IN THE INCOME TAX APPELLATE TRIBUNAL
CHANDIGARH BENCHES, CHANDIGARH

BEFORE SHRI H.L.KARWA, HON'BLE VICE PRESIDENT &
MS. RANO JAIN, ACCOUNTANT MEMBER

ITA Nos. 648 & 649/Chd/2014
Assessment years : 2010-11 & 2011-12

M/s Ambuja Cement Limited, Mumbai	Vs.	The ITO (TDS), Solan (H.P.)
PAN No. PTLGI2065E		
(Appellant)		(Respondent)

Appellant By : Sh. Harish Aggarwal
Respondent By : Sh. Jatinder Kumar

Date of hearing : 28.01.2016
Date of Pronouncement : 04.02.2016

ORDER

PER H.L.KARWA, VP

These two appeals by the assessee are directed against the consolidated order of CIT(A), Shimla (H.P.) dated 5.5.2014 relating to assessment year 2010-11 and 2011-12.

2. In these appeals common issue is involved and, therefore, they were heard together and are being disposed of by this common order for the sake of convenience.

3. The Common grounds of appeals are as under:-

1. That on the facts and in the circumstances of the case, the Ld. Commissioner of Income Tax (Appeals) [here-in-after referred to as Ld, CIT(Appeals)] was not justified and grossly erred in confirming the order of the Income Tax Officer {TDS), Solan [here-in-after referred to as JTO(TDS)], treating the appellant as an assessee in default fur non-deduction of tax u/s 194C on payments made to the transport cooperative societies for carrying out transportation work.

2. That on the facts and circumstances of the case, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the action of the ITO(TDS) in treating the appellant as assessee in default for non deduction of tax u/s 194C on payments made to the Himachal Pradesh Road Transport Corporation (HRTC) without appreciating the fact that the same is a trust registered u/s 12A of the I.T. Act.

4. Briefly stated, the facts of the case are that the assessee is a Public Limited Company engaged, inter alia, in the business of manufacture and sale of cement and as a part thereof is also engaged in generation of power and developing, operating and maintaining infrastructure facilities. In these cases, TDS survey / inspection u/s 133A of the Income-tax Act, 1961 (in short 'the Act') u/s 133A of the Act was conducted against the assessee vide notice 5.10.2014. Thereafter, spot inspection / verification us/ 133A was conducted on 7.12.2012 at Suli and Rauri unit. A Summon u/s 131 of the Act was issued to the assessee requiring it to produce details and evidence of expenses on which it was liable to deduct tax. Subsequently, a show cause notice was issued to the assessee requiring it to show cause as to why it should not be treated as an assessee in default in non-deduction of tax at source u/s 194C on payments made to the transporter cooperative societies. In response to the same, the assessee

vide letter dated 25.3.2013 submitted detailed reply. Disregarding the reply submitted by the assessee, the ITO (TDS) Solan passed an order u/s 201(1) and 201(1A dated 28.3.2013 and created a demand of Rs. 1,91,78,200/- and Rs. 3,84,01,159/- for the assessment years 2010-11, 2011-12 respectively. On appeal, the CIT(A) vide his separate orders dated 30.11.2015 confirmed the order of the ITO (TDS), Solan dated 28.3.2013 relating to financial years 2009-10 and 2010-11 relevant to assessment years 2010-11 and 2011-12, and hence, the assessee is in appeal before the Tribunal.

5. Before us, Shri Harish Aggarwal, Ld. Counsel for the assessee submitted that during the period relevant to assessment year under consideration, the assessee had entered into an agreements with various Transport Cooperative societies viz. The Solan Distt. Truck Cooperative Transport Society Ltd, the Baghal Land Loosers Transport Society Ltd, Amuja Darla Kashlog Transport Cooperative Society Ltd and The Golden Land Loosers & Houseless Cooperative Society Ltd for carrying out the transport work at its Darlagghat unit. The Transport society is nothing more than a conglomeration of the truck operaors. Shri Harish Aggarwal, Ld. Counsel for the assessee submitted that the reasons for creation of the society was only to ensure equitable distribution of work amongst the individuals truck operators. These societies are registered under Himachal Pradesh Cooperative Societies Act, 1968. One of the objects of these societies is to carry out all type of transport business for transporting of goods through truck, trailers etc. Shri Harish Aggarwal, Ld. Counsel for the assessee submitted that terms of sub section(6) of section 194C substituted by Finance (No.2) Act, 2009 w.e.f. 1.10.2009, tax is not required to be deduced at source against payments made to contractors during the course of business of plying, hiring and leasing of goods carriages. Since the transport societies are engaged in the business of transportation of goods, the assessee w.e.f. 1.10.2009 has not

deducted tax on payments made to the above societies. Shri Harish Aggarwal, Ld. Counsel for the assessee pointed out that the issue is squarely covered in favour of the assessee by the decision of this Bench of the Tribunal dated 29.01.2016 passed in the case of M/s ACC Limited, Barmana v ITO, Palampur in ITA Nos. 634 to 637/Chd/2014 relating to assessment years 2010-11 to 2013-14 . He, therefore, submitted that in view of the order of the Tribunal referred to above, the order of CIT(A) may be set aside and the appeal of the assessee be allowed.

6. On the other hand, Shri Jatinder Kumar, Ld. DR strongly supported the orders of the lower authorities.

7. After considering the rival submissions, we may observe here that this Bench had occasion to decide a similar issue in the case of M/s ACC Limited, Barmana Vs. ITO, Palampur in ITA Nos. 634 to 637/Chd/2014 relating to assessment years 2010-11 to 2013-14 vide order dated 29.1.2016, observing as under:-

> *"5. We have heard the rival submissions. It is relevant to observe here that we had decided a similar issue in the case of ACIT (TDS), Chandigarh Vs. M/s ACC Limited (Chandigarh Sales unit), Chandigarh in ITA Nos. 651 & 652/Chd/2015 vide order dated 29.10.2015 for the assessment years 2012-13 and 2013-14 wherein similar issue was involved. In the above case, the Assessing officer passed order u/s 201(1) read with section 201(1A) of the Act on 11.3.2014 creating a demand of Rs. 3,54,02,834/- for the assessment year 2012-13. The Ld. CIT(A) Chandigarh vide his order dated 29.04.2015 deleted the demand created u/s 201(1) and 201(1A) of the Act observing as under:-*
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> > *"5. On appeal, the CIT(A) deleted the demand created u/s 201(1) and 201(1A) of the Act, observing as under:-*

"5. I have considered facts of the case. As the demand created u/s 201(1)/(1 A) in respect of payments made to H.P. Ex-Servicemen Corporation has been reduced to 'nil', the dispute remains only in respect of payments made to Bilaspur District Truck Operators Co-operative Transport Society Ltd. For appreciating the issue in proper prospective, it would be appropriate to reproduce relevant provisions of this Act. Hence, for the sake of ready reference, provisions of section 194C(6) and Explanation-(ii) below section 194C(7), provisions of section 44AE{1) and Explanation below section 44AE(7) of the Act are reproduced below:

"194C. Payments to contractors.

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 specified person 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—

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(6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, on furnishing of his Permanent Account Number, to the person paying or crediting such sum.

Explanation - For the purposes of this section, -

(ii) "goods carriage" shall have the meaning assigned to it in the Explanation to sub-section (7) of section 44AE;"

"44AE. Special provision for computing profits and gains of business of plying, hiring or leasing goods carriages.

(1) Notwithstanding anything to the contrary contained in sections 28 to 43C, in the case of an assessee, who

owns not more than ten goods carnages at any time during the previous year and who is engaged in the business of plying, hiring or leasing such goods carriages, the income of such business chargeable to tax under the head "Profits and gains of business or profession" shall be deemed to be the aggregate of the profits and gains, from all the goods carnages owned by him in the previous year, computed in accordance with the provisions of sub-section (2).

Explanation - For the purposes of this section,-

(a) the expression "goods carriage" shall have the meaning assigned to it in section 2 of the Motor Vehicles Act, 1988 (59 of 1988);

(b) an assessee, who is in possession of a goods carriage, whether taken on hire purchase or on installments and for which the whole or part of the amount payable is still due, shall be deemed to be the owner of such goods carriage."

5.1 From the above provisions, it is evident that for claiming benefit of provisions to section 194C(6), following conditions have to be satisfied:

- *The contractor should be in the business of plying, hiring or leasing of goods carriage.*
- *The term 'goods carriage' is assigned meaning as per section 2(14) of the Motor Vehicles Act, 1988. Section 2(14} of Motor Vehicles Act, 1988 defines goods carriage as - "'goods carriage[1] means any motor vehicle constructed or adapted for use solely for the carriage of goods, or any motor vehicle not so constructed or adapted when used for the carriage of goods".*
- *PAN is furnished by the contractor to the payer i.e. deductor.*
- *The deductor furnishes before the Income Tax Authority the details pertaining to the above contractor in the prescribed form.*

5.2 In the instant case, the appellant had obtained PAN from the payee and furnished the same before the prescribed authority. Further, the goods carriages involved also satisfied

the definition given in the Motor Vehicles Act. Therefore, the only issue to be decided is whether the payee i.e. Bilaspur District Truck Operators Co-operative Transport Society Ltd (hereinafter referred to as 'Society[5]) was engaged in the business of plying, hiring or leasing of goods carriage. The appellant has filed a copy of bye-laws of this Society, a perusal of which reveals that the main object of this Society is to provide goods and passenger carriages on hire and lease to anyone. This clearly implies that it is engaged in the business of plying, hiring and leasing of goods carriage. As per clauses of the agreement between the appellant and the Society, it was the responsibility of the Society to honour the commitment and obligation, which arose from the said agreement and to bear all risks arising therefrom

5.3 It is noteworthy that Explanation--(ii) below section 194C(7) refers to the definition of 'goods carriage', to have the same meaning as in Explanation (a) below sub-section (7) of section 44AE and so the reference is only in context of definition of goods carriage. Explanation-(a) below section 44AE(7) is applicable to section 194C, but Explanation-(b) below section 44AE{7) is applicable only to section 44AE. Therefore, the inference drawn by the Assessing Officer that for the purposes of claiming the benefit of sub-section (6) of section 194C, the appellant is required to satisfy the ownership criteria mentioned in Explanation-(b) below section 44AE(7) is not correct.

5.4 In view of the above, it is held that the Assessing Officer was not right in treating the person responsible as 'assessee in default' for not deducting tax on the payments made to the Society and the demand created u/s 201(1)/ (1A) is accordingly deleted. Grounds of appeal taken by the appellant are allowed."

6. The Revenue challenged the order of CIT(A) Chandigarh in appeal before this Bench of the Tribunal and the Tribunal vide its order dated 29.10.2105 upheld the order of the CIT(A), observing as under:-

> *"6. We have heard the rival submissions and have also perused the materials available on record. The Ld. CIT(A) has reproduced the provisions of section 194C(6) read with Explanation (ii) to section 194C of the Act in his order. On perusal of these provisions it is clear that following conditions are required to be satisfied for claiming the benefit of section 194C(6) of the Act:-*
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> *i) The contractor should be engaged in the business of plying, hiring or leasing goods carriage.*
> *ii) The contractor shall furnish its PAN No. to the deductor*
> *iii) The deductor furnishes before the I.T. Authorities the details of amount paid to the contractor*
> *iv) Goods Carriage shall have the same meaning as assigned in Section 2(14) of the Motor Vehicle Act, 1988*
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> *Before us, the assessee has submitted a photocopy of the bye-laws of the Bilaspur District Truck Operators Co-operative Transport Societies Ltd. wherein the main object of the society is to provide goods and passenger carriages on hire or lease. The transport co-operative society has also furnished its PAN number to the assessee, a copy of the same is available at page 44 of the assessee's paper book. It is claimed that in terms of Rule 31A(4)(v), the assessee has also furnished particulars of amount paid or credited to the transport cooperative society on which tax has not been deducted in its quarterly TDS return. Shri Soumen Adak, Ld. Counsel for the assessee submitted that the goods carriage involved also satisfies the definition of 'goods carriage' given in Section 2(14) of the Motor Vehicle Act, 1988. The term 'goods carriage' means any motor vehicle construed or adopted for use solely for the carriage of goods or any motor vehicle not so constructed or adapted when used for the carriage of goods.*

7. In our view, the Ld. CIT(A) has correctly observed that the inference drawn by the Assessing officer that for the purpose of claiming the benefit of sub section (6) of section 194C, the assessee is required to satisfy the ownership criteria mentioned in Explanation (b) below section 44AE(7) is not correct. In our view, reference of Explanation to section 44AE(7) in section 194C is only in the context of definition of 'goods carriage'. Clause (a) of Explanation to Section 44AE(7) defines 'goods carriage' and clause (b) defines 'deemed ownership'. The Ld. CIT(A) has correctly held that clause (a) is applicable to both sections i.e. section 194C and 44 AE, clause (b) is applicable only to section 44AE, since for the benefit of presumptive taxation the assessee should not own more than ten goods carriages. Therefore, the assessee is not required to satisfy the ownership criteria as mentioned in clause (b) of Explanation to section 44AE (7). On a perusal of section 194C (6) read with Explanation (II) to section 194C, it is crystal clear that the transport contractor is not required to be the owner of goods carriage for applicability of section 194C(6) of the Act. At this stage, we may observe here that an amendment has been made vide Finance Act, 2015 in section 194C (6) wherein it is specifically stated that w.e.f. 1.6.2015, the benefit of non deduction of tax on payment made to transport contractors would be applicable only if the transport contractor owns ten or less goods carriages at any time of the previous year and a declaration to this effect is furnished. In our opinion, the Legislature has intentionally inserted the ownership condition for claiming the benefit of non deduction of tax which was not existing in the erstwhile section 194C(6) of the Act. In view of the above discussion, the assessee (Person responsible) cannot be treated as 'assessee in default' for not deducting tax on the payments made to the Bilaspur District Truck Operators Co-operative Society thus, we do not find any infirmity in the order of CIT(A) and accordingly we uphold the same. The appeal of the Revenue is dismissed."

7. The facts of the present case are similar to that of M/s ACC Limit (Chandigarh Sales Unit), Chandigarh. It is observed that the CIT(A) Chandigarh while deciding the case of M/s ACC Cement Ltd (Chandigarh Sales Unit), Chandigarh (supra) has deleted the demand created by the Assessing officer u/s 201 and 201(1A) of the Act. However, the CIT(A), Shimla while deciding the assessee's case relating to Gagal Cement Works has upheld the demand created by Assessing officer u/s 201 and 201(1A) of the Act. In fact, the decisions of the CIT(A), Chandigarh and CIT(A), Shimla on identical facts and issue are contrary and the assessee is common in both the cases. In view of the order of the Tribunal dated 29.10.2015, passed in case of ACIT(TDS), Chandigarh Vs. M/s ACC Limited (Chandigarh Sales unit), Chandigarh (supra), we are of the view that the impugned order passed by CIT(A), Shimla is not based on correct appreciation of the facts of the case and law and, therefore, the impugned order deserves to be set aside and consequently, we allow all the appeals of the assessee and delete the demand created u/s 201 and 201(1A) of the Act.

8. It is relevant to state here that facts of the present case are similar to that of M/s ACC Limited, Barmana Vs. ITO, Palampur referred to above. The issue involved is also identical. Respectfully following the order of the Tribunal in the case referred to above, we set aside the order of CIT(A) and allow common ground No.1 of the appeal. Accordingly, the demand of Rs. 1,91,78,200/- and Rs. 3,84,01,159 created u/s 201(1) and 201(1A) for assessment years 2010-11 and 2011-12 are hereby deleted.

9. As regards ground No.2 of the appeal, the relevant facts are that the assessee entered into an agreement with Himachal Road Transport Corporation (in short 'HRTC') in availing bus services on contract basis. The employees engaged with the assessee company including their families were permitted to travel in the buses provided by HRTC. The assessee did not deduct tax u/s 194C

while making payment to HRTC in view of the fact that HRTC is registered as a trust and enjoyed the benefit of exempt income provided u/s 11 & 12 of the Income-Tax Act, 1961. The ITO (TDS) in his order passed u/s 201(1) / 201(1A) treated the assessee as an assessee in default u/s 201(1) / 201(1A) on the ground that registration of HRTC as a trust u/s 12A is not a pre-condition for non deduction of tax u/s 194C of the Act.

10. On appeal, the CIT(A) held as under:-

> *"6.2 I have considered the facts of the case and submissions made by the appellant, The AO noted that the appellant did not deduct tax u/s 194C on payments made to HRTC. Accordingly the AO treated the deductor as assesses in default u/s 201(1). The appellant submitted that HRTC is a charitable institution which is entitled for exemption u/s 11 and since the HRTC income is exempted, on their request the TDS u/s 194C was not done. The appellant has also drawn attention the provisions of section 190 (1) of the Act which creates a charge for deduction of tax at source. The appellant submitted that TDS is required to be deducted from any income on which the tax is payable since the income of HRTC is exempt so the question of deduction of tax does not arises.*
>
> *6.3 After considering the rival submissions it is noted that the appellant's submissions is contrary to the provisions of section 190(1) and misplaced, The section nowhere provides that tax is not deductible at source in case of any exempt income. The provision u/s 190(1) is that the tax on income shall be payable by deduction at source. It does not say that tax is to be deducted on 'taxable income'. Further, the taxability of income or exemption u/s 11* ***is*** *subject to various conditions and subject to assessment of income by the Assessing Officer. So the deductor cannot assume that since HRTC is registered as a trust for charitable purpose its income is non-taxable. The only provision available for lower*

rate of deduction or no tax deduction is according to certificate obtained from assessing officer as per provisions of section 197 of the Act. So the AO was justified in treating the deductor as assessee in default for no deduction of tax on payments made to HRTC. However, the directions given as in para 5.18 to the AO in view of Board's circular No. 275 (supra) is applicable on the present ground also. Accordingly, the relief is available to the appellant subject to verification by A.O."

11. We have heard the rival submissions. In the above findings, the Ld. CIT(A) has given certain directions to the Assessing officer as per para 5.18 of the order. These are as under;_

"5.18 In view of the aforesaid decision it is found that even though the deductor has been held as assessee in default, tax cannot be recovered from them to the extent if the same has been paid by the recipient. There are no findings by the ITO (TDS) regarding the payment of taxes by the deductees. Therefore, the ITO (TDS) is directed to find out the extent and quantum of tax paid by the deductees. If the entire amount as claimed from the deductor has been paid by the deductees then for that amount the deductor cannot be treated as assessee in default. Accordingly the relief is available to the appellant subject to verification by Assessing officer."

12. After considering the entire facts of the present case, we are of the view that the Ld. CIT(A) has taken a correct view that that there is no provision in the Income Tax Act, 1961 to the effect that tax is deductable at source in case of exempt income. The assessee claimed that the deductee HRTC is registered as a Trust and enjoyed the benefit of exempt income as per sections 11 & 12 of the Income-tax Act. In our opinion, the taxability of income or exemptions u/s 11 & 12 is subject to various conditions and subject to assessment of income by the Assessing officer. Thus, the deductor (assessee) cannot assume that since

HRTC is a Trust / Charitable Institution registered u/s 12A of the Act and its income is non-taxable. In that view of the matter, we do not see any infirmity to the above extent in the order of the CIT(A) on this issue as he has correctly directed the ITO (TDS) to find out the extent of quantum of tax paid by the payees. The Ld. CIT(A) has also directed the ITO (TDS) that if entire tax amount has been claimed from the deductor has been paid by the deductees, then for that amount the deductor cannot be treated as assessee in default. Accordingly, the CIT(A) has directed the Assessing officer to give relief subject to verification as above. In our opinion, before deciding the issue the Assessing officer should give an opportunity of being heard to the assessee. The Assessing officer is further directed to decide the issue keeping in view the relevant provisions of Income-tax Act, 1961 applicable to the facts of the present case. We, therefore, remand this issue to the Assessing officer for a fresh decision. Accordingly, the order of the CIT(A) is modified to the above extent. Ground No.2 of the appeal is allowed for statistical purposes.

13. The Ld. Counsel for the assessee did not press the following grounds:-

> *3. That on the facts and circumstances of the case, and without prejudice to ground Nos. 1 & 2 taken here-in-above, the Ld. CIT(A) was not justified and grossly erred in holding that the deductor shall not be treated as an assessee in default if the entire TDS liability of the deductor has been paid by the deductee without appreciating the fact that the deductee is liable to pay only the amount of taxes due on the income declared by him in his return of income.*
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> *4. That on the facts and in the circumstances of the case and without prejudice to ground Nos. 1 & 2 taken here-in-above, necessary direction may please be given to the ITO (TDS) to compute interest u/s 201(1A) only on the*

amount of taxes which the deductee was liable to pay on the income declared by him in his return of income.

14. Accordingly, the above grounds are dismissed as not pressed.

15. In the above terms, the appeals are allowed partly and partly for statistical purposes.

Order pronounced in the Open Court on 04.02.2016

Sd/-	*Sd/-*
(RANO JAIN)	**(H.L.KARWA)**
ACCOUNTANT MEMBER	**VICE PRESIDENT**

Dated : 4th February, 2016
Rkk

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT*
4. *The CIT(A)*
5. *The DR*