IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 245 of 2021

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THE PRINCIPAL COMMISSIONER OF INCOME TAX 1

Versus

ASIAN MILLS PVT. LTD.

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Appearance:
M R BHATT & CO.(5953) for the Appellant(s) No. 1
MR B S SOPARKAR(6851) for the Opponent(s) No. 1
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CORAM: **HONOURABLE MS. JUSTICE SONIA GOKANI**
and
HONOURABLE MR. JUSTICE HEMANT M. PRACHCHHAK

Date : 26/10/2021

ORAL ORDER
(PER : HONOURABLE MS. JUSTICE SONIA GOKANI)

1. Being aggrieved by and dissatisfied with the order dated 02.03.2021 passed by the Income Tax Appellate Tribunal ("ITAT" for short), Ahmedabad, the appellant has preferred this appeal raising the following substantial questions of law:-

> *"[A] Whether the Appellate Tribunal has erred in law and on facts in deleting the disallowance of Rs.2,59,03,812/- made under section 40(a)(ia) of the Act without appreciating that the assessee had not complied with the provisions of seb-sections (6) and (7) to Section 194C and that the assessee did not deduct TDS under Section 194C(3) of the Act on freight payments made to Essar Steel?*
> *[B] Whether the Appellate Tribunal has erred in law and on facts in deleting the disallowance of Rs.5,48,921/- without appreciating the fact that the additional discount given is by way of godown ent*

and therefore, the assessee is under obligation to deduct TDS under section 1941 of the Act which the assessee failed to comply?
[C] Whether the Appellate Tribunal has erred in law and on facts in deleting the depreciation on car and car expenses of Rs.34,63,547/- without appreciating the fact that the car purchased in the name of director cannot be said to be assets of the company"

2. The Income Tax Appellate Tribunal ("the Tribunal" for short) passed an order dated 02.03.2021 in ITA No.1531/Ahd/2015 for the Assessment Year 2011-12. There were cross appeals being ITA No.1397/Ahd./2015. Against the order of the Tribunal passed in ITA No.1091/Ahd./2015, Tax Appeal No.244 of 2021 has been preferred before this Court by the appellant original respondent.

3. The first question raised herein is identical, except for the amount of disallowance. This Court, while deciding the Tax Appeal No.244 of 2021, dealt with the same in following manner:

"2.The respondent assessee filed return on 30.09.20130 declaring total income of Rs.8,65,92,110/- crores. It was processed under section 143(1) of the Income Tax Act ("the Act" for short) and the same was selected for scrutiny.
3. Notice under section 142(1) of the Act along with questionnaire was issued on 27.08.2012. In response,the authorised representative of the company attended time to time. It was noticed that

the respondent assessee had not deducted the tax under section 194(C) for the payments made to various transporters, this included the freight inward charges and clearing and forwarding charges.

4. The Assessing Officer rejected the contention of the respondent assessee that TDS was not deducted, as the same was not applicable as per the provisions of law. According to the assessee Company TDS was not to be deducted on payment made to the transporters as per Clause 6 of section 194(c). Again, the details of the transporters have been filledin at the time of filing of the TDS return, wherein their PANs have been duly submitted to the authority. Therefore, the condition reflected in sub-section(7) also have been fulfilled. The Assessing Officer held the assessee in default and made the disallowance of all the three charges of the total income of the assessee under section 40(a)(ia).

5. The assessee preferred the appeal before the CIT(Appeals), which deleted the addition to the extent of transportation towards freight, inward charges and clearing charges, but confirmed the addition of Rs.1,38,350/- towards forwarding charges for payment to M/s. Trishul Transport Company.

6. The Revenue as well as the assessee both preferred appeal before the Tribunal. The Tribunal dismissed the appeal of the Revenue and allowed the appeal of the assessee. The appeal of assessee was allowed on the ground that it had obtained PAN card details from the transporters, which were furnished with TDS return. Therefore, the assessee's claim cannot be denied on account of non-deduction of TDS on the payment made to the transporters towards freight inward charges and clearing charges under sub-section (6) of section 194(c). The claim also cannot be denied on the ground that the assessee was under an obligation after obtaining the PANs from the transporter to furnish the same in the prescribed form to the prescribed authorities.

7. This Court has heard Mr. M.R.Bhatt, learned Senior Advocate appearing with Mr.Karan Sanghani, learned advocate for the appellant and Mr. B.S.Soparkar, learned advocate for the opponent.

8.The issue is covered by the decision of this Court rendered in the case of Commission of Income-tax-I

vs. Valibhai Khanbhai Mankad, [2012] 28 taxman.com 119(Gujarat), where the issue was again with regard to payment to the contractor and requirement of deduction of TDS. Relevant paragraphs are reproduced as under:

"3) We have heard the learned counsel for the Revenue as well as for the assessee. Section 194C of the Act, as is well known, pertains to payments to contractors. Sub-section (1) of section 194C, as it stood at the relevant time, required that any person responsible for paying any sum to any resident, contractor for carrying out any work in pursuance of a contract between the contractor and the specified entities, shall credit specified sum as income tax on income comprised therein. Likewise, sub-section (2) of section 194C required a person responsible for paying any sum to resident-sub-contractor to deduct tax at source under given circumstances. It is not in dispute that ordinarily the assessee was required to make such deduction on the payments made to the sub-contractors, unless he was covered under the exclusion clause contained in sub-section (3) of section 194C of the Act. Such provision, as it stood at the relevant time, read as under:-

"Section 194C(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, subsection (2) shall be liable to deduct incometax 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 subcontractor 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 cooperative 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 cooperative 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." 4) Section 40(a)(ia) of the Act, in turn, provides that certain amounts shall not be deducted in computing the income chargeable to tax under the head 'profits and gains of business or profession', namely, payments made towards interest, commission or brokerage etc., on which tax is deductible at source and such tax has not been deducted or, after deduction, the same has not been paid on or before the due date specified in sub-section (1) of section 139 of the Act. Section 40(a)(ia) of the Act, insofar as it is relevant for our purpose, reads as under:- "Section 40(a)(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 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:]" 5) From the above statutory provisions, it can be seen that under section 40(a)(ia) of the Act, payments made towards interest, commission or brokerage etc. would be excluded for deduction in

computing the income chargeable under the head 'profits and gains of business or profession', where though tax was required to be deducted at source, is not deducted or where after such deduction, the same has not been paid on or before the due date. Thus for application of section 40(a)(ia) of the Act, the foremost requirement would be of tax deduction at source. 6) Section 194C, as already noticed, makes provision where for certain payments, liability of the payee to deduct tax at source arises. Therefore, if there is any breach of such requirement, question of applicability of section 40(a)(ia) would arise. Despite such circumstances existing, sub-section (3) makes exclusion in cases where such liability would not arise. We are concerned with the further proviso to sub-section (3), which provides that no deduction under sub-section (2) shall be made from the amount of any sum credited or paid or likely to be credited or paid to the subcontractor 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 it in the prescribed manner within the 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. 7) The exclusion provided in sub-section (3) of section 194C from the liability to deduct tax at source under sub-section (2) would thus be complete the moment the requirements contained therein are satisfied. Such requirements, principally, are that the sub-contractor, recipient of the payment produces a necessary declaration in the prescribed format and further that such sub-contractor does not own more than two goods carriages during the entire previous year. The moment, such requirements are fulfilled, the liability of the assessee to deduct tax on the payments made or to be made to such sub-contractors would cease. In fact he would have no authority to make any such deduction. 8) The later portion of sub-section (3) which follow the further proviso is a requirement which would arise at a much later point of time. Such requirement is that the person responsible for paying such sum to the sub-contractor has to furnish such particulars as

prescribed. We may notice that under Rule 29D of the Rules, such declaration has to be made by the end of June of the next accounting year in question. 9) In our view, therefore, once the conditions of further proviso of section 194C(3) are satisfied, the liability of the payee to deduct tax at source would cease. The requirement of such payee to furnish details to the income tax authority in the prescribed form within prescribed time would arise later and any infraction in such a requirement would not make the requirement of deduction at source applicable under sub-section (2) of section 194C of the Act. In our view, therefore, the Tribunal was perfectly justified in taking the view in the impugned judgment. It may be that failure to comply such requirement by the payee may result into some other adverse consequences if so provided under the Act. However, fulfillment of such requirement cannot be linked to the declaration of tax at source. Any such failure therefore cannot be visualized by adverse consequences provided under section 40(a)(ia) of the Act. 10) When on the basis of the record it is not disputed that the requirements of further proviso were fulfilled, the assessee was not required to make any deduction at source on the payments made to the subcontractors. If that be our conclusion, application of section 40(a)(ia) would not arise since, as already noticed, section 40(a)(ia) would apply when there is a requirement of deduction of tax at source and such requirement is either not fulfilled or having deducted tax at source is not deposited within prescribed time." 9.Yet another decision of the High Court of Madras is reported in the case of Commissioner of Income Tax, Madurai vs.Sri Parameshwari Spinning Mills(P.)Ltd.,[2019] 10 taxmann.com 386(Madras), where sub-section 6 of section 194, which grants benefit to the assessee, is discussed along with subsection(7) of section 194. The Court held that this benefit comes with the condition of compliance of sub-section (7) of section 194(c). This is a procedure required to be followed. The Court held that non-filing of the statement in terms of sub-section(7) of section 194(C) cannot take away the benefit, which will accrue to the assessee under subsection(6) of section 194. Relevant

paragraphs are reproduced as under: "6. We find sub-Section 6 of Section 194C is the provision which grants benefit to the assessee. This benefit comes with the condition of compliance of Sub-Section (7) of Section 194C, which is the procedure to be followed. The question would be as to whether if the procedure under Section 194C(7) has not been adhered to by the assessee would it be fatal and thereby disentitle the assessee to the benefit under sub-Section 6 of Section 194C.

7. It is a submission of Mr.A.S.Sriraman, learned counsel for the appellant/assessee that Section 31A deals with statement of deduction of tax under sub-Section 3 of Section 200 referring to Section 31(A)(4)(vi). It is submitted that the deductor at the time of preparing statement of tax, deductor shall furnish particulars of amount paid or credited on which tax was not deducted in view of the compliance of provision of sub-Section 6 of Section 194C by the payee. Section 234(E) was relied to state that if the statement is not filed, a fee of Rs.200/-for every day, during which the failure continues, has to be paid by the assessee. Therefore, it is the submission that the nonfiling of a statement in terms of sub-Section 7 of Section 194C cannot take away the benefit which will accrue to the assessee under sub-Section 6 of Section 194.

8. We fail to understand as to what is the apprehension in the mind of the Revenue when the Tribunal has remanded the matter to the Assessing Officer to consider whether the assessee has filed form no. 26(Q) belatedly and to examine as to whether the fee has to be collected. We find that there is no ground to interfere with the order passed by the Tribunal. 9. Ms.V.Pushpa placed reliance on the decision of the Hon'ble Supreme Court in the case of CIT Vs. Valibhai Khanbhai Mankad reported in [(2014) 51 Taxmann.com 385 (SC)] where the Hon'ble Supreme Court has granted leave to file appeal by the revenue against the order passed by the Gujrat High Court in CIT Vs. Valibhai Khanbhai Mankad reported in [(2012) 28 Taxmann.com 119]. In the said decision the High Court of Gujarat held that once conditions of proviso to Section 194(C)(7) are satisfied, liability of payer to deduct taxes at

source would cease and consequently, disallowance of payment of subcontractor under Section 40(a)(ia) could not be made on the ground that the assesee had not furnished form no.15J as required under Rule 29D. We find that the said decision is of no assistance to the case of the Revenue.

10. Mr.A.S.Sriraman, learned counsel for the assessee referred to the decision of the ITAT Jaipur in the case of ACIT Vs. Arihant Trading Co. reported in [176 ITD 397 (Jaipur-Tri)]. In the said decision it has been held that Section 194C(6) & (7) are independent of each other and cannot read together to attract disallowance under Section 40(a)(ia) read with Section 194C of the Act"

10. In the instant case also, as detailed above, the assessee company has not deducted the TDS of payment made to the transporters as per sub-section(6) of section 194(c). However, the details of the transporters have been filled-in in the TDS return, wherein their PAN cards also have been duly submitted to the Income-tax authorities, as this is a sufficient compliance of sub-section (7) of section194(c). The Tribunal was absolutely correct in upholding the version of the assessee. It also rightly held that after obtaining the PAN Card from the transporters, assessee is needed to furnish the same in the prescribed form to the prescribed authority within prescribed time. section194(C) (7) is reproduced as under:

"(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."

11. The Tribunal held that there is no prescribed authority nominated under the provisions of law. Thus, in absence of such prescribed authority, no fault was attributed to the assessee obviously for not filing the details before such authority. The details filed by the respondent assessee along with Form No.26 naturally could be construed as sufficient compliance. No fault can be found with these detailed findings and the settled position of law.

12. The first question is accordingly answered."

4. Here also the first question is accordingly answered.

5. So far as the second question is concerned, dealing with the disallowance of Rs.5,48,921/-, we notice that the Assessing Officer has added disallowance of Rs.5,48,921/-, whereas the CIT(Appeals) deleted the said addition made by the Assessing Officer for the additional discount given on account of the godown rent and tax not deducted thereon under section 194(i) of the Act.

6. As noted by the ITAT, the assessee gave additional discount to parties on account of godown rent paid by the said parties. According to the assessee, the customers did not take the delivery of the goods in their own godown after the purchase and the goods would continue to be at the godown of the assessee till the customer sells the goods to the other parties. However, five persons to whom the deduction had been given by the assessee had taken the delivery of the goods to their own godown and, therefore, they were given the discount for the godown rent paid by

them, on the ground that these parties were located in Mumbai and they also owned the godown. The Assessing Officer had chosen not to allow the payment made to them as according to him, the discounts were for rent, which required deduction of tax under section 194(1) of the Act, and, therefore, this discount had been added to the total income of the assessee.

7. The CIT(Appeals) deleted the addition. The CIT(Appeals) had directed to verify the contention of the Revenue and modify the above and subject to verification, disallowance of the amount was deleted.

8. When challenged before the Tribunal, it held that the discount offered by the assessee to its parties had been disallowed on two counts. Firstly, that they were owning their own godown in Mumbai and secondly, the assessee was paying the rent to those parties in the form of discounts extended to them and such discount is subject to the provisions of section 194(1) paying the rent in the garb of discounts.

9. The Tribunal rightly held that the Assessing Officer had no authority to sit on the arm chair of the assessee and direct the assessee to carry out its business affairs in a particular manner, so far as the first reason was concerned. The second reason, according to the Tribunal, of protection of section 194(i) of the Act on the discount extended was not sustainable. Again, the assessee had claimed the assessment as deduction, which cannot be equated with the rent. The CIT (Appeals) adjudicated the issue raised before it by allowing the appeal of the assessee subject to the directions, which has been discussed above. Hence, it did not interfere.

10. The Tribunal is absolutely right in holding that every assessee is required to decide its own business affairs. The manner of conducting the business also gives it a fillip, which shall need to be essentially decided by the assessee and no one can comment and run his business usurping his position. Again, the rational given on the discount and having held it a non-protection of the provisions

of section 194(i) of the Act, would not require any interference.

11. So far as the third issue is concerned, there was a disallowance of depreciation on expenses relating to car which was registered in the name of Director.

The assessee claimed depreciation of three cars, out of which two cars were bought during the year under consideration. The cars were registered in the name of Directors, but they were used for the business purpose of the assessee company.

12. The Assessing Officer held that the car purchased and owned in the name of Directors, cannot be said to be the asset of the company, since the assessee company and the Directors are two different persons. It was held to be their asset in personal capacities. Again, according to the Assessing Officer, the Director may not be the Director of the assessee company and he may also hold Directorship with other company or can also hold stake in some other business concern.

13. He did not find satisfactory evidence to establish that their purchase of cars was by the company on

behalf of the Director.

14. The Assessing Officer also held and observed that the depreciation was denied in the year 2010-11, as the assessee failed to establish the same on producing the documentary evidence. He thus, disallowed the depreciation, RTO expenses and insurance charges of all the three cars. The same was challenged by the assessee before the CIT(Appeals).

15. The CIT(Appeals) held in favour of the assessee by holding thus:

> *"20. Aggrieved assessee preferred an appeal before the learned CIT(A) who allowed the appeal of the assessee by observing as under:*
>
> *Having considered the facts of the case I am inclined to accept the contentions of the Ld.A.R. as admitted by the A.O himself the funds for purchase of the car were provided by the appellant.*
>
> *The Hon'ble Supreme Court in the case of Mysore Minerals Ltd. vs. C.I.T 239 ITR 775(S.C.) has held that the section of the I.T.Act, 1961, confers a benefit of the assessee. The provision should be so interpreted and the words used therein should be assigned such meaning as would enable the assessee to secure the benefit intended to be given by the Legislature to the assessee. It was further held by the Hon'ble Supreme Court that the term owned as occurring in section 32(1) of the Income-tax Act must be assigned a wider meaning. The Hon'ble Supreme Court has held as under:*
>
> *"It is well-settled that there cannot be two owners of the property simultaneously and in the same*

sense of the term. The intention of the Legislature in enacting section 32 of the Act would be best fulfilled by allowing deduction in respect of depreciation to the person in whom for the time being vests the dominion over the building and who is entitled to use it in his own right and is using the same for the purpose of his business or profession. Assigning any different meaning would not subserve the legislative intent."

4.3.1 Further, the Ahmedabad I.T.A.T. in the case of Ambuja Synthetics Mills Pvt. Ltd. vs. the Dy. C.I.T., Range-1, Ahmedabad, on similar facts, decided the issue in favour of the assessee, by holding.

"It is not disputed that funds for purchases of the car- were provided by the assessee company which is also reflected in the accounts of the assessee company. In our opinion, when the car is actually used for the purpose of business of the company depreciation thereon cannot be denied."

As regards the A.O's observation that the appellant failed to establish that the vehicles were used by the company, it is seen that there are various judicial pronouncements to the effect that the use means kept ready for use and not actually use. The case laws cited at 123 ITR 404 (Delhi, 170 Taxman 407(MP), 187 Taxman 442 (Mad), 201 Taxman 666 (P & H), 198 Taxman 470 & 199 Taxman 273 are in favour of the appellant."

16. The Revenue challenged the same before the Tribunal. It also relied on the decision of ***ITO vs. Electro Ferro Alloys Ltd.*** in ITA No.2773/Ahd/2009 reported in **25 taxmann.com 458**. According to the ITAT, the material available on record, when looked at, the assessee though was not the legal owner of the vehicle, it has made the payment for acquisition

of cars and thus, it is a beneficial owner. It is, therefore, held to be entitled for depreciation on the car. It has drawn the support from the decision of ***ITO vs. Electro Ferro Alloys Ltd.B*** (supra) and the decision of the Rajasthan High Court in ***CIT (Appeals) vs. Mohd. Bux Shokat Ali (no.2)***,**[2002] 256 ITR 357(Raj.)** and the decision in the case of ***CIT vs. Basti Sugar Mills Co.Ltd.*** **[2002] 257 ITR 88(Delhi)**.

17. The Tribunal has rightly distinguished the concept of dominion ownership of the car. The question raised is answered accordingly.

18. In the result, in absence of substantial questions of law arising for consideration, we choose to dismiss the appeal.

(MS. SONIA GOKANI, J.)

(HEMANT M. PRACHCHHAK,J)

SUDHIR