinery at Vadinar near Jamnagar; whether same is one contract or three separate contracts for supply of equipments/materials, labour-cum-erection and for

construction. Section 194C of the Act contemplates that in pursuance of the contract between the contractor and the parties specifying therein, any person responsible for paying any amount to the contractor for carrying out any work shall, at the time of credit of such sum into the account of the contractor, or while making payment thereof, in cash or otherwise, deduct an amount equal to 2% of such sum as Income-tax.

The Apex Court in case of **Associated Cement Company Limited**, reported in 201 ITR 435, while interpreting the provisions of Section 194C held that there is no *ambiguity* in the language employed in the sub-section (1) of Section 194C. What is contained in the sub-section, as appears from its plain reading and analysis, admits of the following formulations :-

(1) A contract may be entered into between the contractor and any _____ of the organizations specified in the sub-section.

(2) Contract in Formulation 1 could not only be for carrying out any _____ work but also for supply of labour for carrying out any work.

(3) Any person responsible for paying any sum to a contractor in _____ pursuance of the contract in Formulations 1 & 2 could credit that _____ sum of his account or make its payment to him in any other _____ manner.

(4) But, when the person referred to in Formulation-3

either credits the sum referred to therein to the account of or pays it to the contractor, he shall deduct out of that sum an amount equal to two per cent, as income tax on income comprise therein.

The Court further held that, while permitting exclusion of the amount reimbursed by the appellant to the contractor under clause 13 from the sum envisaged therein.

"Thus, when the percentage amount required to be deducted under the sub-section as income-tax is on the sum credited to the account of or paid to a contractor in pursuance of a contract for carrying out a work or supplying labour for carrying out a work, of any of the organizations specified therein, there is nothing in the sub-section which could make us hold that the contract to carry out a work or the contract to supply labour to carry out a work should be confined to 'works contract' as was argued on behalf of the appellant. We see no reason to curtail or to cut down the meaning of plain words used in the Section. 'Any work' means any work and not a 'works-contract', which has a special connotation in the tax law. Indeed, in the sub-section, the 'work' referred to therein expressly includes supply of labour to carry out a work. It is a clear indication of legislature that the 'work' in sub-section is not intended to be confined to or restricted to 'works contract'. 'Work' envisaged in the sub-section, therefore, has wide import and covers 'any work' which one or the other of the organizations specified in the sub-section can get carried out through a contractor under a contract and further it includes obtaining by any of such organizations supply of labour under a contract with a contractor for

carrying out its work which, would have fallen outside the 'work', but for its specific inclusion in the sub-section."

It emerges from the record as also from the decision of the Tribunal that Essar Oil Limited – the appellant herein entered into a contract with EPL – the contractor for establishing a Refinery Plant at Jamnagar. The question arose with regard to deduction of tax at source under the provisions of Section 194C of the Income Tax Act as there were three separate contracts viz., one for Supply of Indian sourced equipments and materials; second for labour-cum-erection; and third for construction of refinery. As it was emphasized by the Department that this amounts to only one contract which was signed on 7th November 1994, deduction of amount equal to 2% of such sum as Income-tax on income comprising therein was a must whenever the person responsible for paying any sum to any contractor for carrying out any work in pursuance to a contract.

The Tribunal noted that the provisions of Section 194C of the Act would be applicable in view of the decision of the Apex Court rendered in case of **Associated Hotels of India Limited** [*Supra*], if the principal objective of the work undertaken by the payee of the price is not the transfer of a chattel, but to improve the land or the other chattel. The

Tribunal also noted that the provisions of this Section will not cover the contract for sale of goods and the Tribunal also noted that the Supreme Court in case of *Associated Hotels of India Limited* [Supra] clearly laid down that the provisions of Section 194C of the Act are applicable to the material contracts also. It further held that the contract herein is not for transfer of chattel but for labour and work done and the material furnished, and therefore, provisions of Section 194C would be applicable. As in the present case, the contract for supply of Indian sourced equipments and materials was held to be fully covered by the said Supreme Court decision and provisions of Section 194C were held applicable to these contracts. It went to an extent saying that even if there were three separate contracts, then also, the assessee was bound to deduct tax at source.

Another question connecting this very discussion the Tribunal addressed to is as to whether three contracts were composite contracts, or they were separate contracts. It relied upon the discussion made by CIT [A] and it also independently examined this issue by holding that all the three contracts were for construction of refinery and there was only one single contract. It noted that for construction of refinery, the contractor was need to arrange labour, shall also to arrange

some import and Indian equipments and materials, however, that would not divide the main contract which was for construction of a refinery. It also held that once the main contract is in existence, further separate contracts for different jobs of material and labour cannot be given. It referred to a decision in case of Associated Cement Company Limited [*Supra*] to dilate the word “any work” and concluded that in case of this decision and also as ruled out by the Patna High Court in case of **Associated Cement Company Limited**, reported in 120 ITR 444, Section 194C of the Act would be applicable to all types of contracts. It further emphasized upon the fact that these three contracts reiteratively refer to the original document which is an agreement dated 7th November 1994, and therefore also, it concluded that later agreements were only amendments to the original agreement. They were inseparable part of the original agreement dated 7th November 1994. Logically also, it was of the opinion that when contract is for erection of a Refinery Plant, without supply of material, it is not possible and contract for construction of building, dam, air ports, railways are in the nature of contracts for work and labour and their liability to deduct tax at source from the payment made in respect of such contracts.

Thirdly, with regard to deduction of tax at source, in the

aforementioned discussion, when it held that it was a composite contract of the assessee appellant that EPL and the rest were merely amendments to the original agreement, it concluded that tax was to be deducted on the total amount paid to the contractor for the work done for construction of the refinery and as it held that the provisions of Section 194C would be applicable for material contracts also, it held the applicability of Section 194C, while making the payment to the contractor and accordingly, this led to the discussion on issuance of Certificate under Section 197 [1] of the Act.

It was found that the contractors submitted Certificate dated 9th September 1997 issued by the ITO authorizing deduction of tax at source from one person and the application for certificate was made on 6th August 1997. It also held that the deduction of tax had to be made at the time of credit of the amount; or at the time of payment thereof, by cash or issuance of cheque/draft, and therefore, certificate issued on 9th September 1997 could not have retrospective effect and for the amount paid between 1st April 1997 to 9th September 1997, the default can be said to have been committed, as neither there was any certificate which could have any application for such period, nor was there any mention in the certificate that the same would have effect from 1st April 1997. And therefore,

it held that defect cannot be rectified by the certificate.

Circular No. 777 dated 17th March 1999 issued by the CBDT makes it clear that such certificate cannot have retrospective effect. The reason put forth by the assessee that he had a *bona fide* belief, as for earlier financial years the Assessing Officer of the contractor allowed the assessee to credit or pay without deduction of tax at source did not find favour with the Tribunal on the ground that the Circular issued under Section 197 (1) of the Act cannot have retrospective effect. Again the say of the assessee on the basis of earlier years experience did not weigh with it and it held that automatically such presumption was not allowable to the appellant that the tax was not deductible on account of the earlier experience. It also further directed to take steps for default of not deducting the tax at source for the payment made to the contractors for the period from 1st April 1997 to 9th September 1997.

As mentioned herein before, under chapter XVII collection and recovery-deduction at source, provision of Section 194C of the Act is incorporated, which incumbents upon the person liable to pay to the contractor for carrying out any work in pursuance of a contract 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 cheque or draft to deduct an amount equal to two percent where payment is to be made to other than an individual or a HUF under Section 194C of the said Act.

Assessing Officer under Section 197 of the Act, on an application moved by an assessee can issue a certificate for less deduction or no deduction of Income-tax on being satisfied with justification and till such certificate remains in existence, this benefit continues. However, as a consequence of failure to deduct or pay any sum in accordance with the provision of this Act, the assessee is deemed to be in default in respect of such tax. If such person, without good and sufficient reason, fails to deduct and pay such tax, penalty under Section 221 is contemplated as provided under Section 201 of the Act.

Question therefore would be whether the contract entered into by the appellant-assessee with Essar Projects Ltd was a contract for labour/service or contract for sale of material or was it contract for constructing oil refinery essentially and therefore, non deduction of tax at source would make appellant a defaulter or as was it a *bona fide* mistake as certificate was issued under Section 197 for the period from 9.09.1997 to 31.3.1998. Validity of such certificate would be there till it is cancelled, however, no retrospective effect is to be given to it. Again, would entitlement of refund of huge

amount condone or exempt the appellant to such payment of interest/penalty ?

In our opinion to answer the last point first, neither the grant of certificate under Section 197 of the Act from 1.4.1997 to 31.3.1998 obliterates the requirement of payment of tax from retrospective date, when statute insisted upon such payment nor would huge sum of refund take away the statutory requirement of holding assessee defaulter in the event of the non fulfillment, if otherwise statute so mandates.

And therefore, the moot question that requires to be answered is whether three contracts in essence are one and the only contract *ie.*, of setting up of refinery and whether Tribunal was justified in terming them as the only contract for setting up refinery and hence was justified in holding non compliance of provision of Section 194C of the Income Tax Act and thereby holding assessee as a defaulter under Section 201 of the Income-tax Act.

For the reasons hereinafter, we answer in favour of the revenue and find no cogent grounds to entertain this tax appeal of the assessee appellant.

The appellant-Essar Oil Limited gave three contracts to its sister concerns *viz.*, Essar Project Limited (EPL) (i) for supply of Indian sourced equipments and materials (ii) for labour-cum-

erection (iii) for construction of refinery.

Main contract dated 7th Nov. 1994 for establishing refinery continues to hold field and is often referred to in these three contracts.

In case of **Himachal Pradesh & Associated Hotels & India Limited (Supra)** what is held necessary to be considered for the Court in each case is as to what is the primary object of the transaction and intention of the parties while entering into it before the court determines whether contract is divisible or indivisible. It was observed :

“The difficulty which the courts have often to meet with in construing a contract of work and labour, on the one hand, and a contract for sale, on the other, arises because the distinction between the two is very often a fine one. This is particularly so when the contract is a composite one involving both a contract of work and labour and a contract of sale. Nevertheless, the distinction between the two rests on a clear principle. A contract of sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the principal object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale ; neither the ownership of materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel.”

What is sought to be canvassed by the appellant is that

parties entered into separate contracts; one for work and service and other for sale & purchase of materials to be used in the course of executing the work and therefore, transaction be treated divisible and not one.

Both CIT (A) and the Tribunal, while dealing with these submissions have elaborately discussed factual *matrix* of this case and drawing from these details, when primary object of transaction is grasped, it undoubtedly is the setting up of a refinery and all the three agreements have not only reference of the main contract of the year 1994, but, intention of the parties is also very clearly emerging. This is not a transfer of chattel *qua* chattel but essentially the contract is for work and labour.

From the order of the Commissioner (Appeals) and the Tribunal we notice that the appellant had originally entered into a single agreement dated 7.11.1994 for construction of refinery plant. The assessee had thereafter, made amendments to the original agreement and created three separate contracts for supply of (i) Indian sourced equipment and material, (ii) labour-cum- erection and (iii) construction. These amendments were made later on *i.e.* on 25.3.1997. In the subsequent agreements, the original agreement was mentioned at various places. The Tribunal therefore, held that later agreements were

only in the nature of amendments to the original agreement and such new agreements were not independent agreements. The Commissioner (Appeals) also noticed a clause in the agreement dated 25.3.1997 for supply of materials which read as under:

“complete Responsibility. Notwithstanding the separate identification of the work for design, engineering, manufacturing, testing, inspection and FOR Site delivery of all Indian Sourced Equipment and Materials in the SUPPLY CONTRACT, the work of construction of all buildings, bridges, structures, all enabling facilities, permanent General Work, construction erection, testing and commissioning of various package units, loading and despatch system, marine works, Piping Works, perimeter fence and boundary wall in the CONSTRUCTION CONTRACT and the work of Site Preparation, Port Clearance and Inland Transportation of Non-Indian sourced equipment and materials, Site & Marine Survey, Erection and Installation of all equipment and materials (Indian sourced & Non-Indian sourced) and carrying out of commissioning, start-up and performance testing of various units and facilities in the LABOUR CUM ERECTION CONTRACT, SUPPLIER shall be responsible for successful completion of the work of procurement of Indian sourced Equipment and Materials, Port Clearance and Inland Transportation of Non Indian Sourced Equipment and Materials, Site preparation, Construction of all buildings, bridges, structures and various units and facilities, all enabling facilities and permanent General work and erection and installation of all Equipment and materials and carrying out of commissioning, start-up and performance testing of all process units, offsites, utilities and infrastructural facilities of the Refinery in its entirety.”

On the basis of such clause, the Commissioner came to the conclusion that three contracts were composite contracts i.e. for construction of refinery at Vadinar. We have no reason to take a different view. Particularly, in view of the background that three separate agreements were created long after the initial contract for construction of refinery was executed between the parties and such agreements were referred to as

amendments in the original agreement, it cannot be disputed that there was one single integrated agreement for construction of refinery plant.

In case of **State of A.P. v. Kone Elevators (India) Ltd**, reported in (2005) 140 STC 22(SC), the Supreme Court observed that there is no standard formula by which one can distinguish a '*contract for sale*' from a '*works-contract*'. The question is largely one of fact depending upon the terms of the contract including the nature of the obligations to be discharged thereunder and the surrounding circumstances. If the intention is to transfer for a price a chattel in which the transferee had no previous property, then the contract is a contract for sale. Ultimately, the true effect of an accretion made pursuant to a contract has to be judged not by artificial rules but from the intention of the parties to the contract'. In a '*contract of sale*', the main object is the transfer of property and delivery of possession of the property, whereas the main object in a '*contract for work*' is not the transfer of the property but it is one for work and labour.

As about the supply of Indian sourced equipments being employed in the works contract, in our opinion, the Tribunal has not misinterpreted the *ratio* of the Apex Court to so hold it.

We find absolutely no reason to interfere with any of the

findings made by the Tribunal where both – the CIT [A] and the Tribunal have concurrently decided the issue in favour of the Department and against the appellant. Interpretation made by both these authorities are drawn from overwhelming facts existing on the record whereby from the very reading of all the three agreements, reiteratively reference was made of the original agreement. Thus, the covenants of the agreement led both the authorities to conclude that essentially it was only the main contract for construction of refinery and not three separate contracts. There is no reason to hold otherwise than what has been concluded by these authorities consecutively.

Resultantly, this Tax Appeal, for the reasons aforementioned, deserves no entertainment. The question is answered in the negative *ie.*, against the assessee and in favour of the Revenue. The Appeal is dismissed.

{Akil Kureshi, J.}

{Ms. Sonia Gokani, J.}

Prakash*