* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 17 September 2024**
Judgment pronounced on: 12 November, 2024

\+ ITA 1145/2017

COMMISSIONER OF INCOME TAX (TDS) - 2.....Appellant

Through: Mr. Sanjay Kumar & Ms. Easha, Advs.

versus

NATIONAL HIGHWAY AUTHORITY OF INDIA .....Respondent

Through: Mr. Santosh Kumar, St. Counsel with Mr. Adithya Ramani & Mr. Devansh Malhotra, Advs.

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CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The Commissioner of Income Tax (TDS) impugns the judgment rendered by the **Income Tax Appellate Tribunal**[1] on 10 April 2017

[1] Tribunal

and which has principally held that the capital grant subsidy given by the respondent-assessee to its Concessionaires would not be subject to a withholding tax as contemplated under Section 194C of the **Income Tax Act, 1961**[2]**.**

2. We had upon hearing learned counsels for respective sides on 19 March 2024 admitted the appeal on the solitary issue of deduction of tax at source. The said order is reproduced hereinbelow:-

> "1. Having heard Mr. Sanjay Kumar and Mr. Santosh Kumar, leamed counsels appearing for respective sides, we are of the considered opinion that the appeals would merit further consideration.
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> 2. We note that undisputedly the viability gap funding was part of a prescription of the concession agreement itself. It is in the aforesaid context that, prima facie, we find ourselves unable to sustain the view taken by the Income Tax Appellate Tribunal [**'ITAT'**] which has observed in paragraph 7 that the said payment was not in discharge of a contractual obligation. We, consequently, admit these appeals on the following question of law: -
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>> A. Whether on the facts and in the circumstances of the case and in law, the ITAT was justified in holding that the assessee was not liable to deduct tax at source from non-refundable sums paid under any name by NHAI to the Concessionaries particularly when such sums have been paid as per Concession Agreement for securing rights of NHAI?
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> 3. List again on 15.07.2024."

3. Shorn of unnecessary details, it would be the following facts which would merit being noticed for the purposes of disposal of the present appeals. For the sake of brevity, we propose to take note of the facts as they emanate from ITA 1145/2017. The respondent-assessee,

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[2] Act

the **National Highways Authority of India**[3], is a body constituted under the **National Highways Authority of India Act, 1988**[4] and charged with the responsibility of development, maintenance and operation of National Highways and associated facilities. It functions through various **Project Implementation Units**[5] which are spread out across the length and breadth of the country and obligated to oversee and administer projects being undertaken by the NHAI.

4. As per the disclosures made in the appeal, the PIUs' are entrusted with funds made available by the concerned Ministry in the Union Government and which are routed through the Head Office of the NHAI to those units. We are in the present case concerned with the capital grant subsidy which has been disbursed by the NHAI to a Concessionaire who was awarded the project work on **Build-Own-Operate-Transfer**[6] basis.

5. In terms of an order framed by the **Assessing Officer**[7] on 28 March 2012, it was held that NHAI had failed to comply with the obligation to deduct taxes in terms of Section 194C on the capital grant subsidy released by it to its Concessionaires. Aggrieved by the aforesaid order, NHAI is stated to have preferred an appeal before the **Commissioner of Income Tax (Appeals)**[8] and which in terms of its order of 20 May 2013 affirmed the view as expressed by the AO.

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[3] NHAI
[4] NHAI Act
[5] PIUs'
[6] BOOT
[7] AO
[8] CIT(A)

6. The NHAI, being aggrieved by the aforesaid decision, had approached the Tribunal and which appeal has come to be allowed in terms of its order dated 10 April 2017 for **Assessment Year**[9] 2010-11, leading to the institution of the present challenge by the appellant.

7. The Tribunal has held that in terms of the Concession agreements, the Concessionaires develop roads and highways based on the **Public Private Partnership**[10] model and in terms of which the construction of expressways and roads is undertaken by the Concessionaire at its own risk and cost. It was this decision which was followed by the Tribunal in its decision dated 18 March 2021 rendered for A.Y. 2011-12 and which forms the subject matter of challenge in ITA 159/2021.

8. In terms of the concession agreements, the Concessionaires are obliged to develop and maintain the highways during the concession period and are also enabled to charge and collect user fee as per rates prescribed by the Union Government. The capital grant subsidy is explained by NHAI as essentially being financial support which is rendered by it to the Concessionaire in relation to projects where, on account of various factors, the revenue that the Concessionaire generates is less than the expected projection or where it may be found that the Concessionaire would be unable to recover the total project cost. In order to attend to this viability gap, NHAI provides funding to the Concessionaire as a capital grant on the basis of a competitive

[9] A.Y.
[10] PPP

bidding process. According to the disclosures made before the Tribunal, the bidders are selected for the award of the **"Build, Operate Transfer"**[11] contracts based on the lowest viability gap funding requirement bid for.

9. NHAI had before the Tribunal explained the nature of BOT contracts as envisaging the Concessionaire to be recognized as the owner of the assets which come to be created, conferred with the right to collect toll over the concession period and at the end of which the highway would revert to the NHAI. It had contended before the Tribunal that the capital grant subsidy is essentially in the nature of financial support which is extended by NHAI and is not liable to be viewed as a revenue receipt in the hands of the Concessionaire.

10. NHAI had averred that in terms of the obligations placed under the BOT contract, the Concessionaire is obliged to construct appropriate buildings, superstructures, toll plazas, drains, bridges, tunnels, tube wells, flyovers and create facilities for the benefit of users of the expressway. According to the respondent-assessee, since the capital grant support could not possibly be viewed as a sum paid to the Concessionaire for carrying out a '*work*', the provisions of Section 194C were clearly inapplicable.

11. The Tribunal while dealing with the nature of a BOT contract and the statutory obligations that are placed upon a Concessionaire rendered the following observations:-

[11] BOT

"**5.** Having gone through the orders of the authorities below, we find that assessee is the head office having its project implementation unit (PIUs) at several state head-quarters and different places all over India. The head office is run by Ministry of Surface Transport, Transport Bhawan, New Delhi. The PIUs get the funds from Ministry through head office and HAI disburse the funds to different concessionaries, who are the private limited companies firms etc. Who get the project work on built-own-operate-transfer (BOOT) basis, then transfer the project to Government of India after a period of 12/15 years. Thus it is the model of public-private partnership between private business concerns and Government of India so that the role of private companies in nation building/infrastructure is enhanced and utilized by the Government of India to the maximum possible extent. The private business concerns also get their benefits of employing their man power along with resources and nation's wealth is created in this manner with modern infra-structure facilities like high quality roads, as found in developed countries. The Assessing Officer applying the provisions of section 194C of the I. T. Act on capital grant subsidy given by the assessee to its concessionaries as per concession agreement and creating it to be a contractual payment, held the grant given by the assessee as a contract payment and thus, TDS should be deducted on the capital grant. The contention of the assessee, on the other hand, remained that the private concessionaries are owners of the project for 15 years and they receive the capital grants from the assessee on which no TDS should be deducted. It was submitted that there are hundred and sixteen PIUs all over India, who disburse the money at project level being branch office of head office of NHAI and the branch offices (PIUs) are having their own TAN number and, therefore, there should not be double deduction of TDS at head office level, PIU level. It was submitted that the relation between head office of the assessee and PIUs is like that 'of head office and branch office. Since PIUs have done their duty of tax deduction at source at different places all over India, there should not be double deduction of TDS at assessee's head office level. The assessee thus claimed that it should get full relief on the issue. It was pointed out that the assessee had disbursed capital grants to different concessionaires during the financial year which was about 2% to 40% of total project cost. It was argued that since the capital grant is given by the Government through the assessee as a capital work in progress there should not be any TDS under section 194C on this capital grant.

5.1. Some undisputed facts in the present case are that the concessionaire is constructing the toll plaza at its own risk for owning and maintaining the same for a period specified in

concession agreement and not under a work contract agreement between the assessee and concessionaire. The concessionaire will ultimately transfer to NHAI-assessee the plaza by executing a conveyance or any deed or document and other writings as the assessee may deem fit. The grant paid by assessee to concessionaire is in the nature of capital subsidy/equity support to make the project lucrative and viable for the concessionaire."

12. The aspect of creation of infrastructure being an activity undertaken by the Concessionaire at its own risk and cost was one which came to be reiterated in paragraph 7 of the decision of the Tribunal and is reproduced below:-

> "7. When we examine the facts of the present case in view of the above cited decisions, we find certain undisputed facts that the concessionaire is constructing the toll plaza at its own risk for owning and maintaining the same for a period specified in concession agreement and not under a work contract between the assessee and the concessionaire. The concessionaire will ultimately transfer to NHAI the plaza by executing a conveyance or any deed or documents and other writings as the NHAI may deem fit. It proves beyond doubt that the concessionaire is the owner of the toll plaza during the concession periods. The right of concessionaire to claim depreciation on the toll plaza (as per Income Tax Act) has been upheld by Court of Law [(CIT Vs. Noida Toll Bridge Co. Ltd., Gujarat Road & Infrastructure Co. Ltd. vs. CIT (supra)] which also proves that it is owner of the toll plaza during the concession period as defined in the Income Tax Act. Thus, it is evident that the agreement is actually public private partnership for development of the infrastructure. The agreement between the assessee and the concessionaire is not that of principal and contractor, but that of principal and principal. It is also pertinent to mention over here that in the first appellate order for the assessment year 2004-05 vide its order dated 2.12.2011 in appeal No. 418/JPR/2010-11 in the case of assessee itself has decided the issue in favour of the assessee and there is no information brought on record that the Revenue had preferred any appeal questioning the said first appellate order. It is also an undisputed fact that the Government of India have approved in Model Concession Agreement (MCA) that to make such project viable in / private partnership models, the assessee provides viability gap funding as capital grant on competitive bidding process. Therefore, the assessee has not deducted the TDS on the payment of VGF (Grant) as it is not contractual payment liable for deduction of

tax at source under section 194C of the Act as VGF is not a revenue receipt in the hands of the concessionaire. The ratio laid down in the above cited decisions also support this stand of the assessee. We thus hold that the authorities below were not justified in coming to the conclusion that grant given by the assessee to concessionaire as a contract payment and not in the nature of grant/subsidy given by the assessee for building, operating and maintaining the toll road with this observation that relationship between assessee and concessionaires is contractor- builder or a contractor - maintainer, concessionaires assets for the purpose of Income Tax, the word grant has been used as it is not expected to be returned hack and that relationship between the assessee and the concessionaire is that of contractor builder or a contractor - maintainer. The nature of the work between the assessee and concessionaires, as discussed above, does not support the above observations made by the Assessing Officer to justify his action for application of the provisions of section 194C of the Act on the capital grant subsidy given by the assessee to its concessionaires as per concession agreement on BOT basis based on the policies of Government of India and treating it to be a contractual payment. We thus, while setting aside orders of the authorities below, direct the Assessing Officer to accept the claim of the assessee that provisions of section 194C of the Act are not applicable on the capital grant subsidy given by the assessee to its concessionaires. The grounds are accordingly allowed."

13. It is the correctness of the aforesaid view which is questioned before us by Mr. Sanjay Kumar, learned counsel who appeared for the appellant. Mr. Kumar would contend that the Tribunal has clearly erred in construing Section 194C and has failed to bear in consideration that as long as a sum is paid to a contractor for work, any such disbursement would fall within the ambit of that provision. According to learned counsel, the Tribunal has erred in relying upon various decisions which had principally considered the issue of whether a works contract alone would fall within the scope of Section 194C.

14. According to Mr. Kumar, the word '*work*' as it appears in Section 194C is clearly intended to be conferred an expansive meaning

and thus not restricted to a works contract alone. It was his submission that all payments, therefore, as made to a Concessionaire by NHAI would be subject to a withholding tax in terms of Section 194C.

15. Mr. Santosh Kumar, learned counsel appearing for the NHAI, on the other hand, submitted that the Tribunal has rightly appreciated the nature of a BOT contract and the capital grant subsidy which is paid in terms of the covenants contained in the Concession Agreement. According to learned counsel, the subsidy which is paid to the Concessionaire is essentially to meet the shortfall in revenue and which may render the project itself economically unviable and has been rightly understood by the Tribunal to constitute a viability gap funding measure.

16. Mr. Kumar would contend that the challenge which stands raised is no longer *res integra* and was duly examined by the Jaipur Bench of the Tribunal in Deputy **Commissioner of Income Tax (TDS) v. National Highway Authority of India Ltd.**[12] and where the following pertinent observations came to be rendered:-

> "4.1 The ld. CIT D/R vehemently argued that the ld. CTT (A) was not justified in deleting the addition. He submitted that the assessee has given colour of contractual payment as 'grant'. He submitted that the payment made to the concessionaires is nothing but a contractual payment. Therefore, the assessee was required to deduct tax thereon as per section 194C of the Act. The assessee has grossly failed to do so, therefore, the AO was justified in treating the assessee in default.
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> 4.2. On the contrary, the ld. Counsel for the assessee reiterated the submissions as made in the written submission. The ld. Counsel for the assessee submitted that as per clause XXIII of the agreement

[12] ITA Nos. 236, 237 & 238/JP/2012

with M/s. GVK, the total contributions made by the NHAI of Rs. 211 crores in A.Y. 2004-05, 2005-06 & 2006-07 towards its shares in respect of the cost of the project. Such contributions have been nomenclature as 'grant' to meet out the capital cost of the project and treated the same as part of the share holders funds or equity support from the above specific intention of the appellant as declared in the BOT agreements. It is quite clear that the above contributions were not contractual payments to a contractor but amount to capital participation by a member of joint venture towards its equity support as such. Obviously, it is felt that the provisions of section 194C do not apply to such capital contribution/equity participation made by an assessee, under such circumstances. The ld. Counsel reiterated that the principal NHAI and the concessionaires were required to be contributed the costs of the project and also they are eligible to share the revenue generated out of such project and the entire inflow and outflow of revenue are being managed through a common escrow account. Thus, in view of such financial arrangement, their relationship is found more of like partners/joint owners of a project than a contractor and contractoree. Moreover, another unique arrangement i.e. ownership of the assets/project is rested with the concessionaires for initial phase only and subsequently requires to be passed on to the NHAI also suggests that such unusual phase-wise ownership arrangement is not at all possible. In a normal contractual agreement, having such unique characteristics and dimensions cannot be subject matter of Section 194C of the Act, which deal with simple contractual matters. In other words, the phase-wise ownership arrangements entered between BOT concessionaires and NHAI is found absolutely different from the relationship, normally the NHAI is having with the other contractors who are engaged for road construction in routine manner. Since the NHAI and the BOT concessionaires are found investing in the project are like carrying out its own business and the same are not found similar to a relationship of the principal and contractor as such accordingly, any contribution made by NHAI is out of purview of section 194C. He further submitted that normally in works contract agreement, the principal pays to the contractor against the works completed under the contractual obligation on agreed upon quantum thereof. However, in the present case the contribution towards cost of the project i.e. concessionaires also. Like co-owner of the project, they are also entitled to share the revenue/income received as toll collection, through the method of escrow accounting system. These peculiar features also differentiate the present agreements from the normal works contract agreement. Accordingly, the AO's findings given in this regard are irrelevant and incorrect. He further submitted that in the works contract agreement, the ownership of the

project/assets lies with the principal only and the contractor is not having any sort of rights, be of real ownership or beneficial in nature, in this regard. However, it can be noticed that as per clause XXXVIII of the concession agreement, till the specified time period therein, the BOT concessionaires would have the ownership rights of the project and its assets for all practical and legal purposes. Thus the concessionaires are not only executors of the project, but they also assumed status of the co-owners of the same. The ld. Counsel submitted that in the case of M/s. GVK, the Coordinate Bench of the Tribunal allowed depreciation to the concessionaires on such assets while treating them beneficial ownership in the project as such. He submitted that the AO has erred in not appreciating Escrow Accounting System, as specified in such agreements. By doing so, the AO has given a different meaning or connotation to such phrases than the obvious and literal meaning of such aspects. He submitted that the 'cardinal rule of interpretation of law suggest that when the meaning of the words/phrase used in a statute is clear and unambiguous, then such words to be given its plain and grammatical meaning and effect of the law has to be given in such context only. In In simpler term, when there is no ambiguity in the language of the statute, then such provision cannot be interpreted in different manner to arrive at a particular conclusion as such. In support of this contention, the ld. Counsel placed reliance on the judgments of the Hon'ble Supreme Court reported in 306 ITR 277 (SC) and 266 ITR 521 (SC). The Id. Counsel then drew our attention to various articles of the agreement and vehemently argued that the AO was not justified in holding the assessee in default for non deduction of tax under section 201(1) and also charged interest under section 201(1A) of the Act. On the facts and circumstances of the case, the Id. Counsel further submitted that all the BOT concessionaires have already discharged the duty and duly filed their returns of income for all assessment years after paying due taxes, hence there is no liability on the deductor for deduction of tax under section 194C. The ld. Counsel placed reliance on the judgment of Hon'ble Supreme Court rendered in the case of Hindustan Coca Cola Beverage Pvt. Ltd. vs. CIT (2007) 293 ITR 226 (SC). Therefore, he submitted that even otherwise also the demands so raised deserve to be deleted.

4.3. We have heard rival contentions, perused the material available on record and gone through the orders of the authorities below. The only issue to be adjudicated under the facts of the case whether provisions of section 194C of the Act is applicable or not. For the sake of clarity, section 194C is reproduced as under:-

xxxx xxxx xxxx

A bare reading of above section, makes it explicit that any person

responsible being the contractor 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 any other mode, whichever is earlier, deduct an amount equal to two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family of such sum as income-tax for A.Y. 2011-12 of such sum as income comprised therein. Therefore, specified person the deductor herein i.e. NHAI is required to deduct tax in the event the payment is made to the contractor in pursuance of a contract. In the case in hand, we need to examine whether the payments made by the NHAI under the head 'Grant' to M/s. GVK Kishangarh Expressway Pvt. Ltd. was liable to deduction of tax or not. Undisputed facts remain that the NHAI has made payment to M/s. GVK Kishangarh Expressway Pvt. Ltd. under the head 'Grant'. The AO treated such payments as payment made under the contract. The AO examined various terms of the agreement between NHAI and M/s. GVK Kishangarh Expressway Pvt. Ltd. and has also reproduced certain terms of agreement. The AO, therefore, treated the assessee in default. However, the ld. CIT (A) after examining the terms of agreement came to the conclusion that such payments are not in the nature of payment made to the contractor. By doing so, he observed in para 3.3.1 of his order as under:-

xxxx xxxx xxxx

The contention of the assessee in substance is that from the terms of the agreement it can be inferred that the payments made to the concessionaires in the form of 'Grant' would not attract the provisions of section 194C. Essentially these payments are in the nature of contribution in the joint venture. We have gone through the terms of the agreement. The inference drawn by the AO is that the 'Grant' is nothing but payment to the contractor is mis-placed. As per section 194C, the payment is required to be made to the contractor but in the given case payment is not made to the contractor. The agreement cannot be stated to be purely a contract agreement but it is a contract agreement of joint venture. Hence, we do not see any infirmity in the order of ld. CIT(A), therefore, the same is hereby upheld."

17. Our attention was also drawn to the order passed by the High Court of Rajasthan on an appeal which was taken against the aforenoted decision of the Tribunal and which came to be dismissed on 21 April

2017. While affirming the view expressed by the Tribunal, the High Court had held as follows:-

> "3. The facts of the case are that The assessee has entered into concession agreements with these companies and the agreement is on Build Operate and Transfer (BOT) Model. As per these agreements, NHAI has conveyed the concession to construct the Highways, operate and maintain them and collect Toll on these Highways to the abovenamed Concessionaries. As per these agreements, the concessionaries were to be given certain amount for construction of roads by the NHAI. The AO observed that the assessee (NHAI) had not made TDS as per section 194 C of the IT Act, 1961 which appeared to be applicable in the instant case in respect of the above concessionaries. The AO passed order u/s 201 (1)/ 201(1A,) on 18.03.2011 creating demand of Rs. 6,56,58,200/- for AY 2006-07 for non deduction of TDS on the payment of 'Contract Money' to the concessionaries.
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> 4. While considering the case, the Tribunal has observed as under:-
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> > "We have gone through the terms of the agreement. The inference drawn by the AO is that the "Grant" is nothing but payment to the contractor is mis-placed. As per Section 194C, the payment is required to be made to the contractor but in the given case payment is not made to the contractor. The agreement cannot be stated to be purely a contract agreement but it is a contract agreement of joint venture. Hence, we not see any infirmity in the order of ld. CIT(A), therefore, the same is hereby upheld."
>
> 5. In view of the concurrent finding of all the authorities below regarding payments in the nature of contribution in the joint venture, no interference is required in this appeal."

18. At the outset, it becomes pertinent to note that undisputedly, Section 194C is not confined to works contracts. This aspect has been authoritatively settled by the Supreme Court in **Associated Cement Company Ltd. v. Commissioner of Income Tax**[13] and where it had held as follows:-

[13] (1993) 2 SCC 556

"**4.** Section 194-C(l) of the Income Tax Act on the proper construction of which the decision on the aforesaid question should necessarily rest, runs thus:

xxxx xxxx xxxx

No ambiguity is found in the language employed in the sub-section. What is contained in the sub-section, as appears from its plain reading and analysis, admit of the following formulations:

(1) A contract may be entered into between the contractor and any of the organisations 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 and 2, could credit that sum to 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 comprised therein.

5. 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 organisations 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 a wide import and covers 'any work' which one or the other of the organisations specified in the sub-section can get carried out through a contractor under a contract and further it includes obtaining by any of such organisations 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."

19. That still leaves us to consider whether the capital grant subsidy which was extended by NHAI could be construed as being payment for a '*work*' to a contractor and which forms the subject matter of Section 194C. In order to appreciate the question which stands posited, we deem it apposite to extract Section 194C hereunder:

> "**Payments to contractors.**
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> **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 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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> (*i*) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;
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> (*ii*) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,
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> of such sum as income-tax on income comprised therein.
>
> (2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.
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> (3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (*e*) of clause (*iv*) of the *Explanation*, tax shall be deducted at source-
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> (i) on the invoice value excluding the value of material, if such value is mentioned separately in the invoice; or
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> (ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.
>
> (4) No individual or Hindu undivided family shall be liable to deduct income tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu

undivided family.

(5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed [thirty 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 [one lakh rupees], the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income tax under this section.

(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, [where such contractor owns ten or less goods carriages at any time during the previous year and furnishes a declaration to that effect along with] his Permanent Account Number, to the person paying or crediting such sum.

(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.

Explanation.— For the purposes of this section,—

(i) "specified person" shall mean,—

(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); or

(j) any Government of a foreign State or a foreign enterprise or any association or body established outside India; or

(k) any firm; or

(l) any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,—

(A) does not fall under any of the preceding sub-clauses; and

(B) [has total sales, gross receipts or turnover from business or profession carried on by him exceeding one crore rupees in case of business or fifty lakh rupees in case of profession] during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor;

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

(iii) "contract" shall include sub-contract;

(iv) "work" shall include—

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;

(c) carriage of goods or passengers by any mode of transport other than by railways;

(d) catering;

[(e) manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer or its associate, being a person placed similarly in relation to such customer as is the person placed in relation to the assessee under the provisions contained in clause (b) of sub-section (2) of section 40-A,]

but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer [or associate of such customer].]"

20. It would also be beneficial to advert to some of the relevant provisions contained in the **Model Concession Agreement**[14] which stands placed on our record. Article 2 of the MCA defines the scope of the project in the following terms:-

"ARTICLE 2

SCOPE OF THE PROJECT

2.1. Scope of the Project

The scope of the Project (the **"Scope of the Project"**) shall mean and include, during the Concession Period:

(a) construction of the Project Highway on the Site set forth in Schedule A and as specified in Schedule-B together with provision of Project Facilities as specified m Schedule-C, and in conformity with the Specifications and Standards set forth in Schedule-D,

(b) operation and maintenance of the Project Highway in accordance with the provisions of this Agreement; and

(c) performance and fulfilment of all other obligations of the Concessionaire in accordance with the provisions of this Agreement and matters incidental thereto or necessary for the performance of any or all of the obligations of the Concessionaire under this Agreement."

21. The grant of concession is spoken of in Article 3 and reads as follows:-

"ARTICLE 3

GRANT OF CONCESSION

3.1 The Concession

3.1.1 Subject to and in accordance with the provisions of this Agreement, the Applicable Laws and the Applicable Permits, the Authority hereby grants to the Concessionaire the concession set forth herein including the exclusive right, licence and authority during the subsistence of this Agreement to construct, operate and maintain the Project (the "**Concession**") for a period of 20 (twenty) years commencing

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[14] MCA

from the Appointed Date, and the Concessionaire hereby accepts the Concession and agrees to implement the Project subject to and in accordance with the terms and conditions set forth herein:

3.1.2 Subject to and in accordance with the provisions of this Agreement, the Concession hereby granted shall oblige or entitle (as the case may be) the Concessionaire to:

(a) Right of Way access and licence to the Site for the purpose of and to the extent conferred by the provisions of this Agreement;

(b) finance and construct the Project Highway;

(c) manage, operate and maintain the Project Highway and regulate the use thereof by third parties;

(d) demand, collect and appropriate Fee from vehicles and persons liable for payment of Fee for using the Project Highway or any part thereof and refuse entry of any vehicle if the Fee due is not paid;

(e) perform and fulfil all of the Concessionaire's obligations under and in accordance with this Agreement; "

22. In order to facilitate the carrying out of work over the site in question, the NHAI provides a 'right of way' as stipulated in Article 10 of the MCA. We, for our purposes deem it appropriate to notice Clauses 10.1, 10.2.1 and 10.2.2 of Article 10 and which are reproduced hereinbelow:-

"ARTICLE 10

RIGHT OF WAY

10.1 The Site

The site of the Project Highway shall comprise the real estate described in Schedule-A and in respect of which the Right of Way shall be provided and granted by the Authority to the Concessionaire as a licensee under and in accordance with this Agreement (the "**Site**"). For the avoidance of doubt, it is hereby acknowledged and agreed that references to the Site shall be construed as references to the real estate required for Six-Laning of the Project Highway as set forth in Schedule-A,

10.2 Licence, Access and Right of Way

10.2.1 The Authority hereby grants to the Concessionaire access to the Site for carrying out any surveys, investigations and soil tests that the Concessionaire may deem necessary during the Development Period, it being expressly agreed and understood that the Authority shall have no liability whatsoever in respect of survey, investigations and tests carried out or work undertaken by the Concessionaire on or about the Site pursuant hereto in the event of Termination or otherwise.

10.2.2 In consideration of the Concession Fee, this Agreement and the covenants and warranties on the part of the Concessionaire herein contained, the Authority, in accordance with the terms and conditions set forth herein, hereby grants to the Concessionaire, commencing from the Appointed Date, leave and licence rights in respect of all the land (along with any buildings, constructions or immovable assets, if any, thereon) comprising the Site which is described, delineated and shown in Schedule-A hereto (the "**Licensed Premises**"), on an "as is where is" basis, free of any Encumbrances, to develop, operate and maintain the said Licensed Premises, together with all and singular rights, liberties, privileges, easements and appurtenances whatsoever to the said Licensed Premises. hereditaments or premises or any part thereof belonging to or in anyway appurtenant thereto or enjoyed therewith, for thc duration of the Concession Period and, for the purposes permitted under this Agreement, and for no other purpose whatsoever."

23. The subject of construction of the project highway is dealt with and regulated by Articles 12, 12.1, 12.2 and 12.4.2 and which read as follows:-

"ARTICLE 12

CONSTRUCTION OF THE PROJECT HIGHWAY

12.1 Obligations prior to commencement of construction

Prior to commencement of Construction Works, the Concessionaire shall:

(a) submit to the Authority and the Independent Engineer its detailed design, construction methodology, quality assurance procedures, and the procurement, engineering

and construction time schedule for completion of the Project in accordance with the Project Completion Schedule as set forth in Schedule-G;

(b) appoint its representative duly authorised to deal with the Authority in respect of all matters under or arising out of or relating to this Agreement;

(c) undertake, do and perform all such acts, deeds and things as may be necessary or required before commencement of construction under and in accordance with this Agreement, the Applicable Laws and Applicable Permits; and

(d) make its own arrangements for quarrying of materials needed for the Project Highway under and in accordance with the Applicable Laws and Applicable Permits.

12.2 Maintenance during Construction Period

During the Construction Period, the Concessionaire shall maintain, at its cost, the existing lane(s) of the Project Highway so that the traffic worthiness and safety thereof are at no time materially inferior as compared to their condition 7 (seven) days prior to the date of this Agreement, and shall undertake the necessary repair and maintenance works for this purpose; provided that the Concessionaire may, at its cost, interrupt and divert the flow of traffic if such interruption and diversion is necessary for the efficient progress of Construction Works and conforms to Good Industry Practice; provided further that such interruption and diversion shall be undertaken by the Concessionaire only with the prior written approval of the Independent Engineer which approval shall not be unreasonably withheld. For the avoidance of doubt, it is agreed that the Concessionaire shall at all times be responsible for ensuring safe operation of the Project Highway.

xxxx xxxx xxxx

12.4.2 The Concessionaire shall construct the Project Highway in accordance with the Project Completion Schedule set forth in Schedule- G. In the event that the Concessionaire fails to achieve any Project Milestone within a period of 90 (ninety) days from the date set forth for such Milestone in Schedule-G, unless such failure has occurred due to Force Majeure or for reasons solely attributable to the Authority, it shall pay Damages to the Authority in a sum calculated at the rate of 0.1% (zero point one per cent) of the amount of Performance

Security for delay of each day until such Milestone is achieved; provided that if any or all Project Milestones or the Scheduled Six-Laning Date are extended in accordance with the provisions of this Agreement, the dates set forth in Schedule-G shall be deemed to be modified accordingly and the provisions of this Agreement shall apply as if Schedule-G has been amended as above; provided further that in the event Project Completion Date is achieved on or before the Scheduled Six-Laning Date, the Damages paid under this Clause 12.4.2 shall be refunded by the Authority to the Concessionaire, but without any interest thereon. For the avoidance of doubt, it is agreed that recovery of Damages under this Clause 12.4.2 shall be without prejudice to the rights of the Authority under this Agreement, including the right of Termination thereof."

24. Article 17 sets out the obligations of the Concessionaire with respect to operation and maintenance. Clause 17.1.1 of Article 17 makes the following provisions in this respect:-

"ARTICLE 17

OPERATION AND MAINTENANCE

17.1 O&M obligations of the Concessionaire

17.1.1 During the Operation Period, the Concessionaire shall operate and maintain the Project Highway in accordance with this Agreement either by itself, or through the O&M Contractor and if required, modify, repair or otherwise make improvements to the Project Highway to comply with the provisions of this Agreement, Applicable Laws and Applicable Permits, and conform to Good Industry Practice. The obligations of the Concessionaire hereunder shall include:

(a) permitting safe, smooth and uninterrupted flow of traffic on the Project Highway during normal operating conditions;

(b) collecting and appropriating the Fee;

(c) minimising disruption to traffic in the event of accidents or other incidents affecting the safety and use of the Project Highway by providing a rapid and effective response and maintaining liaison with emergency services of the State;

(d) carrying out periodic preventive maintenance of the Project Highway;

(e) undertaking routine maintenance including prompt repairs of potholes, cracks, joints, drains, embankments, structures, pavement markings, lighting, road signs and other traffic control devices;

(f) undertaking major maintenance such as resurfacing of pavements, repairs to structures, and repairs and refurbishment of tolling system and other equipment;

(g) preventing, with the assistance of concerned law enforcement agencies, any unauthorised use on the Project Highway;

(h) preventing with the assistance of the concerned law enforcement agencies, any encroachments on the Project Highway;

(i) protection of the environment and provision or equipment and materials therefore;

(j) operation and maintenance of all communication, control and administrative systems necessary for the efficient operation of the Project Highway;

(k) maintaining a public relations unit to interface with and attend to suggestions from the Users, government agencies, media and other agencies; and

(l) complying with Safety Requirements in accordance with Article 18."

25. Part IV of the MCA comprises the financial covenants. Article 25, which forms a part of the financial covenants, deals with the subject of capital grant and is reproduced hereinbelow:-

"ARTICLE 25

GRANT

25.1 Grant

25.1.1 <u>The Authority agrees to provide to the Concessionaire cash support by way of an outright grant</u> equal to the sum set forth in the Bid, namely, Rs. .... (Rupees in words ....), in accordance with the provisions of this Article 25 (the "**Grant**").

25.1.2 <u>The Grant shall be disbursed to the Concessionaire by way of</u>

Equity Support in accordance with the provisions of Clause 25.2.

25.2 Equity Support

25.2.1 Subject to the conditions specified in this Clause 25.2, the Grant shall be credited to the Escrow Account and shall be applied by the Concessionaire for meeting the Total Project Cost (the "**Equity Support**").

25.2.2 "The Equity Support" shall not exceed the sum specified in the Bid and as accepted by the Authority, but shall in no case be greater than 1/2 (one half) of the Equity, and shall be further restricted to a sum not exceeding 10% (ten per cent) of the Total Project Cost. For the avoidance of doubt, the Total Project Cost to be reckoned for the purposes of this Clause 25.2.2 shall include Equity Support."

25.2.3 Equity Support shall be due and payable to the Concessionaire after it has expended the Equity, and shall be disbursed proportionately along with the loan funds thereafter remaining to be disbursed by the Senior Lenders under the Financing Agreements. The Authority shall disburse each tranche of the Equity Support as and when due, but not later than 15 (fifteen) days of receiving a request from the Concessionaire along with necessary particulars. Provided further, within 30 (thirty) days of Lenders Representative certifying the final drawdown of the last instalment of the debt, all the balance Equity Support shall be disbursed by the Authority.

25.2.4 In the event of occurrence of a Concessionaire Default, disbursement of Equity Support shall be suspended till such Concessionaire Default has been cured by the Concessionaire.

25.3 O&M Support

(PREMIUM)

(25.4 Premium

The Concessionaire acknowledges and agrees that as set forth in the Bid, it shall pay to the Authority for each year of the Concession Period, a premium (the "Premium") in the form of an additional Concession Fee, as set forth in Clause 26.2.1, and in the manner set forth in Clause 26.4.)"

26. Of equal significance is Article 28 which introduces the concept

of a revenue shortfall loan. The said chapter is extracted hereunder:-

"**ARTICLE 28**

REVENUE SHORTFALL LOAN

28.1 Revenue Shortfall Loan

28.1.1 If the Realisable Fee in any Accounting Year shall fall short of the Subsistence Revenue as a result of an Indirect Political Event, a Political Event or an Authority Default, as the case may be, the Authority shall, upon request of the Concessionaire, provide a loan for meeting such shortfall (the **"Revenue Shortfall Loan"**) at an interest rate equal to 2% (two per cent) above the Bank Rate.

28.1.2 If the half-yearly results of the Concessionaire indicate that the shortfall referred to in Clause 28.1.1 and contemplated for an Accounting Year has arisen in respect of the first 6 (six) months thereof, the Concessionaire shall be entitled to a provisional Revenue Shortfall Loan; provided that, no later than 60 (sixty) days after the close of such Accounting Year, the Concessionaire shall either repay the provisional loan with interest or adjust it against the Revenue Shortfall Loan, if any, as may be due to it under this Clause 28.1.

Provided further if the Realisable Fee in any Accounting Year shall fall short of the Subsistence Revenue as a result of a judicial pronouncement not related to the default of the Concessionaire the Authority shall, upon request of the Concessionaire, provide "Revenue Shortfall Loan" at an interest rate equal to 2% (two percent) above the Bank Rate. The entire surplus cash, atter meeting the subsistence expenditure shall be used for repayment of such Revenue Shortfall Loan.

28.1.3 The Authority shall disburse the Revenue Shortfall Loan or the provisional Revenue Shortfall Loan, as the case may be, within 60 (sixty) days of receiving a valid request from the Concessionaire along with the particulars thereof including a detailed account of the Indirect Political Event, Political Event or the Authority Default, as the case may be, and its impact on the collection of Fee.

28.2 Repayment of Revenue Shortfall Loan

A sum equal to 50% (fifty per cent) of the 'profit before tax' of the Concessionaire, as and when made, shall be earmarked for repayment of the Revenue Shortfall Loan and interest thereon, and paid by the Concessionaire to the Authority

within 90 (ninety) days of the close of the Accounting Year in which such profits have been made; provided that the Concessionaire shall repay the entire Revenue Shortfall Loan and interest thereon not later than one year prior to the expiry of the Concession Period and in the event that any sum remains due or outstanding at any time during such period of one year, the Authority shall be entitled to terminate this Agreement forthwith. For the avoidance of doubt, it is agreed that the repayment of Revenue Shortfall Loan shall be in accordance with and subject to the provisions of Article 31."

27. In terms of Article 31, the funds constituting the financial package, fees and other revenue generated by and from the project as well as all payments made by the NHAI are to be placed in an Escrow account. The withdrawals from that account are also duly regulated by appropriate provisions being incorporated in the concession agreement. Article 31 is extracted in its entirety hereinbelow:-

"ARTICLE 31

ESCROW ACCOUNT

31.1 Escrow Account

31.1.1 The Concessionaire shall, prior to the Appointed Date, open and establish an Escrow Account with a Bank (the "**Escrow Bank**") in accordance with this Agreement read with the Escrow Agreement.

31.1.2 The nature and scope of the Escrow Account are fully described in the agreement (the "Escrow Agreement") to be entered into amongst the Concessionaire, the Authority, the Escrow Bank and the Senior Lenders through the Lenders' Representative, which shall be substantially in the form set forth in Schedule-S.

31.2 Deposits into Escrow Account

The Concessionaire shall deposit or cause to be deposited the following inflows and receipts into the Escrow Account:

(a) all funds constituting the Financial Package;

(b) all Fee and any other revenues from or in respect of the Project Highway, including the proceeds of any deposits. capital receipts or insurance claims; and

(c) all payments by the Authority, after deduction of any outstanding Concession Fee:

Provided that the Senior Lenders may make direct disbursements to the EPC Contractor in accordance with the express provisions contained in this behalf in the Financing Agreements.

31.3 Withdrawals during Concession Period

31.3.1 The Concessionaire shall at the time of opening the Escrow Account, give irrevocable instructions, by way of an Escrow Agreement, to the Escrow Bank instructing, inter alia, that deposits in the Escrow Account shall be appropriated in the following order every month, or at shorter intervals as necessary, and if not due in a month then appropriated proportionately in such month and retained in the Escrow Account and paid out therefrom in the month when due:

(a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;

(b) all payments relating to construction of the Project Highway. subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;

(c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

(d) O&M Expenses and other costs and expenses incurred by the Authority in accordance with the provisions of this Agreement, and certified by the Authority as due and payable to it;

(e) Concession Fee due and payable to the Authority;

(f) monthly proportionate provision of Debt Service due in an Accounting Year;

{(g) Premium due and payable to the Authority;)

(h) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan; Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the Authority under Clause 17.9.2 and debit the same to O&M Expenses

(i) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated

Debt;

(j) any reserve requirements set forth in the Financing Agreements; and

(k) balance, if any, in accordance with the instructions of the Concessionaire.

31.3.2 The Concessionaire shall not in any manner modify the order of payment specified in Clause 31.3.1, except with the prior written approval of the Authority.

31.4 Withdrawals upon Termination

31.4.1 Notwithstanding anything to the contrary contained in this Agreement, all amounts standing to the credit of the Escrow Account shall upon Termination, be appropriated in the following order:

(a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway:

(b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;

(c) outstanding Concession Fee;

(d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire, including repayment of Revenue Shortfall Loan; Concessionaire hereby agrees to give irrevocable instructions to the Escrow Bank to make payment from the Escrow Account in accordance with the instructions of the Authority under Clause 17.9.2 and debit the same to O&M Expenses.

(e) retention and payments relating to the liability for defects and deficiencies set forth in Article 39;

(f) outstanding Debt Service including the balance of Debt Due;

(g) outstanding Subordinated Debt;

(h) incurred or accrued O&M Expenses;

(i) any other payments required to be made under this Agreement; and

(j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that no appropriations shall be made under Sub-clause (j) of this Clause 31.4.1 until a Vesting Certificate has

been issued by the Authority under the provisions of Article 38.

31.4.2 The provisions of this Article 31 and the instructions contained in the Escrow Agreement shall remain in full force and effect until the obligations set forth in Clause 31.4.1 have been discharged."

28. Of equal significance are some of the provisions contained in Schedule-S appended to the Concession Agreement and which, insofar as they would be relevant for our purposes, are extracted hereunder:-

"**2 ESCROW ACCOUNT**

2.1 Escrow Rank to act as trustee

2.1.1 The Concessionaire hereby appoints the Escrow Bank to act as trustee for the Authority, the Lenders' Representative and the Concessionaire in connection herewith and authorises the Escrow Bank to exercise such rights, powers, authorities and discretion as are specifically delegated to the Escrow Bank by the terms hereof together with all such rights, powers, authorities and discretion as are reasonably incidental hereto, and the Escrow Bank accepts such appointment pursuant to the terms hereof.

2.1.2 The Concessionaire hereby declares that all rights, title and interest in and to the Escrow Account shall be vested in the Escrow Bank and held in trust for the Authority, the Lenders' Representative and the Concessionaire, and applied in accordance with the terms of this Agreement. No person other than the Authority, the Lenders' Representative and the Concessionaire shall have any rights hereunder a: the beneficiaries of, or as third party beneficiaries under this Agreement.

2.2 Acceptance of Escrow Bank

The Escrow Bank hereby agrees to act as such and to accept all payments and other amounts to be delivered to and held by the Escrow Bank pursuant to the provisions of this Agreement. The Escrow Bank shall hold and safeguard the Escrow Account during the term of this Agreement and shall treat the amount in the Escrow Account as monies deposited by the Concessionaire, Senior Lenders or the Authority with the Escrow Bank. In performing its functions and duties under this Agreement, the Escrow Bank shall act in trust for

the benefit of, and as agent for, the Authority, the Lenders' Representative and the Concessionaire or their nominees, successors or assigns, in accordance with the provisions of this Agreement.

2.3 Establishment and operation of Escrow Account

2.3.1 Within 30 (thirty) days from the date of this Agreement, and in any case prior to the Appointed Date, the Concessionaire shall open and establish the Escrow Account with the ....(name of Branch) Branch of the Escrow Bank. The Escrow Account shall be denominated in Rupees.

2.3.2 The Escrow Bank shall maintain the Escrow Account in accordance with the terms of this Agreement and its usual practices and applicable regulations, and pay the maximum rate of interest payable to similar customers on the balance in the said account from time to time.

2.3.3 The Escrow Bank and the Concessionaire shall, after consultation with the Lenders' Representative, agree on the detailed mandates, terms and conditions, and operating procedures for the Escrow Account, hut in the event of any conflict or inconsistency between this Agreement and such mandates, term and conditions, or procedures, this Agreement shall prevail.

2.4 Escrow Bank's fee

The Escrow Bank shall be entitled to receive its fee and expenses in an amount, and at such times, as may be agreed between the Escrow Bank and the Concessionaire. For the avoidance of doubt, such fee and expenses shall form part of the O&M Expenses and shall be appropriated from the Escrow Account in accordance with Clause 4.1.

2.5 Rights of the parties

The rights of the Authority, the Lenders' Representative and the Concessionaire in the monies held in the Escrow Account are set forth in their entirety in their entirety in this Agreement and the Authority, the Lenders' Representative and the Concessionaire shall have no other rights against or to the monies in the Escrow Account.

2.6 Substitution of the Concessionaire

The Parties hereto acknowledge and agree that upon substitution of the Concessionaire with the Nominated Company, pursuant to the Substitution Agreement, it shall be deemed for the purposes of this Agreement that the

Nominated Company is a Party hereto and the Nominated Company shall accordingly be deemed to have succeeded to tile rights and obligations of the Concessionaire under this Agreement on and with effect from the date of substitution of the Concessionaire with the Nominated Company.

3 DEPOSITS INTO ESCROW ACCOUNT

3.1 Deposits by the Concessionaire

3.1.1 The Concessionaire agrees and undertakes that it shall deposit into and/or credit the Escrow Account with:

(a) all monies received in relation to the Project from any source, including the Senior Lenders, lenders of Subordinated Debt and the Authority;

(b) all funds received by the Concessionaire from its share-holders in any manner or form;

(c) all Fee levied and collected by the Concessionaire;

(d) any other rcvenues, deposits or capital receipts, as the case may be, from or in respect of the Project Highway; and

(e) all proceeds received pursuant to any insurance claims.

3.1.2 The Concessionaire may at any time make deposits of its other funds into the Escrow Account, provided that the provisions of this Agreement shall apply to such deposits.

3.2 Deposits by the Authority

The Authority agrees and undertakes that, as and when due and payable, it shall deposit into and/or credit the Escrow Account with:

(a) Grant and any other monies disbursed by the Authority to the Concessionaire;

(b) Revenue Shortfall Loan;

(c) all Fee collected by the Authority in exercise of its rights under the Concession Agreement; and

(d) Termination Payments:

Provided that the Authority shall be entitled to appropriate from the aforesaid amounts, any Concession Fee due and payable to it by the Concessionaire, and the balance remaining shall be deposited into the Escrow Account.

3.3 Deposits by Senior Lenders

The Lenders' Representative agrees, confirms and undertakes that the Senior Lenders shall deposit into and/or credit the Escrow Account with all disbursements made by them in relation to or in respect of the Project; provided that notwithstanding anything to the contrary contained in this Agreement, the Senior Lenders shall be entitled to make direct payments to the EPC Contractor under and in accordance with the express provisions contained in this behalf in the Financing Agreements.

3.4 Interest on deposits

The Escrow Bank agrees and undertakes that all interest accruing on the balances of the Escrow Account shall be credited to the Escrow Account, provided that the Escrow Bank shall be entitled to appropriate there from the fee and expenses due to it from the Concessionaire in relation to the Escrow Account and credit the balance remaining to the Escrow Account.

4 WITHDRAWALS FROM ESCROW ACCOUNT

4.1 Withdrawals during Concession Period

4.1.1 At the beginning of every month, or at such shorter intervals as the Lenders' Representative and the Concessionaire may by written instructions determine, the Escrow Bank shall withdraw amounts from the Escrow Account and appropriate them in the following order by depositing such amounts in the relevant Sub-Accounts for making due payments, and if such payments are not due in any month, then retain such monies in such Sub-Accounts and pay out there from on the Payment Date(s):

(a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;

(b) all payments relating to construction of the Project Highway, subject to and in accordance with the conditions, if any, set forth in the Financing Agreements;

(c) O&M Expenses, subject to the ceiling, if any, set forth in the Financing Agreements;

(d) O&M Expenses incurred by the Authority, provided it certifies to the Escrow Bank that it had incurred such expenses in accordance with the provisions of the Concession Agreement and that the amounts claimed are due to it from the Concessionaire;

(e) Concession Fee due and payable to the Authority;

(f) monthly proportionate provision of Debt Service due in an Accounting Year;

{(g) Premium due and payable to the Authority;}

(h) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including repayment o f Revenue Shortfall Loan;

(i) monthly proportionate provision of debt service payments due in an Accounting Year in respect of Subordinated Debt:

(j) any reserve requirements set forth in the Financing Agreements; and

(k) balance, if any, in accordance with the instructions of the Concessionaire.

4.1.2 Not later than 60 (sixty) days prior to the commencement of each Accounting Year, the Concessionaire shall provide to the Escrow Bank, with prior written approval of the Lenders' Representative, details of the amounts likely to be required for each of the payment obligations set forth in this Clause 4.1; provided that such amounts may be subsequently modified, with prior written approval of the Lenders' Representative, if fresh information received during the course of the year makes such modification necessary.

4.2 Withdrawals upon Termination

Upon Termination of the Concession Agreement, all amounts standing to the credit of the Escrow Account shall, notwithstanding anything in this Agreement, be appropriated and dealt with in the following order:

(a) all taxes due and payable by the Concessionaire for and in respect of the Project Highway;

(b) 90% (ninety per cent) of Debt Due excluding Subordinated Debt;

(c) outstanding Concession Fee;

(d) all payments and Damages certified by the Authority as due and payable to it by the Concessionaire pursuant to the Concession Agreement, including {Premium,} repayment of Revenue Shortfall Loan and any claims in connection with or arising out or Termination;

(e) retention and payments arising out of, or in relation to,

liability for defects and deficiencies set forth in Article 39 of the Concession Agreement;

(f) outstanding Debt Service including the balance of Debt Due;

(g) outstanding Subordinated Debt;

(h) incurred or accrued O&M Expenses;

(i) any other payments required to be made under the Concession Agreement; and

(j) balance, if any, in accordance with the instructions of the Concessionaire:

Provided that the disbursements specified in Sub-clause (j) of this Clause 4.2 shall be undertaken only after the Vesting Certificate has been issued by the Authority."

29. As is manifest from the aforesaid provisions, it is the primary obligation of the Concessionaire to raise funds for the purposes of implementation of the project. The project itself is handed over to the Concessionaire to be held and possessed during the concession period and it is only thereafter that the highway would revert to the NHAI at the end of the concession period or termination whichever be earlier. While, principally it is the obligation of the Concessionaire to endeavour to meet the economic targets, arrange for appropriate credit facilities from lenders, the NHAI bearing in mind the huge investment required to be made also extends financial aid and support in the shape of viability gap funding.

30. Having noticed the salient provisions of the Concession Agreement, it becomes apparent that the work relating to the creation of infrastructure, and which in this case was concerned with the six-laning of an expressway, constituted the physical component of the contract. It becomes relevant to note that Section 194C requires a deduction of tax

at source on any sum which may be paid to a contractor for carrying out any work. The expression '*work*' is further expanded in the principal provision with the statute ordaining that it would include supply of labour for carrying out any work. The word '*work*' also stands defined in the Explanation to Section 194C and which includes activities such as advertising, broadcasting and telecasting of programmes, carriage of goods or passengers, catering, manufacturing or supplying a product as some of the activities which could fall within the meaning of that expression. That the definition is not intended to be exhaustive is evident from clause (iv) of the Explanation using the phrase '*shall include*'.

31. As we read Section 194C, it becomes evident that the same is principally concerned with the undertaking of a physical or tangible activity as opposed to the mere grant of subsidy or financial assistance. The provision creates a direct linkage between the sum paid and the carrying out of work. The **Black's Law Dictionary** [8TH Edition] defines '*work*' as follows:

> "**work,** *n.* **1.** Physical and mental exertion to attain an end, esp. as controlled by and for the benefit of an employer; labor.
>
> xxxx xxxx xxxx
>
> **work,** *vb.* **1.** To exert effort; to perform, either physically or mentally <lawyers work long hours during trial> **2.** To function properly; to produce a desired effect <the strategy worked>. **3.** *Patents.* To develop and use (a patented invention, esp. to make it commercially available) <the patentee failed to work the patent>. • Failure to work a patent in a specified amount of time is grounds for a compulsory license in some countries. [Cases: Patents ⚷191. C.J.S. *Patents* §§ 217, 214, 339.]"

32. The meaning of the word 'work' was further elaborated in the **Oxford English Dictionary** [2ND Edition, Vol. XVI] as follows:-

> "**2.** Something to be done, or something to do; what a person (or thing) has or had to do; occupation, employment, business, task, function.
>
> xxxx xxxx xxxx
>
> **3.** † a. Action (of a person) in general; doings, deeds; conduct. (Often conjoined with *word.*) *Obs.*
>
> xxxx xxxx xxxx
>
> **b.** Action (of a person or thing) of a particular kind; † doing, performance; working, operation. In various connexions; of a thing, often in reference to result; *to do its work*, to produce its effect (cf. 9b).
>
> xxxx xxxx xxxx
>
> **4.** Action involving effort or exertion directed to a definite end, esp. as a means of gaining one's livelihood; labour, toil; (one's) regular occupation or employment.
>
> xxxx xxxx xxxx
>
> **b.** Used *gen.* in reference to any action requiring effort or difficult to do. Often with epithet.
>
> xxxx xxxx xxxx
>
> **c.** *spec*. The labour done in making something, as distinguished from the material used (in reference to the cost); = WORKMANSHIP I.
>
> xxxx xxxx xxxx
>
> **d.** Exercise or practice in a port or game; also, exertion or movement proper to a particular sport, game or exercise.
>
> xxxx xxxx xxxx
>
> **5.** A particular act or piece of labour; a task, job. Also *gen*. something difficult to do, a 'hard task' (cf. 4 b); or in special connexions, e.g. a particular operation in some manufacture. *Obs*. exc. *Hist*.
>
> xxxx xxxx xxxx
>
> † **b.** In early use applied *spec.* (in *sing.* or *pl.*) to the building or repair of a church. *Obs*.
>
> xxxx xxxx xxxx

c. *slang*. A criminal act or activity. Cf. JOB *sb*[2]. I b.

xxxx xxxx xxxx

6. a. Trouble, affliction; in later use in lighter sense: Disturbance, fuss, 'ferment'. (See also 31.) **b.** Pain, ache: see WARK sb[1]. *dial.*

xxxx xxxx xxxx

II. 9. With possessive: The product of the operation or labour of a person or other agent; the thing made, or thigns made collectively; creation, handiwork. Also vaguely, the result of one's labour, something accomplished.

xxxx xxxx xxxx

b. The result of the action or operation of some person or thing; 'effect, consequence of agency' (J.); (one's) 'doing'; the device or invention *of* some one.

xxxx xxxx xxxx

10. Without possessive: A thing made; a manufactured article or object; a structure or apparatus of some kind, esp. one forming part of a larger thing. Now chiefly in generalised sense with qualification, esp. in established compounds such as BRICKWORK, FIREWORK, FRAMEWORK, LATTICEWORK, WAX-WORK.

xxxx xxxx xxxx

† **11.** An architectural or engineering structure, as a house, bridge, pier, etc.; a building, edifice.

xxxx xxxx xxxx

b. pl. Architectural or engineering operations. Clerk of the Works, Master of the Works: see CLERK sb. 6c, MASTER sb.[1] 19a

xxxx xxxx xxxx

12. *spec.* (*Mil.*) A fortified building, fortress, fort; a defensive structure, fortification; any one of the several parts of such a structure (often in *pl.*). Also as second element of a compound, as *earth-work, field-work, hornwork, outwork*, etc.

The continental equivalent is found in BULWARK.

xxxx xxxx xxxx

13. A literary or musical composition (viewed in relation to its author or composer); often *pl.* and *collect. sing.*, (a person's) writings or compositions as a whole.

xxxx xxxx xxxx

17. An excavation in the earth, made for the purpose of obtaining metals or minerals; a mine. *Obs*. exc. = WORKING *vbl. sb*. 16.

xxxx xxxx xxxx

b. A kind of trench in draining. Local.

xxxx xxxx xxxx

18. *pl*. An establishment where some industrial labour, esp. manufacture, is carried on, including the whole of the buildings and machinery used; a factory, manufactory, etc. In later use commonly construed as sing., in earlier use (to *c* 1860) also in *sing*. form. Often as the second element of a compound; **see** references below.

xxxx xxxx xxxx

b. Phr. *in the works = in the pipeline* s.v. PIPE-LINE *sb*. B. *N. Amer*.

xxxx xxxx xxxx

19. Something that is to be or is being operated upon: in various connexions (see quots.; cf. also 15).

xxxx xxxx xxxx

33. The meaning of the word '*work*' has additionally been clarified by **P. Ramanatha Aiyar's "The Major Law Lexicon"** [4TH Edition] as follows:

"The word 'work' has a very wide meaning. It is used in two senses of bestowing labour and upon which labour has been bestowed. When in plural the word certainly means some ending or important result of the labour that has been bestowed and large industrial and scientific establishment are called works. *Radha Raman v. State of Uttar Pradesh*, AIR 1954 All 700, 702. [Land Acquisition Act (1 of 1984), S. 40(1)(aa)]

Word 'work' appears to mean other constructions or works which are neither buildings nor industrial works. Word cannot be read in ejusdem generis sense. Pramatha Nath Talukdar v. State of W.B., MLJ: QD (1961-1965) Vol IV C162: 67 Cal WN 387: AIR 1963 Cal 554 [Land Acquisition Act (1 of 1984), S. 40(1)(aa)]

xxxx xxxx xxxx

The expression 'work' occurring in Section 194C of the Act is to be understood in the limited sense as product or result. The mere transportation of goods by a common carrier does not affect the goods carried nor are the goods affected thereby and as such cannot

be brought within the scope of Section 194C of the Act [*Calcutta Goods Transport Association v. Union of India*, (1996) 219 ITR 486 (Cal)] [Income-tax Act (43 of 1961), S. 194C]

The word 'work' may have different and wider meanings but one has to find out the real meaning of the word in the context of its setting in Section 194C of the Act. A lawyer is not engaged to carry out the work of arguing a case; he is engaged to argue a case or to conduct a case; he is paid a fee for the services rendered by him and not any price for the work done by him [*S.R.F. Finance Ltd. v. CBDT*, (1995) 211 ITR 861 (Del)] [Income-tax Act (43 of 1961), S. 194C]"

34. A learned judge of the Allahabad High Court in **Radha Raman v. State of Uttar Pradesh and others**[15], while considering the meaning to be ascribed to the word '*work*' as it occurs in Section 40 of the Land Acquisition Act, 1894 had held as follows :

"**9.** It is argued that the word "work" has been used in Section 40 of the Act with reference to the construction of large industrial or scientific establishments, and the construction of ordinary houses for purposes of residence do not come within the meaning of the word. In support of this argument the learned counsel has referred me to the meaning of the word "work" as given in the *Chambers Dictionary* (20th Century) and the *Webster's Dictionary*, Vol. 4.

10. No useful purpose will be served by quoting the meaning as given in these dictionaries, because the word "work" has a very wide meaning. It is really used in two senses of bestowing labour and that upon which labour has been bestowed. When used in plural, the word certainly means some outstanding or important result of the labour that has been bestowed, and large industrial and scientific establishments are called works; but in the singular the meaning is not confined in the field of construction to only large or important establishments. If a mason has constructed a wall, it is the work of that mason, and if an engineer has constructed a house it is the work of that engineer. The word really gets its colour and complexion from the nature of the work, and when used in singular with reference to constructions it is not confined to only big industrial or scientific constructions. The learned counsel relied upon two cases

[15] 1954 SCC OnLine All 124

in support of his contention, but none of them, in my opinion, is of any real help to him.

11. In the case of- *'The Easton Estates Mining Co. v. Western Wagon Co.'*, (1883) 54 LT 735 (A), the facts were that an engine was seized while it was standing in a shed which the contractor rented from the appellant company and which was connected by a siding with the Railway. The question was whether the engine was rolling stock in a "work" and was, therefore, liable to distress for rent. It was held that the word "work" in Section 3 of the Railway Stock Protection Act, 1872, "means any establishment or place used for the purpose of trade or manufacture, which is connected with a line of Railway by siding along which the rolling stock may be propelled."

12. The word "work" was defined in the Act and Wills J. observed that it was not easy to say exactly what was meant by "a work". He then says:

> "The difficulty arises from the fact of its not being a word known to the law it is a mere word of art not being work in popular use in the sense in which it is used in the Act"."

35. The meaning so ascribed was also noticed by the Supreme Court in **Larsen and Toubro Limited and Another v. State of Karnataka and Another**[16], as would be evident from paragraphs 69 and 70 of the report:-

"**69.** The ordinary dictionary meaning of the word "work" means a structure or apparatus of some kind; architecture or engineering structure, a building edifice. When it is used in the plural i.e. as works, it means architectural or engineering operations, a fortified building, a defensive structure, fortification or any of the several parts of such structures. In *Webster's Comprehensive Dictionary*, International Edition the term "work" is stated to be, … (2) that upon which labor is expended; an undertaking task; (3) that which is produced by or as by labor, specifically, an engineering structure;... In the same dictionary, the term "works" is stated as a manufacturing establishment including buildings and equipment.

[16] (2014) 1 SCC 708

> **70.** In *Radha Raman*, the Allahabad High Court stated (although in the context of Section 40 of the Land Acquisition Act, 1894) that: (AIR p. 702, para 5)
>
> "5. .... the word 'work' has a very wide meaning. It is really used in two senses of bestowing labour and that upon which labour has been bestowed. When used in plural, the word certainly means some outstanding or important result of the labour that has been bestowed, and large industrial and scientific establishments are called works ....."

36. Notably, the Supreme Court in **Birla Cement Works v. Central Board of Direct Taxes and Others**[17] as relied upon by learned counsel for the appellants, clarified the true import of the decision in *Associated Cement* as well as the scope of Section 194C and had ultimately come to hold as follows:

> "**11.** The key words in Section 194-C are "carrying, out any work". Learned counsel for the appellant contended that a word or collection of words should fit into the structure of the sentence in which the word is used or collection of words formed. The contention is that in the context of Section 194-C, carrying out any work indicates doing something to conduct the work to completion or something which produces such result. The mere transportation of goods by a carrier does not affect the goods carried thereby. The submission is that by carrying the goods, no work to the goods is undertaken and the context in which the expression "carrying out any work" has been used makes it evident that it does not include in it the transportation of goods by a carrier. In *Bombay Goods Transport Association v. CBDT*, the Bombay High Court quashing the impugned circular has held that the expression 'carrying out any work' would not include the carrying of goods. In *Calcutta Goods Transport Association v. Union of India*, a similar view has been expressed by the Calcutta High Court. It has also been pointed out in this decision that Parliament had sought to bring professional services and other works within the net of tax deduction at source. If such 'works' were already covered by section 194C, it was wholly unnecessary for Parliament to introduce separate statutory provisions in this regard and, thus, it follows that the word 'work' is to be understood in the limited sense as a product or result. The carrying out of work indicates doing something to conduct the work to

[17] (2001) 9 SCC 35

completion or an operation which produces such result. In *V. M. Salgaocar and Bros. Ltd. v. ITO*, the Karnataka High Court has concurred with the view expressed by the Bombay and Calcutta High Courts. The High Courts of Gujarat, Madras, Orissa and Delhi have also expressed similar views. On the other hand, as already noticed, the Rajasthan High Court in the judgment under appeal has expressed the contrary view relying upon the decision in *ACC case*.

12. Two interpretations are reasonably possible on the question whether the contractor for carrying of goods would come or not within the ambit of the expression 'carrying out any work'. One of the two possible interpretations of a taxing statute, which favours the assessee and which has been acted upon and accepted by the Revenue for a long period should not be disturbed except for compelling reasons. There can be no doubt that if the only view of section 194C had been the one reflected in the impugned circular, then the issue of earlier circulars and acceptance and acting thereupon by the Revenue reflecting the contrary view would have been of no consequence. That, however, is not the position. Further, there are no compelling reasons to hold that Explanation III inserted in section 194C with effect from July 1, 1995, is clarificatory or retrospective in operation. We hold that section 194C before insertion of Explanation III is not applicable to transport contracts, i.e., contracts for carriage of goods. For the aforesaid reasons the appeal is allowed, the impugned circular to the extent it relates to transport contracts is quashed. The parties are left to bear their own costs."

37. The Bombay High Court in **East India Hotels Ltd. and Another v. Central Board of Direct Taxes and Another**[18] was primarily concerned with whether services rendered by a hotel to its guests would fall within the ambit of the expression "*carrying out any work*" as provided under Section 194C. In that context, while placing reliance on the decision of the Supreme Court in *Birla Cement*, the Bombay High Court had observed:

"**16.** Thus, from the above decision of the apex court, it is clear that the word "carrying out any work" in section 194C is limited to any work which on being carried out culminates into a product or result.

[18] 2009 SCC OnLine Bom 362

In other words, the word "work" in section 194C is limited to doing something with a view to achieving the task undertaken or carry out an operation which produces some result.

17. As illustrated in Circular No. 86, section 194C would apply to payments for carrying out the work such as constructing buildings or dams or laying of roads and air fields or railway lines or erection or installation of plant and machinery, etc. In all these contracts, the execution of the contract by a contractor/sub-contractor results in production of the desired object or accomplishing the task under the contract.

18. The services rendered by a hotel to its customers by making available certain facilities/amenities like providing multilingual staff, 24 hour service for reception, telephones, select restaurants, bank counter, beauty saloon, barber shop, car rental, shopping centre, laundry/valet, health club, business centre services, etc. do not involve carrying out any work which results into production of the desired object and, therefore, would be outside the purview of section 194C of the Act.

19. From the fact that the contracts for supply of labour to carry out any work have been specifically brought within the purview of section 194C and the fact that four categories of service contracts have been specifically brought within the purview of section 194C by inserting Explanation III to section 194C, it cannot be inferred that the services rendered by a hotel to its customers are also covered under section 194C of the Act. In other words, as the services rendered by a hotel to its customers by providing certain facilities/amenities do not constitute "work" within the meaning of section 194C, the impugned Circular No. 681 issued by the Central Board of Direct Taxes to the extent it applies to a customer availing of the services rendered by the hotel must be held to be contrary to section 194C of the Act.

20. It is true that the word "work" in section 194C is not restricted to "works contract" only as held by the apex court in the case of Associated Cement Co. Ltd. v. CIT [1993] 201 ITR 435. However, as held by the apex court in the case of Birla Cement Works [2001] 248 ITR 216 the word "work" in section 194C has to be understood in a limited sense and would extend only to the service contracts specifically included in the said section by way of Explanation III. Therefore, the argument of the Revenue that the service contracts between petitioner No. 1 hotel and its customers is covered under section 194C of the Act cannot be accepted because, neither does such a contract constitute "work" within the meaning of section 194C of the Act nor are those contracts covered under service

contracts specifically included by way of Explanation III to section 194C of the Act.

21. If the contention of the Revenue that the words "any work" in section 194C are very wide enough to include all types of work is accepted, then it would mean that even the hair cutting work done by a barber would be a "work" covered under section 194C and the person making payment to the barber would be covered under section 194C. Such a wider interpretation is uncalled for, especially when the Revenue itself had considered since inception that section 194C is restricted to the works done by contractors/ sub-contractors. Apart from the above, the Central Board of Direct Taxes by its Circular No. 715 dated August 8, 1995 ([1995] 215 ITR (St.) 12), has clarified that the payments made by persons other than individuals and HUFs for hotel accommodation taken on regular basis will be in the nature of "rent" subject to TDS under section 194-I of the Act. Thus, there is inconsistency in the stand of the Central Board of Direct Taxes as to whether the services rendered by a hotel to its customers is covered under section 194C or under section 194-I of the Act.

22. In the present case, we are concerned with the question as to whether the services rendered by the petitioner hotel to its customers is covered under section 194C of the Act.

23. As noticed above, the facilities/amenities made available by petitioner No. 1 hotel to its customers do not constitute "work" within the meaning of section 194C of the Act. Consequently, Circular No. 681 dated March 8, 1994, to the extent it holds that the services made available by a hotel to its customers are covered under section 194C of the Act must be held to be bad in law. ”

38. This Court in **S.R.F. Finance Ltd. v. Central Board of Direct Taxes and Others**[19] had, while adjudging the validity of Circular Nos. 661 and 681 issued by the **Central Board of Direct Taxes**[20], rendered the following pertinent observations with regards to ‘*work*’ as that expression finds place in Section 194C:-

“4.16. Mr. Syali is right in pointing out the qualitative differences between the subject, referred as 'work' and the subject referred as 'service'. The two words convey different ideas. In the former (i.e.

[19] 1994 SCC OnLine Del 597
[20] CBDT

'work') the activity is predominantly physical, it is tangible. In the activity referred as 'services', the dominant feature of the activity is intellectual, or atleast, mental. Certainly, 'work' also involves intellectual exercise, to some extent. Even a gardener has to bestow sufficient care in doing his job; so is the case with a mason, carpenter or a builder. But the physical, (tangible) aspect is more dominant than the intellectual aspect. In contrast, in the case of rendering any kind of 'service', intellectual aspect plays the dominant role. The vocation of a lawyer, doctor, architect or a Chartered Accountant (there are other similar vocations also) involves deep intellectual exercise and physical skill involved in their vocational activities is minimal. A dancer's performance no doubt involves physical movement but all the movements are projections of the talent which is natural, or acquired by training. A surgery certainly involves physically visible and tangible work; but, inherently, it is the mental skill developed by the intellectual exercise that permeates the operation.

4.17. Language is a vehicle of conveying ideas. English language has developed particular terms and usages to convey particular ideas. Same word may convey a different meaning when placed in a different context. Therefore, the meaning conveyed by a word has to be gathered in the context in which the word is used. The long established and recognised meaning of a word, cannot be understood as conveying a meaning different from its natural meaning unless there are strong reasons for it.

4.18. Word 'work' may have different and wider meanings. But, here, we have to find out the real meaning of the word in the context of its setting in Section 194-C. The meaning attributable should fit into the clause "for carrying out any work". An architect is not engaged to carry out the work of drawing a sketch. A lawyer is not engaged to carry out the work of arguing a case; he is engaged; to 'argue' a case or to 'conduct' a case; he is paid 'fee' for the services rendered by him and not any 'price' for the work done by him.

xxxx xxxx xxxx

4.23. No doubt, the Supreme Court has said the word 'work' referred in Section 194-C has a wide import. But this observation is found in the context of an argument (of the petitioner therein), that the said word work has to be confined to the concept of works contract. The word 'work' has a wider meaning because, it is not to be restricted to the term 'works contract'. The concept conveyed by the word 'work' found in Section 194-C is not confined, limited or restricted to the concept of works contract'. The word 'therefore', in the particular sentence clearly brings out the reason for the statement that the word

'work' has a 'wide import'. From this it cannot be inferred that the Supreme Court intended to give the word, a meaning which the sentence in which it is found, does not convey. The wider meaning is indicated, according to the Supreme Court, because the section expressly includes supply of labour to carry out a work.

4.24 The entire paragraph in which the above observation of the Supreme Court is found, shall have to be read together; lifting one or the other sentence and read the lifted portion separately would destroy the integrity of the paragraph. In the opening sentence of the paragraph, the scope of the discussion is indicated, when the Supreme Court said in the last part of the first sentence, "............... 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."

4.25 The position becomes clear when the special connotation of the term 'works contract' in the tax law is properly understood. 'Works contract' involves two elements- (i) the transfer of materials; and (ii) rendering of services in bringing out a tangible property out of the materials; for example, in the case of a building contract, where, the contractor has to use his the case of a building contract, where, the contractor has to use his own materials for the construction, payment made to the contractor is for the transfer of materials used in the construction and towards the services rendered by him in constructing the building. Similarly, when a carpenter is asked to supply a table, the consideration payable to him comprises of the cost of the timber and other materials used and the remuneration for the job of converting these materials into a table. However, if the timber and other materials are supplied and the carpenter is asked to make a table, he is paid towards his services in making the table. In the case of a building, if the contractor is engaged to perform the construction work, but the entire materials are supplied by the person engaging the contractor, the contractor is paid for supplying the labour and supervising the construction work. While the former type of cases fall within the category of works contract, the latter type are considered as contract for 'services'.

xxxx xxxx xxxx

4.27 The narrow meaning attributed to the word 'work' in Section 194-C as confined to works contract was rejected by the Supreme Court and in that context the Court held that the term 'any work' is a term of wide import, to include not only the work involved in the works contract but also the work resulting in other type of contracts where the contract requires 'carrying out of any work'.

4.28 One more factor makes the meaning of the section beyond the

pale of any doubt. If the term 'any work' in Section 194-C by itself covers any kind of service, the words found in the bracket, in sub-section (1) of Section 194-C will have to be treated as otiose or superfluous. Supply of labour to carry out any work, is a concept that falls within the concept of 'service' if so, why should the Parliament include these words in the bracket, to give an expanded meaning to the term 'any work'. The Supreme Court, in the Associated Cement Company case clearly pointed out that but for the specific inclusion of those words (i.e. 'including supply of labour for carrying out any work'), in Section 194-C, obtaining of supply of labour for carrying out the work would have fallen outside the word 'work'. The concluding part of the Supreme Court observation quoted above brings out the true purport of the term 'any work' in Section 194-C

4.29 Any work, certainly is a term of wide import; but, it is not so wide, as to comprise within its stoppage the obtaining of the supply of labour to carry out the work, because, the latter concept is essentially, a concept falling within the sphere of 'services'. However, the term 'any work' is wide enough to cover any kind of work which one can got carried out through another. The essentiality is that, it should be a 'work' which is to be 'carried out'.

xxxx xxxx xxxx

4.32 It is most inappropriate to equate rendering of a service to carrying, out a work. That is why Parliament thought it expedient to expand the meaning of the word 'work' by including in it the supply of labour. It is obvious that because the word 'work' would not include within its amplitude the supply of labour, Parliament added the same by 'including' the latter in the former, thereby giving the word 'work' an extended meaning. The extended meaning cannot travel beyond the actual extended area; the Parliament has stretched the scope of the word to some extent only.

The manner in which the relevant words were understood and the scope of Section 194-C was measured, immediately after its enactment throws considerable light on the point in issue."

39. It is thus manifest that '*work*' is essentially understood to mean the expending of labour and the output or result of labour that has been bestowed. The capital grant subsidy was really not concerned with the physical elements of the contract. As has been correctly noted by the Tribunal, it was more in the nature of a grant in aid, the provision of

financial assistance and equity contribution provided to the Concessionaire by the NHAI bearing in mind the imperatives of economic viability. The Concession Agreement in Clause 25.1.1 had in clear and unambiguous terms provided that the grant would be in the nature of cash support to be made outrightly and equivalent to the sum set forth in the bid**.** The said grant was to be extended and disbursed by way of equity support. The said equity support was to be read in conjunction with the loans and credit facilities which were to be disbursed by the lenders of the Concessionaire under the financing agreements. These grants and payments were to be placed directly in the Escrow Account and were in that sense neither payments made for work undertaken nor where they funds placed at the discretion and disposal of the Concessionaire. This becomes apparent when one views the priorities which were to be borne in mind for the purposes of withdrawal from the Escrow Account during the currency of the Concession. Those provisions, in explicit terms, provided for the manner in which all sums standing to the credit of the Escrow Account were liable to be utilised.

40. While equity support was undoubtedly a concomitant of the Concession Agreement, it would be wholly incorrect to view it as payment made for a '*work*' entrusted to the Concessionaire. In fact, the BOOT contract itself envisaged investment being primarily made by the Concessionaire for the purposes of creation of the targeted infrastructure. In terms of the contract model, the Concessionaire was upon completion of the physical elements of the project, enabled to

own and operate the expressway, collect fee from users of the highway and exploit the expressway in accordance with the stipulations of the concession so as to recoup the investment made in its creation. Upon completion of the concession term, the highway was to revert to the NHAI. The Concessionaire was thus, and in that sense, in possession of the contract assets and conferred the right to exploit the same as per the contractual stipulations. Quite apart from the BOOT model itself being a hybrid arrangement, the capital grant subsidy was not a payment made for work *per se* but representative of the obligation of NHAI to extend financial support in connection with the creation of an asset of public utility and importance.

41. Viewed in that light it becomes apparent that the capital grant subsidy was essentially aid and support that the NHAI extended to the Concessionaire as opposed to payment that it would have ordinarily made to a contractor and would be directly connected with or constitute recompense for physical work that was performed. As the precedents noticed hereinabove bid us to acknowledge, the word '*work*' in the context of Section 194C is liable to be understood as relating to labour that is expended, the undertaking of a task or operation which produces a result. The infusion of equity capital as a measure of financial support, while surely a contractual obligation, cannot consequently be understood to mean the payment for a work undertaken.

42. Regard must also be had to the provisions contained in Section 194C(2) and which prescribes that any sum credited to any account of the contractor, irrespective of its nomenclature, and entered in its books

of accounts would be deemed to a credit of such income to the account of the payee. However, and as was noticed hereinbefore, the capital grant subsidy was not an amount which was to be deposited in its account or be accounted for in its books of account as that expression is understood in common parlance. Those sums were credited directly to the Escrow Account. This would, therefore, also not be a case where sub-section (2) of Section 194C would be attracted.

43. In our considered opinion, the Tribunal has correctly come to conclude that the subsidy or financial support which was extended by NHAI to the Concessionaire and was only envisaged to work as viability gap funding could not possibly have been construed as payment made for a work undertaken by the contractor. While it is true that Section 194C does not stand confined to a works contracts alone, unless the appellant had established that the sum in question and represented by the viability gap funding were recompense for a physical activity undertaken or labour expended, those disbursements could not have formed subject matter of a withholding tax under Section 194C.

44. Accordingly and for all the aforenoted reasons, we answer the question in the negative and against the Revenue. The appeals shall, consequently, stand dismissed.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

NOVEMBER 12, 2024/kk