IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1182 of 2011

COMMISSIONER OF INCOME TAX-I - Appellant(s)
Versus
VALIBHAI KHANBHAI MANKAD - Opponent(s)

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Appearance :
MRS MAUNA M BHATT for Appellant(s) : 1,
MR MANISH J SHAH for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MS.JUSTICE HARSHA DEVANI

Date : 01/10/2012

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 29th April 2011. Following question has been presented for our consideration:-

> "Whether the Appellate Tribunal is right in law and on facts in deleting the addition of Rs.7,91,02,011/- made under section 40(a)(ia)?"

2) For the assessment year 2006-07, above question arises in the following factual background:-

2.1) The respondent-assessee is engaged in the transport business. He also had other source of income, with which, we are not concerned. During the year under consideration, the assessee made payments of Rs.11,21,09,788/- to sub contractors-transporters. On such payments, the assessee had not deducted tax at source (hereinafter to be referred to as "TDS") for a sum of Rs.3,27,75,595/- on the ground that such payments were made to individual transporters, which did not exceed Rs.20,000/- at a time and Rs.50,000/- in the aggregate during the year. He had also not deducted tax at source for payment of Rs.7,91,02,011/- on the ground that from the transporters, receiving such payments, form No.15I was obtained and, therefore, no TDS was required to be deducted.

2.2) We are concerned with the payment of Rs.7,91,02,011/-. The Assessing Officer disallowed such expenditure under section 40(a)(ia) of the Income Tax

Act, 1961 (hereinafter to be referred to as "the Act") on the ground that the assessee had not furnished form No.15J before 30th June 2006 as required under Rule 29D of the Income Tax Rules, 1962 (hereinafter to be referred to as "the Rules").

2.3) The assessee carried the matter in appeal. Before CIT (Appeals), he did produce the requisite form No.15J. The Appellate Authority, however, did not accept the assessee's appeal, upon which, the assessee approached the Tribunal. The Tribunal, by the impugned judgment, reversed the view of the Revenue authorities and held that disallowance under section 40(a)(ia) of the Act was not justified. The Tribunal relied on its earlier decision in the case of M/s. Shree Pramukh Transport Co. Ltd.. The Tribunal also gave its own independent findings and conclusions. The Tribunal was of the view that the requirement of furnishing form No.15J was not related to the liability to deduct tax at source. Any infraction of such requirement would not result into disallowance under section 40(a)(ia) of the Act. It is this view of the Tribunal, which the Revenue has challenged before us in the present tax appeal.

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, 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."

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 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 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 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 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 sub-contractors. 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.

11) With respect to the Tribunal's earlier judgment in case of M/s. Shree Pramukh Transport Co. Ltd., neither side could throw any light whether the Revenue had carried the same in appeal or not. However, we have examined the question independently and come to our own conclusion recorded herein above.

12) In the result, tax appeal is dismissed.

(AKIL KURESHI,J.)

(HARSHA DEVANI,J.)

IN THE INCOME TAX APPELLATE TRIBUNAL
AHMEDABAD BENCH "A" AHMEDABAD

Before S/Shri Mukul Kr. Shrawat, JM and D.C.Agrawal, AM

ITA No.2228/Ahd/2009 Asst. Year 2006-07

Valibhai Khanbhai Mankad, Prop. Abad Roadways, 35-A, Taslim Society, Nr. Bibi Talav, Vatva, Ahmedabad.	Vs.	Dy. CIT (OSD), Circle-9, Ahmedabad.
(Appellant)	..	(Respondent)

Appellant by :-	Shri A. C. Shah, AR
Respondent by:-	Shri Anil Kumar, CIT, DR

O R D E R

Per D.C. Agrawal, Accountant Member.

This is an appeal filed by the assessee raising following grounds :-

1. The ld. CIT(A) has erred in confirming the disallowance of Rs.7,93,34,193/- u/s 40(a)(ia) on the ground that the assessee has filed Form No.15J with CIT on 26.02.2009 instead of on or before 30th June, 2006 in as much the there is no failure to deduct tax at soure under section 194C since the assessee has received Form No.15-I from the sub-contractors before making payment to them.

1.1 There may be a failure to file Form No.15J in time but there is no failure to deduct tax at source. Therefore, the addition made is not proper.

1.2 The appellant says and submits that Form No.15J is filed on 26.02.2009 separately with CIT

1.3 The appellant further says and submits that requirement to file Form No.15J by 30th June 2006 is directory and not mandatory and

that non-furnishing of Form No.15J in time does not invalidate Form No.15-I submitted by the sub-contractors who submit Form No.15-I before the payment is made in the beginning of the financial year. Whereas Form No.15-J is required to be filed before the end of three months from the end of financial year.

2. The ld. CIT(A) has erred in confirming disallowance of Rs.2,32,182/- u/s 40(a)(ia) where from No.15-I were not submitted by sub-contractors.

3. The ld. CIT(A) has erred in confirming 1/10th vehicle expenses of Rs.20,985/- on the ground that it is personal inasmuch as the expenditure is incurred wholly and exclusively for the purposes of business and there is no element of personal nature.

4. The ld. CIT(A) has erred in confirming 1/10th telephone expenses of Rs.24,673/- on the ground that it is personal inasmuch as the expenditure is incurred wholly and exclusively for the purposes of business and there is no element out of personal nature.

2. Ground No.2 is not pressed by the ld. AR and hence it is rejected.

3. Ground Nos.3 & 4 relate to disallowance of 1/10th vehicle expenses and 1/10th telephone expenses at Rs.20,985/- and Rs.24,673/- respectively. We confirm these additions for the reason that assessee was not able to prove that entire expenditure claimed was incurred wholly and exclusively for the business purposes and that such disallowance is reasonable looking to the facts of the case.

4. Ground No.1 relates to addition u/s 40(a)(ia), of a sum of Rs.7,93,34,193/-. The assessee had filed return of income at Rs.48,62,265/- by showing income from transport contract and commission agency. The AO during the course of assessment proceedings found that assessee has made payment of Rs.7,93,34,193/- to sub-contractors to whom it awarded sub-contract for hiring. It was explained to the AO that he has made payment of Rs.7,91,02,011/- to 151

different transporters from whom he had obtained form No.15-I and hence no TDS was required to be made by him from the payments made to those 151 transporters. The AO, however, noted that even though the forms No.15I were obtained from the transporters the same were not furnished to the CIT in form No.15J as per rule -29 of the IT Rule, 1962. Further the contract payments to those transporters exceeded Rs.50,000/-. He also noted that neither TDS have been made nor any form No.15-J is submitted. Since the assessee had not furnished requisite form No.15J to the CIT, the AO issued a show cause notice to the assessee, in response to which it was submitted that it was the first year of collection of form No.15-I and there was no intention not to submit these forms to the TDS department. The AO thereafter quoting from section 194C(3) as applicable to the relevant Asst. Year held that once assessee failed to furnish form No.15J enclosing therewith form No.15-I to the CIT before 30th June, 2006, he failed to fulfill the conditions laid down u/s 194C(3)(ii), which were effective from 1.6.2005. The AO then inferred that assessee was liable to deduct TDS from the payments made to such transporters and deposit the same into the Government account before the expiry of time prescribed under section 201 of the IT Act. He accordingly, added back the sum of Rs.7,91,02,011/- into the total income of the assessee.

5. The ld. CIT(A) confirmed the addition by holding that responsibility of non-deducting the tax at source does not stop just by collecting form No.15-I from the sub-contractors but also extends to requiring the contractor to furnish form No.15J to the CIT on or before 30th June of the following FY. This form No.15J gives details of declaration given in form No.15I furnished by sub-contractors for non-deducting the TDS. It was contended before the ld. CIT(A) that form

no.15J was submitted to the CIT on 26.2.2009 i.e. after the completion of assessment and after delay of 2 years 8 months. The ld. CIT(A) rejected this contention holding that such delay defeats the very purpose of the section. She accordingly confirmed the addition.

6. Before us, the ld. AR for the assessee submitted that this is the first year of obtaining of form No.15-I. The sub-contractors have submitted form No.15-I being declaration under second proviso to clause (1) of sub-section (C) of section 194, to the assessee as required by rule 29D(1). Once sub contractor have furnished form No.15-I then assessee is not required to deduct the tax on the payment made to the sub-contractors. Once there is no requirement of deducting the tax u/s 194C then there cannot be any default as mentioned in section 40(a)(ia). Even though there is a default on the part of the assessee in submitting form No.15J in time to the CIT but this default alone cannot become the basis of making addition u/s 40(a)(ia). In fact submission of form No.15J is an act subsequent to the close of the FY whereas payment to sub-contractors and deduction of tax therefrom has to be done during the course of the FY. If sub-contractors have furnished form No.15-I during the course of FY then assessee cannot make deduction of tax therefrom, as rule 29D(1) prohibits such deductions. Once deduction of TDS is not made and payment is released to the sub-contractors then by merely not furnishing form No.15J the assessee cannot be compelled to deduct tax from the payment which is already released. The CIT can take action against the assessee for not furnishing the form No.15J in time but this default is not sufficient to hold that there was non-compliance of section 194C and therefore, the addition u/s 40(a)(ia) can be made. The ld. AR relied on the decision of the Tribunal, Ahmedabad Bench-D in ITA No.1717/Ajd/2010 Asst. Year 2007-08 in the case of ACIT vs. M/s Shree Pramukh Transport

Co. Bhutadi, Baroda pronounced on 31.08.2010 wherein on similar facts addition u/s 40(a)(ia) was deleted. He referred to para Nos.4 & 5 from that order as under :-

"4. The learned CIT(A) considering the material on record noted that the AO has not disputed that the assessee claimed that he had obtained declaration in Form No.15-I from the payees. The learned CIT(A) noted that ultimately Form No.15-I was filed with delay in the office of the Commissioner, but the assessee in fact had obtained the declaration and therefore, it cannot be said that the assessee had violated the mandate given by the payees not to deduct tax. The addition was accordingly deleted.

5. On consideration of the rival submissions, we are of the view that no interference is called for in the matter. The learned DR submitted that Rule 29 D of the IT Rules is procedural in nature. The submission of the learned DR itself shows that since the compliance of the rule was procedural only, therefore, when the assessee obtained requisite declaration and filed the same with delay with the office of the Commissioner and also filed the same before the AO at the assessment stage, would prove that the addition is clearly unjustified in the matter. According to section 194(c)(3) of the IT Act, the assessee complied with the second proviso by obtaining declaration in the prescribed form. Therefore, there was no liability for deduction of tax at source. The genuineness of the certificate is not doubted by the authorities below. Therefore, the assessee has substantially complied with the provisions of law. In case of procedural irregularities, the assessee cannot be put to unnecessary hardship in the matter and that too when certain exemption has been given to the assessee in section proviso to section 194(c)(3) of the IT Act. Since, there is sufficient compliance of the provisions of law, therefore, the learned CIT(A) was justified in deleting the addition. We, therefore, do not find any justification to interfere with the order of the learned CIT (A). We confirm his findings and dismiss the appeal of the revenue."

The ld. AR also submitted that genuineness of the payment has not been doubted and addition has been made only on technical ground even though substantial compliance has been made by the assessee.

7. Against this, the ld. DR submitted that facts as reported in the case of Shree Pramukh Transport Co. (supra) are different than the facts in the case of assessee. The Asst. Year involved in the case of Shree Pramukh Transport Co. (supra) was 2007-08, form No.15J was submitted before CIT on 17/12/2007 though it was required to be filed on 30.6.2007. Thus there was a delay of only six months. Further form No.15J was filed before completion of assessment thus enabling the AO to carry out the necessary enquiries as to the genuineness of the payments. In the present case there was inordinate delay of 2 years and 8 months which has not been explained and form No.15J is filed long after completion of assessment u/s 143(3) on 26/12/2008. The ld. DR then submitted that while going through section 194C (3) all the three provisos mentioned therein are required to be satisfied simultaneously and it is not a case that only second proviso alone should be satisfied. Thus compliance of the three provisos should be cumulatively done and if there is any default even in respect of one proviso, the liability of the assessee to deduct the tax on payment made by it will continue to exist. Once assessee intends to seek exemption from the rigours of provisions then strict interpretation has to be made and assessee has to fulfill all the conditions laid down for allowing exemption. If condition relating to furnishing form No.15J to the CIT is done away with and assessee is allowed exemption from deducting the tax from payments by it to sub-contractors then conditions relating to furnishing form No.15J to the CIT will become otiose which cannot be the intention of the Legislature when they introduced this condition. The ld. DR further submitted that third proviso to section 194C(3) clearly lays down by using the word "shall" that it is mandatory to furnish particulars to the prescribed authority in the prescribed form for gaining exemption from deducting the tax. Merely obtaining form No.15-I from the sub-contractors is not sufficient to get exemption from deducting the tax from

payments made to them but liability of the assessee extends to furnishing form No.15J also which is a prescribed form to be submitted to the CIT who is the prescribed authority.

The ld. DR also submitted that there is no word like failure used in section 40(a)(ia) and it refers to only non-deduction of tax and disallowance of such payments. It does not refer to genuineness of the payment or otherwise. In other words the ld. DR submitted that addition u/s 40(a)(ia) can be made even though payments are genuine but tax is not deducted as required u/s 194C.

8. We have heard the rival submissions and perused the material on record. The undisputed facts are that assessee has obtained form No.15-I from the sub-contractors to whom a total payment of Rs.7,93,34,193/- has been made. It submitted form No.15-I to the AO during the course of assessment proceedings but did not submit form No.15J to the Commissioner by 30.6.2006 as required u/d 194C. For the sake of convenience we reproduce section 193C(3) as under :-

"Sec.194C(3) *No deduction shall be made under sub-section (1) or sub-section (2) from -*
(i) the amount of any sub0credited 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 payment such sums referred to in sub-section (1) or as the case may be sub-ection (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"*

Rule 29-D in this regard reads as under :-

29D –(1) The declaration under the second proviso to clause (i) of sub-section (3) of section 194C by a sub-contractor shall be in form No.15-I and shall be verified in the manner indicated therein by such sub-contractor.

(2) The declaration referred to in sub-rule (1) may be furnished to the contractor responsible for paying or crediting any sum to the account of the sub-contractor before the event of such sum being credit or paid to such sub-contractor.

(3) The particulars under the third proviso to clause (i) of sub-section (3) of section 194C to be furnished by a contractor responsible for paying any sum to such sub-contractor shall be in form No.15J.

(4) the particulars referred to in sub-rule (3) shall be furnished -

(i) to the Commissioner of Income-tax, so designated by the Chief Commissioner of Income-tax, within whose area of jurisdiction, the office of the contractor referred to in sub-rule (3) is situated;

(ii) on or before the 30th June following the financial year.

A combined reading of the provisions and the rules made therein shows that assessee is exempted from deduction of tax from payment made to sub-contractors if following conditions are fulfilled :-

(1) amount paid to sub-contractor does not exceed Rs.20,000/-

(2) total payment in FY should not exceed Rs.50,000/-

(3) the sub-contractor produces the declaration to the assessee in the prescribed form and verified in the prescribed manner within such time as may be prescribed, if such sub-contractor does not hold more than two goods carriers at any time during the previous year;

(4) The assessee furnishes to the prescribed income-tax authority such particulars as may be prescribed in such form within such time as may be prescribed;

(5) declaration as per second proviso to clause (i) of sub-section (3) of section 194C is form No.15-I;

(6) the particulars referred to in 3rd proviso would be in form No.15J;

(7) form No.15J shall be furnished to the Commissioner of Income-tax so designated by the Chief Commissioner of Income-tax.

(8) it shall be furnished on or before 30th June following the FY.

The three proviso mentioned in sub-section (3) under clause (i) are in continuity, as they are separated only by a colon (:) and not by word "or" meaning thereby the condition laid down in all the three provisos are to be satisfied simultaneously and cumulatively. In other words not only the assessee has to obtain form No.15-I from the sub-contractors while making the payment to them but it has also to file form No.15J to the Commissioner before 30th June following FY. In the present case other conditions like payment above Rs.50,000 is not disputed as assessee has admitted that payment to each sub-contractor exceeded the sum in one full year. But since according to the assessee it has obtained form No.15I then second proviso would be applicable, therefore it is not required to deduct tax. The short question arises is in a case like this where assessee has obtained form No.15-I is whether the assessee is still liable to deduct

tax under section 194C. In our considered view once assessee has obtained form No.15-I from the sub-contractors whose contents are not disputed or whose genuineness is not doubted then assessee is not liable to deduct tax from the payments made to sub-contractors. Once assessee is not liable to deduct tax u/s 194C then addition u/s 40(a)(ia) cannot be made. For the sake of convenience we reproduce section 40(a)(ia) as under :-

***"Sec.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 (or 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,-

The conditions laid down u/s 40(a)(ia) for making addition is that tax is deductible at source and such tax has not been deducted. If both the conditions are satisfied then such payment can be disallowed u/s 40(a)(ia). In other words where tax is not deductible addition u/s 40(a)(ia) cannot be made. From this it follows that second proviso to section 194C(3) (i) alone would be operative for deciding whether tax is deductible or not deductible. Non-furnishing of form No.15J to the Commissioner is an act posterior in time to payments made to sub-contractors. This cannot by itself, undo the eligibility of exemption created by second proviso by virtue of which sub-contractors have submitted form No.15-I. The deductibility of tax is, therefore, confined or limited to applicability of second proviso only because it is at that point

of time of assessee has to decide whether it has to deduct the tax or not. Where forms No.15-I are not submitted, it has to deduct the tax. Conversely where form No.15-I is submitted to the assessee by the sub-contractors, the tax is not deductible and once tax is not deductible no addition u/s 40(a)(ia) can be made. From this it follows that third proviso to section 194C(3)(1) which requires the assessee to submit form No.15J is only procedural formality and cannot undo what has been done by second proviso. Non-submission of form No.15J to the Commissioner within the time prescribed in rule 29D cannot have any effect on deciding as to whether tax was deductible or not deductible from the payments made by the assessee to the sub-contractors. This can be decided under second proviso alone. Even though the Legislature in their wisdom have added third proviso as addenda to the second proviso by mentioning "provided also" meaning thereby that Legislature intended to put both the conditions mentioned in second and third proviso together to be satisfied by the assessee but in effect both the conditions cannot be satisfied together as both are not the events taking place simultaneously at the same time. One event is the submission of form No.15-I by the sub-contractors to the contractor and takes place at the time or prior to the payment made to them by the contractor. The other event is the submission of form No.15J by the Contractor to the Commissioner of Income-tax giving the details contained in form No.15-I. This event in practice takes place after the contractor has released the payment to the sub-contractor after receiving form No.15-I. The upper time limit for submitting such form no.15J to the Commissioner as laid down in the Rules is on or before 30th June following the FY. The two events are spatially kept apart by the Legislature thus giving a latitude to the assessee to submit form No.15J to the Commissioner much after he receives form No.15-I from the sub-contractors. Apparently the

Legislature intended that the contractor should not only obtain the form No.15I from the sub-contractors but should also submit form No.15J to the Commissioner immediately after releasing the payments to the sub-contractors without deducting the tax on the strength of form No.15-I and if both the conditions are satisfied, then the assessee may not be treated as in default for not complying the provisions of section 194C. Thus satisfaction of the conditions in 2nd and third proviso of section 194C(3)(i) may be necessary for an assessee to save himself from being declared as an assessee in default but conditions laid down for invoking section 40(a)(ia) are not the same as cumulative conditions mentioned in second and third proviso of section 194C(3) (i). For invoking section 40(a)(ia) it is to be decided whether tax was deductible or not, if yes, whether deducted/paid or not. When we look into section 194C(3)(i) for the purposes of invoking 40(a)(ia) we find that only 2nd proviso to it is sufficient to decide whether tax was deductible or not. There is another reason for holding so. Time factor involved for compliance of the conditions mentioned in two provisions are different. 2nd proviso is to be complied with at the time of making payment to the sub-contractor, whereas compliance of third proviso can be deferred till 30th June of next FY. In other words the contractor can wait to comply with third proviso till 30th June of next FY after complying with second proviso. However, the decision on deductibility of tax from the payment made to the sub-contractor cannot be deferred till 30th June of next FY. He has to take this decision (about deductibility of tax from payments being made by it to the sub-contractors) just at the time when he is releasing the payments to the sub-contractors. It is at this point of time second proviso would come into play and when form No.15I are submitted by the sub contractors to the contractor then contractor is not required to deduct tax from such payments. Once deductibility of tax depends upon submission or non-

submission of form No.15-I from the sub-contractor to the assessee then non-compliance of third proviso becomes merely technical without affecting in substance the deductibility or non-deductibility of tax on payments made by the assessee to the sub-contractors. Therefore, in our considered view non-compliance of third proviso becomes merely a technical default, which even if, remained non-complied would not affect the operation of section 40(a)(ia).

The ld. DR has emphasized on the point that word used in rule 29D(4) is "shall" which would mean that it is mandatory to furnish the form No.15J on or before 30th June of following FY. There is no dispute with this proposition but unfortunately as we have held above non-compliance of third proviso cannot have any deciding role in determining whether tax is to be deducted or not to be deducted from the payments made to the sub-contractor.

9. Therefore, our view is in conformity with the decision taken by the Tribunal, Ahmedabad Bench –D in the case of M/s Shree Pramukh Transport Co. (supra) referred to by the ld. AR which has held that if assessee has obtained form No.15-I then it is substantial compliance of the provision of section 194C.

10. As a result, we delete the addition by holding that tax was not liable to be deducted from the payments made to sub-contractors on account of they submitting form No.15-I to the contractor and therefore, no addition u/s 40(a)(ia) could be made.

11. As a result appeal filed by the assessee is partly allowed.

Order was pronounced in open Court on 29/04/11.

Sd/-	Sd/-
(Mukul Kr. Shrawat)	(D.C. Agrawal)
Judicial Member	Accountant Member

Ahmedabad,

Dated : 29/04/11.

Mahata/-

Copy of the Order forwarded to:-

1. The Assessee.
2. The Revenue.
3. The CIT(Appeals)-
4. The CIT concerns.
5. The DR, ITAT, Ahmedabad
6. Guard File.

BY ORDER,

Deputy/Asstt.Registrar
ITAT, Ahmedabad

1.Date of dictation 19/4/2011
2.Date on which the typed draft is placed before the Dictating Member 25/4/ 2011
Member…….Other Member…….
3.Date on which the approved draft comes to the Sr.P.S./P.S…….
4.Date on which the fair order is placed before the Dictating Member for pronouncement……..
5.Date on which the fair order comes back to the Sr.P.S./P.S……
6.Date on which the file goes to the Bench Clerk……..
7.Date on which the file goes to the Head Clerk…….
8.The date on which the file goes to the Asstt. Registrar for signature on the order……
9.Date of Despatch of the Order……..