

आयकर अपीलीय अधिकरण "F" न्यायपीठ मुंबई में।

**IN THE INCOME TAX APPELLATE TRIBUNAL "F" BENCH, MUMBAI**  
**BEFORE SHRI SAKTIJIT DEY, JUDICIAL MEMBER AND**  
**SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No. 3340/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2007-08)

Mr. Vasant J. Khetani, 255/16, Kamla Sadan, Prof. U.U. Bhatt Marg, Matunga, Mumbai 400 019.	<b>बनाम/</b> v.	Joint Commissioner of Income Tax-17(3), Aayakar Bhavan, M.K. Road, Mumbai.
स्थायी लेखा सं./PAN : AACPK 4366M		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )

Assessee by	Shri Nishit Gandhi
Revenue by :	Shri Satya Pal Kumar- (DR)

सुनवाई की तारीख / **Date of Hearing** : 13-01-2016

घोषणा की तारीख / **Date of Pronouncement** : 16-03-2016

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the assessee, being ITA No. 3340/Mum/2012, is directed against the order dated 20-02-2012 passed by learned Commissioner of Income Tax (Appeals) (hereinafter called "the CIT(A)") and the appeal before the CIT(A) arose from the assessment order dated 23.12.2009 passed by the learned assessing officer (Hereinafter called "the AO") u/s 143(3) of the Income Tax Act, 1961 (Hereinafter called "the Act"), for the assessment year 2007-08.

2. The grounds raised by the assessee in the memo of appeal filed with the Tribunal read as under:-

“1.1 The learned Commissioner of Income - tax (Appeals) - 19, Mumbai {“the Id. CIT (A)”} erred in confirming the action of the assessing officer (“A.O.”) of making disallowance of Rs. 12,00,000/- under section 43B of the Income tax Act, 1961 (“the Act”).

1.2 While doing so, the CIT (A) failed to appreciate that the amount payable to Brahanmumbai Municipal Corporation (“BMC”) was not covered by the provisions of section 43 B of the Act so as to call for the disallowance.

1.3 It is submitted that in the facts and the circumstances of the case, and in law, no such disallowance was called for.

2.1 The Id. CIT (A) erred in confirming the action of the A.O. in disallowing the claim of deduction amounting to Rs. 3,02,575/- on account of labour charges paid, by invoking the provisions of section 40 (a) (ia) of the Act.

2.2 While doing so, the Id. CIT (A) failed to appreciate that the provisions of section 40 (a) (ia) were not at all applicable in the facts of the Appellant's case.

3. The brief facts of the case are that the assessee is engaged in the business of development and construction of buildings. During the course of assessment proceedings u/s 143(3) read with Section 143(2) of the Act, it was observed by the A.O. that in Profit & Loss account, the assessee has debited a sum of Rs. 12 lacs as provision for BMC payment which is shown as payable under the head current liabilities. The assessee was asked to explain the same as to why this provision being an unascertained liability should not be disallowed . In reply , the assessee submitted that the original lessor is BMC and Mr. Sylvester & Others are original lessee. When a lessee transfer his lease-hold rights to other party, the said other party has to pay to lessor (i.e. BMC) transfer fee. Transfer fee was 7% of agreement value, when the assessee has started construction of the building. But at the time of completion of the building, transfer fee was increased to 50% & considering that it will be settled to say 10% of the agreement value, the assessee has made provision for 10% of Agreement value i.e. Rs. 12,00,000/- being lease transfer fee

payable. The assessee submitted that if there was accrued liability, then estimated expenditure which could be incurred in discharging that liability could be deducted from the profits and gains of the business. The assessee is following mercantile system of accounting and is entitled to deduct from profits and gains of business such liability which had accrued during the period for which profits and gains were being computed, therefore, the assessee was entitled to deduction of confirmed and accrued contingent liability. The assessee relied upon the decisions in the case of CIT v. Southern Estates (P) Ltd. (1982) 136 ITR 846 (Cal.), CIT v. B&A Plantations & Industries Ltd. (2002) 257 ITR 694 (Gau.), South Eastern Coalfields Ltd. v. Joint CIT (2002) 77 TTJ (Nag-Trib) 401, CIT v. Indian Metal & Metallurgical Corporation, (1964) 51 ITR 240 (Mad) and Sirsa Industries v. CIT (1989) 178 ITR 437 (P & H), Calcutta Co. Ltd. v. CIT (1959) 37 ITR 1 (SC), Addl. CIT v. T Nagireddy & Co. (1976) 105 ITR 669 (AP) and Metal Box Co. of India Ltd. v. Their Workmen (1969) 73 ITR 53 (SC). The A.O. observed that there is a dispute between BMC and the assessee regarding payment of certain dues and the matter is pending before the Hon'ble jurisdictional High Court. In the meanwhile, assessee made a provision for transfer fee payable to BMC @ 10% of agreement value, as against earlier transfer fee rate of 7% of agreement value and as against BMC's demand of increased transfer fee @ 50%. However, the same is also not paid yet as BMC has not agreed upon. The A.O. held that firstly, the transfer fees due to BMC is covered by section 43B of the Act being a Government due. As per the provisions of section 43B of the Act, this transfer fee payable to BMC can be allowable only when it is actually paid. As per the submissions of the assessee, the same is still payable. Hence, the said fee cannot be allowed in the relevant assessment year due to provisions of Section 43B of the Act. Secondly, it is very much clear that in the previous year relating to this assessment year, the liability has not been crystallized being a disputed contractual liability. In mercantile system of accounting, the income & expenditure accrues when there is a right

to receipt and right to payment is established and once the right is withheld by way of a dispute, then the accrual of income & expenditure is postponed till the final settlement of the dispute. It is a settled law that the disputed liability accrues only in the year of final settlement, therefore, the claim made by the assessee is not deductible. The A.O. observed that the case laws relied upon by the assessee, none of them is applicable to the present case as the facts are different. The AO held that in the present case the issue is allowability of liability which is disputed and also covered by section 43B of the Act , whereas the issues in all the case laws cited by the assessee are on different footings . The A.O. relied upon the following decisions:-

1. CIT v. Purushottam Gokuldas (Ker.) 237 ITR 115
2. CIT v. Oriental Motor Car Co.(P.) Ltd. (All.) 124 ITR 74
3. Acentric Chemical Works Ltd. v. DCIT (Guj.) 266 ITR 47
4. CIT v. Highway Construction Co. P. Limited 223 ITR 32
5. N Sundereswaran v. DCIT 226 ITR 142(Ker.)
6. CIT v. Bharat Fire Bricks and Potteryware Private Limited 202 ITR 821(Cal.)
7. Navjivan Roner Flom Pulses Mills Limited v. DCIT 73 ITD 265(Ahd. Trib.)

On the basis of facts and circumstances and the judicial pronouncements, the A.O. disallowed the sum of Rs. 12 lacs and added the same to the total income of the assessee , vide assessment orders dated 23.12.2009 passed by the AO u/s 143(3) of the Act.

4. Aggrieved by the assessment order dated 23.12.2009 passed by the A.O. u/s 143(3) of the Act , the assessee has preferred an appeal before the CIT(A).

5. Before the CIT(A), the assessee contended that the plot of land which was purchased by the assessee is a leasehold land and the said lease is for a period of 999 years. The original lessor is BMC and Mr. Sylvester & Others are original lessee. The assessee submitted that when the lessee transfer his right to other party, the said party to whom the lease hold rights are transferred by the lessee has to pay the transfer charges to the BMC. The BMC has suddenly increased its transfer charges from 7% of agreement value to 50%. The assessee had made provision of transfer charges of Rs.12,00,000/- @10% of agreement value as against 50% demanded by BMC, to be payable in due course assuming that it will be settled @10% of the agreement value. The matter has gone in dispute and the said transfer charges were not paid by the assessee to BMC.

The CIT(A) considered the submission of the assessee and held that since the amount has not been paid to BMC, provisions of Section 43B(a) of the Act is not complied with and in view of this the expenses will not be allowed and the CIT(A) upheld the order of the A.O. , vide orders dated 20.02.2012

6. Aggrieved by the orders dated 20.02.2012 of the CIT(A), the assessee is in appeal before the Tribunal.

7. The Id. Counsel for the assessee submitted that the assessee has to pay transfer fee to BMC and accordingly the assessee has made provision of Rs. 12 lacs with respect to the plot of land which was purchased by the assessee which was a leasehold land for 999 years. The original lessor is BMC and Mr. Sylvester & Others are original lessee. The assessee has to pay transfer charges to the BMC @ 7% of agreement value and the BMC has suddenly increased the transfer charges from 7% of agreement value to 50% of value of land as per ready reckoner rate, however , the assessee has made provision of Rs.12,00,000/- @10% of agreement value as against 50% of value of land as

per ready reckoner rate to be payable in due course and the assessee has claimed expenses in the year under consideration. The Id. Counsel submitted that in view of this dispute with respect to payment of transfer fee/premium to BMC on transfer of lease-hold rights, Writ Petitions vide No. 166 of 1997, 2370 of 2006, writ petition no 1262 of 2010 and 718 of 2010 were filed by various aggrieved petitioners before the Hon'ble Bombay High Court and the said Writ Petitions were disposed of and allowed by the Hon'ble Bombay High Court , vide common judgment dated 15-02-2011 , by holding as under:-

*“12. The Supreme Court has thus held that whenever there is compulsory exaction of money, there should be specific provision for the same. In the present case, we have not been pointed out any provision permitting the Corporation to recover premium from the assignee of lease. We have also not been pointed out any recital in the Lease Deed permitting the Corporation to do so. Therefore, the Corporation obviously was not entitled to claim premium for taking entry about assignment of the lease hold rights. We also found that neither there is any provision in any law nor there is any term in the Lease Deed with which we are concerned in these petitions requiring the lessee to seek prior permission of the Corporation before assigning his lease hold rights. As prior permission itself is not contemplated, there is no question of the Corporation levying any penalty for assigning the lease hold rights without prior permission of the Corporation. The demand made by the Corporation in that regard, therefore, is without authority of law.*

*13. In these circumstances, therefore in our opinion, all these Petitions will have to be allowed. They are accordingly allowed. It is held that in the absence of any stipulation in the Lease Deed permitting the Corporation to charge any premium or any provision in law authorizing the Corporation to claim such a premium on transfer of lease hold rights, the Corporation cannot claim any premium like it has been done in this case from the assignee. Similarly in the absence of any stipulation in the Lease Deed for not obtaining prior permission of the Corporation for assignment of lease hold rights the Corporation cannot demand any transfer fees from the assignee. The amount that might have been collected by the Corporation pursuant to the demand notice which has been made in these Petitions are directed to be refunded by the Corporation after adjusting any legal demands that may be due to the Corporation from the Petitioners within a period of eight weeks from today.”*

The ld. Counsel submitted that the Municipal Corporation of Greater Bombay (also known as BMC) has filed SLP(C) No. 16197/2011 with the Hon'ble Supreme Court challenging the afore-stated judgment dated 15-02-2011 delivered by the Hon'ble Bombay High Court, copy of the SLP is placed vide page No. 31 to 33 of the paper book filed by the assessee with the Tribunal. The ld. Counsel contended that these demands were raised by BMC without any authority of law and nor these are contractual liabilities as per the terms of lease deed entered by and between the lessor and the lessee. The ld. Counsel also relied on the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers Limited, (2000) 245 ITR 428 (SC) and Taparia Tools Private Limited, (2015)372 ITR 605(SC).

8. The ld. D.R., on the other hand, relied on the orders of authorities below and submitted that the demand has not been paid by the assessee to the BMC and there is thus non compliance of provisions of Section 43B(a) of the Act and the authorities below has rightly made the disallowance.

9. We have heard the rival contentions and also perused the material available on record including the case laws relied upon by both the sides. We have observed that the assessee has purchased a plot of land of which the original lessor is 'Brihanmumbai Municipal Corporation'(in short 'BMC') also known as 'Municipal Corporation of Greater Mumbai' ( in short 'MCGM') and Mr. Sylvester & Others are the original lessee. When the lessee transfers his lease-hold rights in the land owned by BMC, to other party, the said party has to pay the premium to BMC. The prevailing premium was 7% of the agreement value since 1993 (earlier it was 5%) but suddenly the premium has been increased from 7% of agreement value to 50% of value of land as per ready reckoner rate by Resolution of the Improvement committee/corporation in March/April 2008 for which the proposal was moved by BMC in July 2007. The assessee has made provision of 10% i.e. Rs.

12,00,000/- in the books for accounts for the previous year relevant to the assessment year 2007-08 assuming that it is finally settled at 10% , as the matter relating to legality and validity of chargeability by BMC of the said premium has been challenged in writ petitions filed with the Hon'ble Bombay High Court vide Writ Petitions bearing No. 166 of 1997, 2370 of 2006, 1262 of 2010 and 718 of 2010 by the Petitioners , although no writ petition has been filed by the assessee before the Hon'ble Bombay High Court. We have observed that in view of this legal dispute with respect to challenge to the legality and validity of premium charged by BMC on transfer of lease-hold rights of the land owned by BMC from lessee's to purchasers/assignees , Writ Petitions bearing No. 166 of 1997, 2370 of 2006, 1262 of 2010 and 718 of 2010 were filed by various aggrieved petitioners before the Hon'ble Bombay High Court and the said Writ Petitions were disposed of and allowed by the Hon'ble Bombay High Court , vide common judgment dated 15-02-2011 , by holding as under:-

*“12. The Supreme Court has thus held that whenever there is compulsory exaction of money, there should be specific provision for the same. In the present case, we have not been pointed out any provision permitting the Corporation to recover premium from the assignee of lease. We have also not been pointed out any recital in the Lease Deed permitting the Corporation to do so. Therefore, the Corporation obviously was not entitled to claim premium for taking entry about assignment of the lease hold rights. We also found that neither there is any provision in any law nor there is any term in the Lease Deed with which we are concerned in these petitions requiring the lessee to seek prior permission of the Corporation before assigning his lease hold rights. As prior permission itself is not contemplated, there is no question of the Corporation levying any penalty for assigning the lease hold rights without prior permission of the Corporation. The demand made by the Corporation in that regard, therefore, is without authority of law.*

*13. In these circumstances, therefore in our opinion, all these Petitions will have to be allowed. They are accordingly allowed. It is held that in the absence of any stipulation in the Lease Deed permitting the Corporation to charge any premium or any provision in law authorizing the Corporation to claim such a premium on transfer of lease hold rights, the Corporation cannot claim any premium like it has been done in this*

*case from the assignee. Similarly in the absence of any stipulation in the Lease Deed for not obtaining prior permission of the Corporation for assignment of lease hold rights the Corporation cannot demand any transfer fees from the assignee. The amount that might have been collected by the Corporation pursuant to the demand notice which has been made in these Petitions are directed to be refunded by the Corporation after adjusting any legal demands that may be due to the Corporation from the Petitioners within a period of eight weeks from today.”*

We have observed that the ‘Brihanmumbai Municipal Corporation’ (in short ‘BMC’) also known as ‘Municipal Corporation of Greater Mumbai’ (in short ‘MCGM’) is the civic body that governs the capital city of Mumbai in Maharashtra . BMC was established under the Bombay Municipal Corporation Act, 1888 and is responsible for the civic infrastructure and administration of the Mumbai city and some suburbs of Mumbai. As per the BMC’s Commissioner letter No. AC/Estates/5077/LB dtd. 27<sup>th</sup> July, 2007 (placed by the assessee in paper book , page-4 filed with the Tribunal ) , it was proposed to recover premium in respect of transfer of leased plot at the rate of 50% of the unearned income taking into account the value of land as per Ready Reckoner rates prevailing on the first day of the year in which these cases are decided by Municipal Corporation of Greater Mumbai instead of prevailing rate of 7% of the total consideration amount mentioned in the documents submitted for transfer of lease plot as premium . The prevailing rate of 7% was approved vide Resolution no 658 of 23.03.1993 and CR no. 240 of 22.06.1993 (earlier rate was 5%). The said proposal to hike rate to 50% of value of land as per ready reckoner rate was moved to bring in parity and adopt similar policy keeping in view the circular u/no. Land/10/2002/Case no 387/J-1 of 29.05.2006 and LCS/10/2005/P K 35/J-1 of 31.10.2006 of Revenue and Forest Department of Government of Maharashtra that in case of transfer of Government Plot, a transfer fee @50% of the unearned income calculated by taking into account value of the land as per ready reckoner rate prevailing on the first day of the year in which a transfer case is decided is

recovered. Thereafter , the proposals were recommended for approval and it is stated by the assessee counsel before us that the same was finally approved in March /April 2008 hiking the premium to 50% of the unearned income taking into account the value of land as per Ready Reckoner rates. The Hon'ble Bombay High Court in its judgment dated 15-02-2011 while disposing of afore-stated writ petitions has held that there is no stipulation in lease deed nor there is any provision in any law in force, permitting Municipal Corporation of Greater Mumbai(BMC) to charge and collect premium on transfer of lease-hold rights from the purchaser/assignees in the plots of land of which BMC is the owner and the BMC cannot claim any premium from the purchaser's/ assignee's. We have observed that the Hon'ble Bombay High court vide its judgment dated 15<sup>th</sup> February, 2011 held that the amount that might have been collected by the Corporation pursuant to the demand notice which has been made in these Writ Petitions filed with the Hon'ble Bombay High Court are directed to be refunded by the BMC after adjusting any legal demands that may be due to the BMC from the Petitioners within a period of eight weeks from the date of judgment. Against this judgment of the Hon'ble Bombay High Court, the Municipal Corporation of the Greater Mumbai also known as BMC has filed Special Leave Petition (SLP) under Article 136 of The Constitution of India before the Hon'ble Supreme Court vide SLP(C)No. 16197/2011 challenging the afore-stated judgment dated 15-02-2011 of the Hon'ble Bombay High Court. Thus, in nut-shell it has been held by the Hon'ble Bombay High Court vide its judgment dated 15-02-2011 that these premium on transfer of lease hold rights in the land is neither a statutory due arising from provisions of any statute in force in India as the same is not collected under authority of any law in force whether Central Act or State Act or any other law in force in India nor is the said premium charged by BMC is a contractual liability as per lease deed executed between lessor and lessee as no such clause exists in the lease deed allowing chargeability of said premium by BMC and the BMC has no authority to

collect such premium from purchaser/assignees of the lease-hold rights in the land of which BMC is owner neither being as a statutory liability nor as a contractual liability. It is pertinent to note that writ petitions were filed with the Hon'ble Bombay High Court vide WP no. 166 of 1997 and WP no. 2370 of 2006 which challenged the legality and validity of charging of premium by BMC @7% on consideration amount being agreement value on transfer of lease-hold rights , whereby writ petitions were filed before the Hon'ble Bombay High Court in the year 1997 and 2006 much before the introduction of increased premium on transfer of lease deed @ 50% of value of land as per ready reckoner rate by resolution of the Improvement committee/Corporation in March/April 2008 , and said increase to 50% was also subject to dispute and challenge before the Hon'ble Bombay High Court vide writ petition no 718 of 2010 filed by the Techno Realtors Private Limited in the year 2010, there was a challenge to legality and validity of said increased rate of 50% of value of land as per ready reckoner rate . It is also pertinent to mention that writ petition no. 2594 of 1994 was also filed by Novel Properties Private Limited with the Hon'ble Bombay High Court as the BMC (earlier Bombay Municipal Corporation) was not effecting the mutation without deposit of premium on transfer of leasehold rights and the Hon'ble Bombay High Court disposed of the petition by directing the Corporation to mutate the name of the petitioner as lessee keeping the question of entitlement of Corporation to demand premium from petitioner open. The said Novel Properties Private Limited later filed writ petition no 1262 of 2010 which is disposed of by the Hon'ble Bombay High Court vide the common judgment dated 15-02-2011 allowing the said writ petition. Thus, the dispute with respect to charging of premium on transfer of lease hold rights in the plots of the land owned by BMC was with the Hon'ble Bombay High Court since 1994. Thus, the assessee was well aware of the on-going legal dispute with respect to challenge to legality and validity of the charging of the premium by BMC on transfer of lease-hold

rights in the land owned by BMC in favour of the purchaser/assignee's, both as a statutory liability as well as contractual liability.

The issue is to be decided on the undisputed and admitted fact that the assessee was fully aware of the on-going legal dispute prevailing with respect to challenge of legality and validity of the premium on transfer of lease-hold rights claimed and collected by BMC being subject of challenge on legal grounds that the said premium on transfer of lease-hold rights is collected without any authority of law in force in India and hence not a statutory liability nor the said premium charged is a contractual liability in the absence of provisions/clause in the lease deed executed by and between the lessor and the lessee authorizing charging of said premium on transfer of lease-hold rights in the land owned by BMC in favour of purchasers/assignees. The assessee was aware of the legal dispute pending at the Hon'ble Bombay High Court challenging the legality and validity of the said premium@7% of agreement value on the grounds that it is neither a statutory liability nor is a contractual liability. The assessee was also aware when he made provisions in the books for accounts for the impugned financial year 2006-07 that the said premium is likely to be increased to 50% of value of land as per ready reckoner rate due to the proposal being moved by BMC although the same was not approved by BMC till the assessee filed its return of income with the Revenue in the month of October 2007 as the said hike was accepted by BMC only in March/April 2008 and there was no specific on-going litigation with respect to this proposed hike to 50% pending with any legal forum at the time of filing return of income by the assessee with the Revenue in October 2007. The assessee made provision of Rs.12,00,000/- @10% of agreement value making an estimate that the liability would be ultimately settled around this amount. The assessee contends that this is an ascertained liability and the provision was correctly made which is allowable under law. The revenue has contended that first of all this payment was not made to BMC and is hit by

Section 43B(a) of the Act, as premium on transfer of lease-hold rights , payable to BMC is a 'fee' and hit by the provisions of Section 43B(a) of the Act. We are afraid that this contention of the Revenue cannot be accepted in view of the finding by the Hon'ble Bombay High Court in judgment dated 15-02-2011 that this premium on transfer of lease-hold rights collected by BMC is not collected under any provisions of any law in force in India be it a Central Act or State Act or any other law in force in India. Section 43B(a) of the Act clearly stipulates that to be covered under the provisions of Section 43B(a) of the Act the 'fee' must have been payable under any law for the time being in force. The Section 43B(a) of the Act is reproduced here-in-below :

*“[Certain deductions to be only on actual payment.*

**43B.** *Notwithstanding anything contained in any other provision of this Act, a deduction otherwise allowable under this Act in respect of—*

*[(a) any sum payable by the assessee by way of tax, duty, cess or fee, by whatever name called, **under any law for the time being in force, or**]*

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The Hon'ble Bombay High court has clearly laid down that the said premium on transfer of lease-hold right is not collected under any provisions of any law in force in India, we hold that said premium on transfer of lease-hold rights of land owned by BMC is not a 'fee' as defined u/s 43B(a) of the Act and is not hit by Section 43B(a) of the Act and the same cannot be disallowed for non-compliance of provisions of Section 43B of the Act.

The second contention of the Revenue is that the liability has not crystallized during the assessment year being a disputed and contingent liability as the same being un-ascertained liability and the said liability will crystallize in the year of final settlement once the legal disputes are resolved by judgments of

the Courts. It is stated in the judgment of the Hon'ble Bombay High Court dated 15-02-2011 that the Writ petition bearing number 2370 of 2006 was filed by Maharashtra Chamber of Housing Industry in representative capacity and the assessee has also produced letter dated 20-09-2011 in the paper book placed at page 9 whereby the said Maharashtra Chamber of Housing Industry has updated to all their members about the recent legal development on this issue vide letter no. MCHI/SEC/11-12/107 dated 20-09-2011. The Hon'ble Bombay High Court has finally vide judgment dated 15-02-2011 held that premium on transfer of lease hold property owned by BMC is not a statutory liability being without authority of any law in force in India nor a contractual liability as there is no stipulation in lease deed executed between lessor and lessee about the chargeability of said premium. The matter is still sub-judice with the Hon'ble Supreme Court as BMC has filed Special Leave Petition(SLP) under Article 136 of The Constitution of India challenging the judgment dated 15-02-2011 of the Hon'ble Bombay High Court. The assessee has relied upon the decision of the Hon'ble Supreme Court in the case of Bharat Earth Movers Limited, (2000) 245 ITR 428 (SC) and Taparia Tools Private Limited , (2015)372 ITR 605(SC).In our considered view, both the case are distinguishable as they deal with the business liability which has definitely arisen during the previous year shall be allowed as deduction although the quantification and discharge of the liability may be done at a later stage. Here, in the impugned appeal we are concerned with a liability whose levability both being as a statutory liability as well as being a contractual liability per-se was subject of legal dispute and challenge before the Hon'ble Bombay High Court on the grounds that neither it is statutorily valid as being without authority of any law in force in India be it a Central Act or State Act or any other law in force in India nor is contractually valid liability as there is no provisions in the lease deed authorizing BMC to collect the premium per-se , which was subject matter of challenge and dispute vide writ petitions filed in the year 1997 and 2006 with the Hon'ble Bombay High

Court , both of which were pending for disposal before the Hon'ble Bombay High Court, at the time of filing of return of income by the assessee for the impugned assessment year , in October 2007 . With the above facts and background , in our considered view, when the assessee was fully aware of the legal dispute going on in the Hon'ble Bombay High Court with respect to challenge as to the legality and validity of charging per-se of the said premium by BMC on transfer of lease-hold rights on the land owned by BMC, both as a statutory as well as a contractual liability, it could not be said that the liability has arisen or accrued against the assessee being an ascertained liability rather it is a contingent liability being an un-ascertained liability , of which ascertainment and quantification is dependent and contingent on the pronouncement and decisions of the Courts on legal challenge raised by the Petitioners with respect to said chargeability of premium both as a statutory liability as well as contractual liability . The cue for this is to be found in the CBDT Notification No. SO 69(E) dated 25th January 1996 issued under Section 145(2) of the Act, which states that provisions should be made for "all known **liabilities** and losses even though the amount cannot be determined with certainty and represents only a best estimate in the light of available information." Accounting Standard AS-29 issued by The Institute of Chartered Accountants of India (ICAI) deals with "Provisions, Contingent **Liabilities** and Contingent Assets'. The purpose of the accounting standards is to ensure that the balance sheet and P&L Account of an enterprise should present a true and fair view of its business affairs. Under AS 29 a 'provision' is defined to mean "a **liability** which could be measured only by using a substantial degree of estimation." The word '**liability**' is defined as "a present obligation of the enterprise arising from past events, the settlement of which is expected to result in an outflow from the enterprise of resources embodying economic benefits." 'Contingent **Liability**' is defined as under:

- "(a) a possible obligation that arises from past events and the existence of which will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the enterprise; or
- (b) a present obligation that arises from past events but is not recognised because:
- (i) it is not probable that an outflow of resources embodying economic benefits will be required to settle the obligation;
- Or
- (ii) a reliable estimate of the amount of the obligation cannot be made."

AS 29 further states that 'provisions' are distinguishable from other **liabilities** such as trade payables and accruals "because in the measurement of provisions substantial degree of estimation is involved with regard to the future **expenditure** required in settlement." However a 'provision' is recognised only where:

- "(a) an enterprise has a present obligation as a result of a past event:
- (b) it is probable that an outflow of resources embodying economic benefits will be required to settle the obligation; and
- (c) a reliable estimate can be made of the amount of the obligation.

If these conditions are not met, no provision should be recognised."

Appendix A to AS-29 sets out in a tabular the summary of the AS. The provisions which are recognised and those that are not are set out in separate columns. What is not recognised is a provision for a **liability** which arises

from 'a possible obligation' that may, but probably will not, require an outflow of resources.

Under the mercantile system of accounting, an assessee gets deduction when liability to pay an expense arises, notwithstanding its actual quantification and discharge taking place subsequently. The relevant criteria for the grant of a deduction is that the incurring of liability must be certain. If the liability itself is uncertain, it assumes the character of a contingent liability and ceases to be deductible. In the instant case the said chargeability of premium on transfer of lease-hold rights in land owned by BMC in favour of purchaser/ assignees was also subject to challenge before the Hon'ble Bombay High Court that it is neither a statutory liability as being levied without any provisions in any statute in force in India be it a Central Act or State Act or any other law in force in India and also subject to challenge that it is also not a contractual liability as there is no provision / clause in the lease deed entered into by and between lessor and lessee which enforces and crystallizes the said charge .

Thus, we hold that the liability to pay the premium to BMC on transfer of lease-hold rights of the land owned by the BMC in favour of purchaser/assignees was an un-ascertained liability being a contingent liability during the impugned assessment year as the said premium per-se both as a statutory and as well as being a contractual liability were subject matter of legal dispute and challenge before the Hon'ble Bombay High Court of which the assessee was fully aware . The assessee was also not making payment to BMC knowingly fully well that it is an unascertained and contingent liability as the matter as to legality and validity of the said premium both as statutory and contractual liability were under challenge and legal dispute being sub-judice with the Hon'ble Bombay High Court, when the assessee filed his return of income in October 2007 with the Revenue

claiming the said expenditure of Rs.12,00,000/- as deduction u/s 37(1) of the Act in the computation of income filed along with return of income with the Revenue. Thus, in our considered view, the said expenses of Rs.12,00,000/- claimed by the assessee as an expenditure in the return of income filed with Revenue is not deductible as revenue expenditure u/s 37(1) of the Act, while computing income of the assessee being disputed , un-ascertained liability and contingent liability which was subject to challenge and dispute before the Hon'ble Bombay High Court both with respect and regard to being classified as statutory as well as contractual liability at the time of filing of return of income with the Revenue by the assessee in October 2007 . Thus, based on our above discussion and reasoning, the grounds of the appeal raised by the assessee are rejected and are dismissed. We order accordingly.

10. Now, coming to the next grievance of the assessee, the assessee challenged the confirmation of A.O.'s assessment order dated 23.12.2009 passed u/s 143(3) of the Act by the CIT(A) vide orders dated 20-02-2012 in disallowing the claim of deduction amounting to Rs. 3,02,575/- on account of labour charges paid by invoking the provisions of section 40(a)(ia) of the Act. The A.O. observed that the assessee has not deducted tax at source u/s 194C of the Act on following payments:-

	Name of the person to whom Payment is made	Nature	Amount(Rs)
1.	Ramesh Solanki	Labour charges	55,255
2.	Kanubhai Solanki	Labour charges	87,320
3.	R-Lite Electricals	Labour charges (Electrical work)	1,60,000
4.	Reliable Security & New India Security Agency	Security charges	<u>14,081</u>
			3,16,656

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The assessee submitted that as per the list of person as specified in Section 194C(1) of the Act who are liable to deduct tax at source as per the law as applicable for the assessment year 2007-08 , individuals have not been specified and the assessee being individual is not liable to deduct tax at source u/s 194C(1) of the Act . The assessee submitted that Section 194C(2) of the Act is not applicable to the assessee as the said sub-section is applicable if the payment is made by contractor to sub-contractor and this being not the case here , the provisions of Section 194C(2) of the Act cannot be made applicable to the assessee.

The A.O held that the assessee has deducted tax at source on labour payments except with respect to above-mentioned parties and hence the assessee plea cannot be accepted. Secondly, in view of the provisions of section 40(a)(ia) read with section 194C (2) of the Act , the AO disallowed the expenditure. While doing so, the A.O. observed that the assessee is engaged in the business of developing and construction wherein he executes contract which is entered between the buyer and himself, hence, the provisions of section 194C(2) of the Act would be applicable instead of section 194C(1) of the Act. As per the above said section 194C(2) of the Act which is applicable in the assessee's case, it is very clear that for any payment made by any person to any resident for carrying out of any work is subjected to deduction of tax at source except in the case of any individual or HUF who is not liable to the tax audit as per clause (a) or clause (b) of section 44AB of the Act, during the immediately preceding financial year in which the such sum is credited or paid to the contractor. The AO disallowed the expenditure of Rs.3,16,656/- and added the same to the income of the assessee vide assessment order dated 23.12.2009 passed u/s 143(3) of the Act.

9. Aggrieved by the assessment orders dated 23.12.2009 passed by the A.O. u/s 143(3) of the Act, the assessee preferred an appeal before the CIT(A) and submitted that during the previous year relevant to the assessment year, the assessee had made payment to contractors of the labour job/service charges to the extent of Rs.3,16,656/- to four different parties. The A.O. had misinterpreted Section 194C(2) of the Act in a different way and disallowed all the payment to contractors. The AO wrongly considered the assessee as a "Contractor" and applied Section 194C(2) of the Act where as the assessee is a builder and developers and he employed others as contractors and contractors appointed sub-contractors to get the work done. The CIT(A) after considering the facts of the case and the submissions of the assessee held that assessee has deducted tax at source where-ever applicable except for these 3 parties as mentioned in the assessment order. He held that to cover its lapses to deduct tax at source, the assessee has deliberately tried to play with the words mentioned in the Section. The CIT(A) held that the moment a contract is given a person is liable to deduct tax at source if the transaction is above the said monetary limit as envisaged in the Act. i.e. 1% where the payment is being made or credit is being given to an individual or HUF or 2% where the payment is being made or credit is being given to a person other than individual or HUF. The CIT(A) also observed that the assessee for the first time has taken the plea that he is a developer and not a contractor and therefore he is not required to deduct tax at source with respect to these payment. Accordingly, addition of Rs.3,16,656/- made u/s 40(a)(ia) of the Act was confirmed by the CIT(A) vide orders dated 20-02-2012 .

11. Aggrieved by the orders dated 20-02-2012 of the CIT(A), the assessee is in appeal before the Tribunal.

12. The ld. Counsel for the assessee submitted that assessee is a builder and developer and payment to certain contractors were made during the

assessment year, but no tax was deducted at source. The ld. Counsel submitted that there was no provision in the Act which obliges the assessee for such deduction of tax at source as per the then applicable laws if the payments were made by an individual who is a builder and developer to the contractor. The ld counsel for the assessee drew our attention to the then prevailing Section 194C of the Act which was later amended w.e.f. 01-06-2007. The assessment year under consideration is 2007-08 and the law has been amended w.e.f. 1st June, 2007 whereby section 194C of the Act was amended and individual were also being made liable for deducting tax at source for payment being made to contractors as stipulated in amended Section 194C(1) of the Act. The assessee submitted that the said plea being legal plea was taken before the CIT(A) for the first time but was not adjudicated by the CIT(A) nor any remand report was called by the CIT(A). The ld counsel for the assessee relied on the decision of the Hon'ble Calcutta High Court in the case of CIT v. Shri Rinku Mallick (ITAT No. 96 of 2012, GA No. 1368 of 2012).

13. The ld. D.R., on the other hand, relied upon the orders of authorities below.

14. We have considered the rival contention and also perused the material available on record. We have observed that the assessee is engaged in the business of builder and developer. The assessee has made payment of Rs. 3,16,656/- to four parties towards labour payments and service charges. No tax have been deducted at source under the provision of section 194C of the Act and disallowance of Rs. 3,16,656/- has been made u/s 40a(ia) of the Act. The assessee has taken a plea before the CIT(A) as well before us that he is builder and developer whereby he appoints contractors for carrying out the work for him and he is not a contractor. However, we find that the assessee has deducted tax at source with respect to other payments which is covered

under Act. No tax has been deducted at source with respect to these three parties to whom payment of Rs.3,02,575/- was made which is subject matter of challenge in this appeal. The assessee has taken a plea that the assessee being individual there was no liability to deduct the tax at source u/s 194C of the Act as per the then prevailing section 194C of the Act as the assessee is builder and developer and appoints contractor to work for it. The assessee has also submitted that Section 194C was amended w.e.f. 01-06-2007 whereby individuals who are under ambit of tax-audit u/s 44AB of the Act as stipulated vide amendments in the Section itself were also brought into the mischief of Section 194C(1) of the Act w.e.f 01-06-2007 but the impugned assessment year being 2007-08, there was no liability on the assessee to deduct tax at source on these payment . The CIT(A) has not adjudicated this plea of the assessee raised for the first time by the assessee before the CIT(A) that provisions of Section 194C of the Act was not applicable on the assessee being an individual as being builder and developer himself and not a contractor . In our considered view, the matter needs to be set aside and restored to the file of the A.O. for determination of issue de-novo , after verification of the facts as to whether the payments made by the assessee to the said parties were made by the assessee in the capacity of the builder and developer and not as contractor to come out of mischief of the un-amended Section 194C of the Act as was existing in the statute during the assessment year 2007-08. Needless to say, that proper and adequate opportunity of hearing will be granted by the AO to the assessee in accordance with the principles of natural justice in accordance with law and the assessee will be allowed to produce evidence to support his contentions in his defense .We order accordingly.

15. In the result, the appeal filed by the assessee in ITA NO. 3340/Mum/2012 for the assessment year 2007-08 is partly allowed for statistical purposes.

Order pronounced in the open court on 16<sup>th</sup> March, 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 16-03-2016 को की गई ।

Sd/-  
(SAKTIJIT DEY)  
JUDICIAL MEMBER

sd/-  
(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 16-03-2016

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व.नि.स./ R.K., Ex. Sr. PS

**आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :**

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "F" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)  
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai