IN THE INCOME TAX APPELLATE TRIBUNAL "H" BENCH, MUMBAI

BEFORE SHRI ABY T. VARKEY, JM AND SHRI AMARJIT SINGH, AM

आयकरअपीलसं/ I.T.A. No.1783/Mum/2021
(**निर्धारणवर्ष** / Assessment Year: 2017-18)

ACIT (OSD) TDS 2(2), Room No 706, 7th Fl.., K.G Mittal Ayurvedic Hospital Bldg, Charni Road (W), Mumbai- 400002	**बनाम**/ Vs.	M/s Shoppers Stop Limited 5th Floor, Umang Tower, Malad Link Road, Minidspace, Malad (W), Mumbai-400064
स्थायीलेखासं./जीआइआरसं./PAN/GIR No. : AABCS4383A		
(अपीलार्थी /**Appellant**)	..	(प्रत्यर्थी / **Respondent**)

Assessee by:	Shri .Vijay Mehta/Shri Manan Mathuriya
Revenue by**:**	Shri. Rakesh Ranjan (DR)

सुनवाईकीतारीख / Date of Hearing: 20/10/2022
घोषणाकीतारीख /Date of Pronouncement: 02/12/2022

आदेश / O R D E R

PER ABY T. VARKEY, JM:

The present appeal is preferred by the Revenue against the order of the Ld. (Appeals) tax-Commissioner of Income-52, Mumbai [in short 'Ld. CIT(A)'] dated 30.07.2021 for A.Y. 2017-18.

2. The main grievance of the Revenue is directed against the action of the Ld. CIT(A) in holding that, the payments made by the assessee to several vendors in relation to its procurements from them, consisting of apparels/ clothes/ footwear/ goods manufactured by these vendors, were not in the nature of *'works contract'* but *'purchase of goods'* and that, therefore, the provisions of

Section 194C of the Income-tax Act, 1961 [in short 'the Act'] invoked by the Assessing Officer [in short 'AO'] in relation thereto, were not applicable.

3. Brief facts as noted by the AO were that, the assessee is a company which runs retail stores, having 83 stores in 38 cities across India, and that it deals in clothing, accessories, footwear, jewelry, fragrances, cosmetics, health and beauty products, home furnishing and décor products. A survey action u/s 133Aof the Actwas carried out upon the assessee on 01-08-2018 and during the post survey analysis it was revealed that the assessee was not deducting taxes on payments at appropriate rates. In the course of the proceedings conducted u/s 201(1) of the Act, the AO noted that the assessee had agreements with various vendors in terms of which the assessee would sell apparels/goods/cloths/footwear/various items through its retail outlets as well as its online marketplace, and that such items were being manufactured by these vendors as per the designs approved by the assessee. The AO, accordingly, issued the following show cause to the assessee:

"On perusal of the agreement with regard to the purchases with the parties enlisted below it is seen you have entered into agreement to manufacture the specific designer dresses which is specifically covered under the contract manufacturing hence the provisions of section 194C is squarely applicable on the said expenditure to them. Please explain.

i. Such Lifestyles Pvt Ltd ii. Beebay kids apparels pvt ltd iii. Dream beams iv. Shakti sales corporation vi. Prime marketing vii. P & G enterprise pvt ltd vii, Keshvi Fashion. Etc." (emphasis supplied)

4. In response to the above, it is noted that the assessee submitted that, it did not have any agreement or contract for manufacture with any of these parties and that this averment was incorrect. It was explained that the assessee had purchased goods from these parties under their 'Sales or Return' model in terms of which the goods were sold by the vendor under their respective brand names and upon issuance of tax invoices. It was also submitted that the risk & title in the goods stood transferred to the assessee upon delivery of goods. In support of their contention, the assessee furnished sample copy of Sale or Return arrangement with a vendor along with details of purchases whose value was in excess of Rs. 5 lacs. The relevant portion of the submission of the assessee is set out below, for the sake of convenience.

- *"At the outset, it is submitted that Shoppers Stop has not entered into any agreement with any parties for manufacturing of specific designer dresses*.
- *Shoppers Stop is in business of retail trading and dealing in sale of apparels of multiple brands. One of the model of business is Sale and Return*
- *In case of Sale or Return Business Module, the Vendor supplies goods to Shoppers Stop under his own brand name on the Tax invoice, bears the risk/ title of goods till the time it reaches to Shoppers Stop, etc* (*copy of sample Sale or Return commercial arrangement is enclosed as Annexure 5*),
- *During the year, the Vendors have supplied goods to Shoppers Stop on principal to principal basis. Further, the Vendors account for the sale of goods to Shoppers Stop in their book of accounts and appropriate indirect taxes is levied*.

In view of the above, it is submitted that there is no contract between Shoppers Stop and the Vendors for manufacturing of any goods. Therefore, the aforesaid purchase of goods is not covered within the purview of contract manufacturing and accordingly the provisions of section 194C is not applicable on such purchases."

(emphasis supplied)

5. The AO, however, was not agreeable to the above contentions of the assessee and disputed their averment that there was no agreement to manufacture According to the AO, there were specific agreements with the .with the vendors vendors for the manufacture of products as specified and approved by the In terms of the agreements, the vendors would send sample products, .assessee which if approved by the assessee, would be manufactured by the vendor and then put up for sale in the assessee'model of ' The AO noted that the term .s outlets model was 'Sales or Return' being used by the assessee for their 'business .misleading and was an attempt to evade the rigors of Section 194C of the Act According to the AO, the following terms of the agreements showed that, they were in the nature of''works contract:-

"c) As per clause 28 to Annexure C of Agreement, Vendor shall at its own expense/cost employ engage its employees in each of SSL stores to assist the sales activity. This is an additional services offered in addition to manufacturing of products/goods and after sale services.

d) *As per the clause 29 to Annexure C of the Agreement*" ,*Vendor may take measures for the marketing of goods at SSL with prior approval of SSL*."*This enunciates the marketing activity of the products is being carried out with the help of assessee Shoppers stop*.

e) *As per the terms clause 4 to Annexure C of agreement* "*Vendor shall be responsible to supply of goods to SSL on the basis of purchase orders*". *This clearly make an obligatory criteria by the Shoppers stop to its vendors* "*on the basis of purchase orders*" *and due to this Vendor has to manufacture the goods as per the terms of agreement*. *Just making lucid words in the context of selling the products in the agreements it does not change the inherited jobs of manufacturing and supplying*

f) *As per terms clause 5 to Annexure C of Agreement* "*it is expressly agreed and understood by and between Vendor and SSL to sale the goods*" *It is mutually agreed between the parties vendors will manufacture and supply to SSL who in turn will sale their products at their counters*.(*Retail as well as online sales*)

g) *As per terms clause 9 to Annexure C of Agreement, SSL shall maintain records of stocks, receipts*/*invoices and shall make such records available for inspection to the authorised officer of Vendor with prior written notice of at least fifteen days to be provided by the Vendor to enable verification of Goods supplied by Vendor*. *The assessee's contention that the vendor took all risk till the delivery of goods also adduce to its business activity of manufacturing of products and supplying to Shoppers stop at his behest and risk covered till the products reaches at Shoppers stop*."

6. The AO, having regard to the above facts (supra) as noted by him, went on to analyze the same in light of the provisions of Section 194C of the Act. The AO noted that the contract specified the material and work along with the estimated cost of supply and labour. It was further observed by the AO that, it was only when the completed product, free of any defect, was handed over by the vendors and which was to the satisfaction of the assessee, that the assessee would make the payments to the vendors in relation thereto. It was also noted by the AO that the vendors were also rendering ancillary services such as distribution at store, removing defects, return of sales, after sales services, etc. which were also

a fundamental part of the contract, almost as much as the fabrication and supply of the product. This, according to the AO, these facts indicates that the contract between the assessee and vendors were '*contracts of work & labour*' not 'contracts of supply'.

7. Referring to the definitions of works contract set out in different dictionaries, the AO inferred that, whether a particular contract is one of sale of goods or work depends upon the main object of the parties which can be examined from the terms of the contract, customs of the trade and circumstances of the transaction. According to the AO, if the primary object is bestowal of labour and services and the supply of material is merely incidental, then it is a works contract. The AO noted that, the assessee approved the goods manufactured before it was put up for sale at its retail outlets, clients would avail after sale services from the vendors and not the assessee, that the vendors modified the defects and the vendors assisted in maintenance of stock, sale, distribution, etc. as well. The AO thus held that such contractual agreement was a *works contract* which was squarely covered under the provisions of Section 194C of the Act and therefore the assessee was under the legal obligation to deduct tax at source on the payments made to these vendors. The assessee, however, had not deducted any tax at source as it was their contention that the transactions with the vendors were for purchase of goods and not in the nature of works contract. The AO, accordingly, held the assessee to be an '*assessee-in-default*' u/s 201(1) of the Act for failure to deduct tax at source u/s 194C of the Act and worked out the default amount at Rs.36,99,46,688/-. The AO further levied interest on the same u/s 201(1A) of the Act. Aggrieved by such action of the AO, the assessee preferred an appeal before the Ld. CIT(A).

8. Before the Ld. CIT(A), the assessee explained that the AO had misunderstood the facts of the case and since little time (4 days) was allowed to them to respond to the show cause, the assessee was unable to furnish relevant details and confirmations from concerned vendors which would establish that the assessee had purchased goods from these vendors and that there was no works contract. The assessee, accordingly, filed additional evidences which was accompanied with a prayer for admission in terms of Rule 46A of the Income-tax Rules, 1962 [herein after 'the Rules']. It is noted that these additional evidences were sent to the AO for his comments vide letter dated 05-02-2019 and the report of the AO was received under letter dated 26-04-2019, which has been extensively reproduced at Pages 9 to 20 of the impugned order. It is noted that the AO had made enquiries both u/s 133(6) & 131 of the Act from the vendors, all of whom had complied with the same. The AO has set out his remarks/observations in a tabulated format (*which shall be discussed in detail in the later paragraphs*). Having regard to the same, the AO summarized the points/issues gathered in the remand proceedings as follows:

"12. In the light of the above discussed facts with regard to applicability of 194C and the points/issues have been recognised from the submissions made by the various vendors during the remand proceedings which are enlisted below:

(i) In the case under consideration (Shoppers stop) the product supplied by the supplier is including the material along with manufacturing cost involved when the vendor/supplier supply the product. The supplier only supplied the products of requisite style code or item code as per the purchase order issued by Shoppers Stop.

(ii) The Vendors/supplier entered into agreement and supplied the products as per the specification i.e style no. and item code no. of the products as mentioned in the purchase order placed by the Shoppers stop. The supply of specific style no. and code no. of the products evident that the manufacturing of the goods/products was done on the basis of the specific orders as per the terms of agreement.

(iii) To sale the products the vendors also deputed its own employees/staff at the premises of the Shoppers stop and in the statement recorded u/s 131, these vendors confirmed the deployment of employees and incurring of employee cost on these employees. It is clearly evident that the vendor/contractor also supply the labour at the premises of Shoppers stop.

(iv) With regard to marketing of goods i.e. scheme and discounts on the products, the vendors only can float schemes or discounts for the customers and benefits pass on to the customers. Shoppers stop does not involved in any schemes or discount as per terms of agreement with vendors and all expense related to events of marketing, schemes etc shall have to be borne by Vendors only. However, the Shoppers stop obtain its margin i.e. profit on the sale of the products as decided in agreement on the sale of the products through their showrooms.

v) The Shoppers stop only provide the place/premises to the vendors and vendors do all the activity of sales and pay fixed margin as per agreement against the use of said place/premises to shoppers stop therefore it is specially asked to vendors why the provisions of section 194l should not be applicable to these vendors. In this regard they denied the same and confirmed they have supplied the products to shoppers stop as per their placement of orders. The replies of these supplier of the products are kept on record and authenticate that the supply was made on contractual terms.

(vi) In the light of the above stated facts the provisions of section 194C are squarely applicable on the said transactions in which the assessee would like to camouflage the same with the purchases."

9. After considering the submissions and the rejoinder put forth by the assessee in light of the AO's order as well his remand report, the Ld. CIT(A) held that, the assessee had purchased goods from these vendors under *Sales or Return* arrangement and that it was not in the nature of works contract as contemplated u/s 194C of the Act. For this, the Ld. CIT(A) relied upon the decision of the Hon'ble Bombay High Court in the case of **CIT Vs Glenmark Pharmaceuticals Ltd (324 ITR 199)**. The Ld. CIT(A) accordingly held that the assessee did not have any liability to deduct tax at source u/s 194C of the Act and thus deleted the demand raised by the AO u/s 201(1)/(1A) of the Act. Aggrieved by the said order of the Ld. CIT(A), the Revenue is now in appeal before us on the following grounds:

1.Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) correct in holding that the agreement between the assesse and the vendor was a contract for sale /return in spite of the fact that the agreement is for supply of goods as well as rendering of services and the services were ancillary to the supply of goods.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) justified in holding that the agreement between the assessee and the vendor a contract for sale/return ignoring the fact that the agreement was a composite contract between assessee and the vendors.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in restricting the order to the works contracts only totally ignoring the different clauses of the agreement between the assessee and the vendor mentioned in the order of the AO which clearly establishes that it was a composite contract for goods and services and not a normal sale return agreement.

4. Whether in the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in holding that the agreement between the assessee and the vendor a contract for sale return ignoring the fact that in spite of the delivery of the goods, in the case of Pilfirage /Shrinkage/ Shortage/Damage or loss of goods, it was to be shared equally by the vendor and the assessee at Vendor invoice value, which clearly shows that the property in the goods were not totally transferred as in the case of normal sale return.

5. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in holding that the agreement between the assessee and the vendor a contract for sale /return ignoring the fact that the vendor was allowed to take the inventory at regular interval of the goods delivered which is not as such as in the case of normal sale return

6. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in holding that the agreement between the assessee and the vendor a contract for sale/ return in spite of the fact that the payment against the delivery of the goods was not made on the basis of delivery of the goods but the payments were made only of the goods which were sold out at the outlet of the assessee.

7. Whether on the facts and in the circumstances of the case and in law, the Ld. CIT(A) is justified in holding that the agreement between the assessee and the vendor a contract for sale/ return in spite of the fact that the sale prices of the goods to the customers were fixed mutually which is not as such as in the case of normal sale/ return.

10. At the time of hearing, Shri**.** Rakesh Ranjan, the Ld**.** DR, heavily relied upon the observations made by the AO in the impugned order and also the findings recorded in the remand report**.** He submitted that the Ld**.** CIT**(**A**)** had failed to correctly appreciate the finer nuances brought out by the AO from the various clauses of the *Sales or Return* **(**'SOR'**)** agreements with vendors

which showed that it was not a simple contract of purchase of goods but it was a composite contract involving supply of goods and services as well and therefore the AO had rightly invoked the provisions of Section 194C of the Act**.** The Ld**.** DR, therefore, urged that the Ld**.** CIT**(**A**)'**s order be reversed and the order of the AO be restored**.**

11. On the other hand, the Ld**.** AR Shri Vijay Mehta supported the order of the Ld**.** CIT**(**A**).** He took us through the relevant findings and showed us that the Ld**.** CIT**(**A**)** had dealt with each of the observations made by the AO **(***which will be discussed infra***)** and thereafter concluded that the SOR arrangements were in the nature of contract for supply of goods and not works contract**.** The Ld**.** AR accordingly prayed that the order of the Ld**.** CIT**(**A**)** should not be interfered with**.**

12. We have heard both the parties and also carefully perused the relevant material and documents placed before us**.** The issue for our consideration is whether, the arrangement between the assessee and the vendors for supply of products was in the nature of **'***works contract***'** as defined in Section 194C of the Act or not; and hence, whether the assessee is required to withhold tax on the same**.** Before we proceed to examine the facts of the present case, it would first be relevant to take note of the relevant provisions of Section 194C of the Act and also the meaning of the term **'**works contract**'.** The relevant provisions contained in Section 194C of the Act reads as follows**:**

"*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—

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(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,

of such sum as income-tax on income comprised therein.

…

Explanation.—For the purposes of this section,:-

…

(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,

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."

(emphasis supplied)

13. From reading of the above provision, it is noted that the term *'work'* has been defined in an inclusive manner and only if the *'work contract'* undertaken by the payee falls within the above definition of *'work'*, as specifically defined in the section itself, that the provisions of Section 194C would become applicable.

It is noted that, the AO does not contemplate holding that the case of the assessee falls within the ambit of items mentioned at sub-clauses (a), (b), (c) or (d) of clause (iv) of the Explanation. The relevant sub-clause in question is sub-clause (e) of clause (iv) of the Explanation to section 194C of the Act, which relates to manufacturing or supplying a product according to the requirements or specification of a customer by using material purchased from the same customer. It thereafter makes it explicitly clear that, *'work'* does not include manufacturing or supplying a product, which even if made in accordance with the specific requirements or specifications of the customer, where the material used for the product is purchased from a person other than the customer.

14. At this juncture, we find it necessary to note that, in the impugned order before us, the AO had incorrectly observed that the relevant section does not define the word *'work'* and for which he went to take support of the definition laid down in other Dictionaries. This action of the AO is held to be patently erroneous. As noted above, the term *'work'* has been defined in an inclusive manner for the purposes of Section 194C of the Act in particular, and therefore, we hold that it was not correct on the AO's part to refer to the dictionary meaning of the term *'work'*. We thus agree with the Ld. CIT(A)'s finding that, the basic premise on which the AO proceeded to analyze the facts of the case, viz., the definition of *'work'*, was incorrect.

15. It was further brought to our notice by the Ld. AR that, prior to its amendment by Finance (No. 2) Act, 2009, as per Explanation (III) to section 194C of the Act, the term *'work'* was defined to *include advertising*,

broadcasting and telecasting including production of programmes for such broadcasting or telecasting, carriage of goods or passengers by any mode of transport other than by railways; catering, and manufacturing or supplying a product according to the requirement or specification of customer by using material purchased from such customer. It was noted by the Legislature that there was anongoing dispute as to whether TDS is deductible under section 194C on 'outsourcing contracts' and whether 'outsourcing' constitutes *'work'* or not. ,Henceto bring clarity on this issue, the definition of *'work'* was consciously amended by the Finance (No.2) Act, 2009 wherein it was specifically provided that *'work'* shall not include manufacturing or supplying a product according to the requirement or specification of a customer by using raw material sourced from a person other than such customer, as such a contract is contract for 'sale'. In this context, we may gainfully refer to the Memorandum explaining the Finance **(**No**.**2**)** Bill, 2009, which read as follows**:**

"*c. Clarifications regarding 'work' under section 194C.*

There is ongoing litigation as to whether TDS is deductible under section 194C on outsourcing contracts and whether outsourcing constitutes work or not. To bring clarity on this issue, it is proposed to provide that 'work' shall not include manufacturing or supplying a product according to the requirement or specification of a customer by using raw material purchased from a person other than such customer as such a contract is contract for 'sale. This will however not apply to a contract which does not entail manufacture or supply or an article or thing (*e.g, a construction contract*). *It is also proposed to include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from such customer, within the definition of 'work'. It is further proposed to provide that in such a case TDS shall be deducted on the invoice value excluding the value of material purchased from*

such customer if such value is mentioned separately in the invoice. Where the material component has not been separately mentioned in the invoice, TDS shall be deducted on the whole of the invoice value.

It is further proposed to make the amendments effective from the 1st day of October, 2009. Accordingly, the proposed amendments will apply to credits or payments effected on or after 1st October, 2009."

16. In view of the above, the legal position which emerges is that, in a case where no raw material is supplied by the assessee to the manufacturer for production of the goods, then irrespective of the fact that, the manufacturer has produced the goods in accordance with the specifications or directions of the assessee, it cannot be considered to be *'work'* within the definition provided in the sub-clause **(**e**)** to clause **(**iv**)** to the Explanation of Section 194C of the Act**.**

17. In light of the above legal proposition, we now proceed to examine the facts of the case**.** It is noted that, the assessee is a multi-brand retailer which sources the products from various reputed brand owner-cum-manufacturers viz**.**, Fossil, Arvind Lifestyle, Titan, etc**.** The assessee purchases goods/products from these vendors either on outright basis or under Sales or Return **(**'SOR'**)** basis**.** The transactions in dispute in the present case relates to the purchases made by the assessee from various vendors under the SOR model**.** From the details of these suppliers placed before us, it is noted that each of these suppliers are noted to be independent suppliers having their own existence, irrespective of the arrangement with assessee**.** Most of these vendors are well-known and the goods supplied by them are their standard products which are supplied by them to any or all retailers or even sold through their own exclusive showrooms, located anywhere in the world**.** The assessee has entered into an SOR arrangement with these vendors, in

terms of which the assessee first inspects the samples before placing the purchase orders**.** Once the products are identified and selected, the assessee places the purchase orders with the vendors who commit to supply to it**.** The key features of an SOR arrangement ***(****sample agreement dated 15.06.2016 with M/sFossil India Pvt. Ltd is found placed at Page 1 to 18 of paper book****)*** as noted by us are that, if these products remain unsold at the stores of the assessee, then the assessee may choose to return these goods back to the vendors, and against which the latter issues credit notes to the assessee**.** Hence, some vendors also depute their personnel to assist in the sales at the retail outlets of the assessee to increase the visibility and sale-ability of these products**.** In case of any defect found in these products, the vendors also provide after sales support**.** Further these arrangements are noted to have provision for joint inventory taking for better management and the payments are made by the assessee on a monthly basis, in respect of the products which have been sold at its outlets**.** The agreements also specify the margins which the assessee can retain on the sales made**.**

18. The case of the Revenue is that, these SOR arrangements are not in the nature of contract for sale but in the nature of **'**works contract**'.** According to the AO, these SOR arrangements are composite in nature, involving supply of both material & labour, but wherein the predominant supply is labour & efforts by the vendors**.** The AO is noted to have discussed the features of the SOR arrangements, as understood by him, which led him to infer that these are in the nature of **'**works contract**'** amenable to Section 194C of the Act**.** The Ld**.** AR showed us that each of these observations made by the AO, which has been relied upon by the Ld**.** DR, had already been dealt with on facts by the Ld**.** CIT**(**A**)**

and that the Revenue was unable to point out any infirmity in the findings of the Ld. CIT(A).

19. It is noted by us that, having regard to the above observations made by the AO and to take the matters to its logical conclusion, the Ld. CIT(A) had remanded the matters back to the AO to make an independent verification from the vendors with regard to the nature of these SOR arrangements. From the remand report and the documents placed before us, it is noted that the AO had made independent enquiries both u/s 133(6) and 131 of the Act from these vendors. The assessee has placed copies of the relevant letters/ confirmations furnished by these vendors before the Ld. AO, which is found placed at Pages 104 to 130 of paper book. Upon going through the same, for instance, it is noted that vendor, M/s Tommy Hilfiger Arvind Fashion Pvt. Ltd (Page no. 105 of PB) had confirmed that the sourced by them from their /goods supplied by them to the assessee were imported Meaning thereby, this vendor itself was a trader in goods and .nominated suppliers not a manufacturer as alleged by the AO. This vendor also confirmed that they had sold their goods to the assessee for sale through their retail outlets and that similar products were also being sold through other retailers and their own ,Similarly .exclusive showroomsM/s Intercraft Trading Pvt. Ltd (Page no. 106 of the PB) had confirmed that they were distributor (not manufacturer) of the goods supplied to the assessee and that none of the materials were supplied by the assessee. They also confirmed that these goods were sold on sale or return basis. Like the earlier vendor, they also confirmed that they had sold their goods to the assessee for sale through their retail outlets and that similar products were also It is further .being sold through other retailers and their own exclusive showrooms of PB 109.Page No) (Blackberry) Mohan Clothing Co Pvt Ltd/noted that, M) has

submitted that the goods manufactured by them were as per their own specifications and based on the inputs of their own designing team and not the The vendor also confirmed that none of the raw materials to manufacture .assessee It further stated that the title and property in the .were provided by the assessee goods was transferred upon sale, raising of invoice and delivery of goods to the Similar .assessee and that such sale was on principal to principal basis .Page No) (VIP) confirmation is noted to have been given by Cravatex Brands Ltd of PB 107) We note that, the AO had also examined the .and others as well s 131 of the Act and each of them /personnel of these vendors on oath u/managers .confirmations /had also affirmed the terms enlisted in the agreements

20. From the above enquiries, it is thus noted that, not all vendors are manufacturers as alleged by the AO, but several of them are suppliers/traders as Each of these vendors have confirmed that they had sold goods to the .well The assessee neither provided .assessee on principal to principal basis specifications or designs nor did the assessee provide raw materials in relation to They have also confirmed that the title, risk and property in goods .these goods passed to the assessee upon sale, issuance of invoice and delivery of goods at their These vendors do not supply their products to the assessee alone but they .outlets or also sell these products /also sell the same products to different retailers and On these facts, we therefore .franchise exclusive showrooms/through their own had rightly held that the SOR arrangements with these (A)CIT .note that the Ld

with these vendors were in the nature of supply of goods and not works contract, .as defined in Explanation to Section 194C of the Act

21. It is noted that the foremost observation made by the AO to hold that the SOR arrangements were in the nature of *'works contract'* was that, there is a manufacturing agreement in place between the assessee and the vendors and that these vendors first manufacture samples, as per the specifications & designs provided by the assessee, and only if the same is approved that the assessee places orders and these vendors manufacture the same at the instance of the assessee**.** As already noted above, it is not the case that all the SOR arrangements are with manufacturers but there are several distributors as well who deal with the assessee on principal to principal basis**.** Before us, the assessee has placed on record a sample SOR agreement with a manufacturer-supplier**.** Having perused the same, it is noted that there is no such manufacturing arrangement in place between the assessee and this vendor based on which one may infer that this supplier is manufacturing at the instance or behest of the assessee and that too as per the specifications/designs provided by the latter**.** We thus agree with the Ld**.** CIT**(**A**)** that this observation of the AO is factually erroneous**.** As noted earlier, these products are procured from internationally reputed brands who are independent manufacturers or vendors themselves**.** These products purchased by the assessee bear the brand names of these suppliers and not the assessee which further supports the case of the assessee that these products were not being manufactured at their behest**.** It is noted from the terms of the agreement that, the assessee does not enjoy any right to place orders for manufacture of any new product but instead only exercises the right to choose from various product offerings from the array of products manufactured by these suppliers**.** Such supply, being independent of raw

material sourcing, cannot be categorized as 'works contract' as contemplated in Explanation to Section 194C of the Act.

22. It was brought to our notice by the Ld. AR that, the AO got swayed by the use of the phrase *'produce sample'* in the agreement. According to him, *'produce sample'* meant to present the sample for approval and not manufacture the same. It is noted that the Ld. CIT(A) had taken specific note of this aspect and after examining the facts in detail, he had agreed with this explanation put forth by the assessee. The relevant findings, as noted by us, is as under:

"5.21 The inference drawn by the Assessing Officer that 'production' of products before SSL for approval means 'manufacturing of the product and then its production before SSL' is clearly not borne out of the facts available. The vendors in this case are vendors owning brands with a very high market value and mostly the products under those brands already available in their inventory. The 'production' of sample of each item before SSL logically means 'making available of such items to SSL for examination' from the inventory available with the vendor. Selection of items out of such samples means selection of some items out of the total models available with the vendor which would have more likelihood of sale at the SSL outlets. It is noted that such production of items before SSL cannot mean production of such items manufacturing facilities of the vendors. None of the evidences collected / produced before the AO indicate that there is a correlation between the SSL orders and manufacturing of such items at manufacturing facilities of the vendors. In fact, many of these vendors are just brand owners and are not manufacturers at all. In its submission, the assessee has provided evidences where the goods have been shipped by the vendor within a day of issue of purchase order and delivered to the assessee within 3 to 4 days. Clearly, the product, in this case, was not manufactured at the instance of the assessee and had its own identity before being delivered to SSL.

5.22 It is also noted that SSL does not have any division which develops specifications or know how for products sold by them. It is only that based on the experience of retailing in the area, SSL has certain understanding of the products

likely to sell in that area and the identification of such saleable products from the total range of the vendor's products is done by them before placing the purchase orders. There is no evidence that specifications have either been developed with respect to any such products nor any specification is given to the vendors. Vendors, being brand owners, have their own way of developing their products based on their research. The orders are placed for identified products and not for products based on SSL specifications. It is also noted that the products are supplied to SSL within a day and supplied within 3 to 4 days of placement of such order. It cannot be the case of the AO that the vendor, within a period of one day, is able to source the material from SSL and produce such goods for appellant's consumption."

23. It was further rightly noted by the Ld. CIT(A) that, even if it be the case that the assessee had provided specifications in relation to supply of these products *(although that is not the case)*, still it could not qualify as '*works contract*' in light of the specific exception set out in clause (iv)(e) of Explanation to Section 194C of the Act, as discussed earlier. It is not the case that, the assessee provided or supplied materials to any of these vendors/suppliers. It is noted that, each of these vendors manufactures or procures the products in their own independent capacity and under their respective brand names in as much as that the assessee does not have any say in the same. In fact, the goods manufactured by these vendors, who are noted to have international repute, is not directly dependent on the orders placed by the assessee. These suppliers are noted to manufacture and supply their products to several retailers and that the assessee is only one of them which procures their products. The assessee does not provide any specifications for manufacture of these products but it only selects from the wide array of the products offered by these vendors which it chooses to sell through its retail outlets. These products sold through the retail outlets are not branded by the assessee but they carry the brand /name of the original suppliers / manufacturers. These material facts remained uncontroverted by the Revenue. We

thus agree with the findings of the Ld**.** CIT**(**A**)** that, these SOR arrangements were on principal to principal basis and therefore in the nature of contract for sale of goods and thus, such an arrangement cannot be categorized as ***'***works contract***'*** as defined in Section 194C of the Act**.**

24. The AO is further noted to have laid much emphasis on the aspect that, the assessee had long term arrangements with these vendors and therefore it was not in the nature of ordinary purchases as claimed by the assessee**.** Having regard to the facts as already discussed in the foregoing, and also having perused sample agreements, we note that nothing much turns on this issue as observed by the AO**.** As rightly noted by the Ld**.** CIT**(**A**)**, it is a common feature in any business that, suppliers enter into a written agreement/understanding with their major customers to outline the terms and conditions and the respective responsibilities / liabilities to avoid confusion in future**.** Further, the placement of purchase orders in any line of business ensures that the suppliers can correspondingly schedule their production in an organized fashion to avoid disruptions or delays in deliveries**.** The Ld**.** AR pointed out that, the assessee-retailer primarily deals in clothing/ apparels/ fashion etc**.** which changes with time and also with each season **(**summer/rainy/winter**)**, and therefore the assessee-retailer has to ensure that it is stocked up with the clothing/ apparels/ fashion that is relevant and saleable during the material period/ season for which it places appropriate orders in advance with these suppliers from amongst the samples presented by them**.** Hence, the

placement of purchase orders by the assessee prior to the supply of goods by these vendors cannot render the arrangement to be held as a ***'works contract'.***

25. The AO thereafter is noted to have referred to the ancillary services provided by the suppliers viz**.**, deputation of personnel at the retail stores, provision of after sales support to remove defects, joint inspection of inventories, etc**.**, to allege that the predominant intent of these SOR arrangements was the supply of labour and not material**.** According to us, each of these averments made by the AO were totally misplaced on the given facts of the case**.** As we have already noted above, these SOR arrangements are in the nature of contract for supply of goods**.** One of the key features of such an arrangement is that, the goods purchased by the assessee may be returned if it remains unsold in their outlets**.** Further, the assessee sells these goods through its retail outlets which houses multiple brands of similar apparels/ cloths/ fashion etc**.** Moreover, the Ld**.** AR explained that, with these products getting more complex and expensive and with the changing fashion, they require specialized handlers to explain the same to the customers to introduce them to the new features or the new fashion in vogue**.** It is therefore, commonly known that the trained sales staff are placed by these suppliers at the retail outlets to educate or assist the customers who visit the retail outlets of the assessee to increase their sales**.** Hence, we agree with the Ld**.** CIT**(**A**)** that, the mere deputation of sales staff, subsequent to sale of goods, cannot be viewed adversely so as to allege that these SOR arrangements are in the nature of ***'works contract'.***

26. Further, if any of the customers of the assessee reports any product defects or size issues at the retail outlets, the assessee, in turn, avails the after sales support from the suppliers/ original manufacturers**.** This after-sales support subsequent to sale of goods is a common feature in any contract for sale**.** In any line of business, the distributors / wholesalers / retailers avail the after sales support for their customers from the original manufacturer, but that does not mean that their contracts with the manufacturers are not for supply of goods**.** The provision of after sales support clearly does not alter or change the nature of the SOR arrangement, which is that of supply of goods by the vendors to the assessee**.**

27. One of the clauses of the SOR agreement also provides for the joint inspection of stock at the retail outlets of the assessee, which according to the AO, shows that there are other onuses on the vendor as well and therefore it is not a mere purchase-sale of goods**.** Before the Ld**.** CIT**(**A**)**, it was explained by the assessee that, this clause was set out in the agreement because as per the agreed terms of payment, the vendors are paid weekly/monthly based on the goods sold at the retail outlets**.** Accordingly, in order to ensure that the payments are being made in a timely fashion, the vendors sought the right to inspect the inventory lying at different retail outlets, if so desired by them**.** Further, having regard to the nature and line of business, i**.**e**.** clothing/shoes/bags/fashion/apparels, etc**.**, the vendors want to take stock of the slow moving items at different locations and thereby get a timely feedback in terms of the evolving sense of taste & liking of the customers, to accordingly chart out their next line of clothing/ shoes/ bags/ fashion/ apparels, etc**.** Hence, as rightly held by Ld**.** CIT**(**A**)**, this clause/option vested with the vendors is of no relevance and does not in any

manner assist the case of the AO nor does it suggest that the SOR arrangement is in nature of ***'works contract'.***

28. The last observation of the AO was that, the payments towards the goods supplied by the vendors were being released by the assessee either after the goods were found to be complete without any defect by the assessee, or after the complete goods were found to be to the satisfaction of the assessee, or after the goods were sold at their retail outlets, which according to him, suggested that the vendors were the contractors of the assessee. It was rightly pointed out by the Ld. AR that, the terms of payments towards purchase of goods cannot be said to indicate that the contract is that of 'works contract' with the vendors. He showed us that, even the Sale of Goods Act 1930, permits contract for payment during delivery of goods or before or after or by installments. In our considered view therefore, this observation of the AO is of no relevance and is not decisive to ascertain the nature of the SOR agreement.

29. Based on our above findings and observations, thesalient features of the SOR agreements with the vendors can be summed up as follows:

a) The assessee first selects the vendors based on its stand in the market and the quality of their products and thereafter enters into SOR agreements with them. These agreements are in the nature of Memorandum of Understanding laying down the terms and conditions of the supply of goods. The vendors present their samples of an array of products for selection. The assessee, after evaluating the samples, places the purchase orders and thereafter the goods are supplied from the vendors from time to time.

b) The vendor supplies the goods either out of vendors' existing stock or goods manufactured or purchased or imported by the vendor. It is noted that there is no correlation between the purchase orders placed by the assessee and the goods manufactured or procured by the vendors. The vendors act in their own independent capacity and the goods supplied by them are manufactured from the raw materials sourced by themselves and nothing is provided by the assessee. Even the designs and specifications are decided by the vendors without the involvement of the assessee. Moreover, even the goods supplied by the vendors only carries the brand/ name of the respective vendors and not of the assessee.

c) The property in the goods passes onto the assessee upon raising of the invoice and the delivery of goods. At no anterior stage does the property in the goods pass to the assessee. The respective vendors are exclusively the owners of the goods at every stage of procurement/manufacturing till the goods are delivered to the assessee.

d) The risk in the goods up to the point of delivery is that of the vendor and after the delivery is that of the assessee. Once the goods are delivered to the assessee, the risk, title and property in these goods vests with the assessee. This is also evident from the insurance policy, copy of which was placed at Pages 55 to 62 of the paper book, that the stocks purchased on sales or return basis are also insured by the assessee.

e) The invoices raised by the vendors are noted to be for the supply of the goods. It is noted that these invoices are subject to the levy of sales tax, etc., which is applicable on sale of goods and no works contract tax/ service tax

is levied on the same which would suggest that it is in the nature of *'works contract'.*

f) In terms of the SOR agreement, the assessee has a right to return the goods under certain circumstances which is set out in the agreement itself.

g) For mutual interests of promoting the business, certain ancillary functions such as deputation of marketing personnel, after sales support, joint inspection of inventory etc. is provided in the SOR agreements. These functions do not alter or change the primary character of the transaction between the vendors and the assessee, which is that of supply of goods.

h) The vendors have also confirmed the above facts and understanding in the course of enquiries made from them u/s 133(6)/131 of the Act. They have affirmed that they have supplied goods to the assessee on principal to principal basis for sale through the assessee's retail outlets.

30. In view of the above, we note that the Ld. CIT(A) had rightly placed reliance on the decision of the Hon'ble Bombay High Court in the case **CIT vs. Glenmark Pharmaceuticals Ltd (supra)** which is found to be relevant and applicable in the present case. In this decided case, the assessee is noted to have been engaged in the manufacture and marketing of drugs and pharmaceutical products. In the course of the TDS survey, it was noted by the Department that, or purchasing drugs from other /apart from manufacturing drugs on their own and suppliers on an outright basis, the assessee also had agreements in place with ,certain third partieswho although would source raw materials on their own but they would manufacture the products as per the specifications and standards provided by the assessee and under its trade mark. According to the AO, such an

agreement was in the nature of works contract amenable to Section 194C of the Act. Since the assessee had not deducted taxes at source from such payments, it was held to be an assessee-in-default u/s 201 of the Act. Although the Ld. CIT(A) upheld the order of the AO but on further appeal this Tribunal decided the issue in favour of the assessee. It is noted that this Tribunal had held that, though the products were manufactured in accordance with the specifications of the assessee and under its trademarks, but the manufacturer carried out the process of manufacturing at his own establishment, engaged his own labour force, purchased the raw materials on its own and paid excise duty and sales-tax, and the property in the goods passed onto the assessee only upon delivery of the products. Referring to the decision rendered by the Hon'ble Bombay High Court in the case of BDA Ltd. v. ITO (TDS) (281 ITR 99), this Tribunal, in the instant case, held that the agreements entered into by the assessee with the manufacturers were not works contracts within the meaning of section 194C of the Act and, consequently, the assessee could not be held as an assessee-in-default under section 201(1) of the Act. Aggrieved by this order of the Tribunal, the Revenue preferred appeal before the Hon'ble High Court and the following substantial question of law was raised for adjudication :

"*Whether, on the facts and in the circumstances of the case, the Income-tax Appellate Tribunal was correct in holding that the transactions between the assessee and the manufacturer is a contract for sale of goods and is not in the nature of works contract and therefore, the provisions of section 194C are not attracted?*"

31. ,Answering the above question in the negative and against the Revenuethe Hon'ble Bombay High Court had held as under:

"28. Hence, what has weighed in the introduction of clause (e) to the Explanation was ongoing litigation on the question as to whether TDS was deductible on outsourcing contracts. Clause (e) was introduced to bring clarity on this issue' or, in other words, to remove the ambiguity on the question. Clause (e) as introduced contains a positive affirmation that the expression 'work' will cover manufacturing or supplying a product, according to the requirement or specification of a customer by using material purchased from such a customer. Clause (e) has placed the position beyond doubt by incorporating language to the effect that the expression 'work' shall not include manufacture or supply of a product according to the requirement or specification of a customer by using material which is purchased from a person other than such customer. In other words, the circumstances that the requirements or specifications are provided by the purchasers is not regarded by the statute as being dispositive of the question as to whether a contract constitutes a contract of work or sale. What is of significance is whether material has been purchased from the customer, who orders the product. When the material is purchased from the customer who orders the product, it constitutes a contract of work while on the other hand, where the manufacturer has sourced the material from a person other than the customer, it would constitute a sale. What is significant is that in using the words which clause (e) uses in the Explanation, Parliament has taken note of the position that was reflected in the circulars issued by the Central Board of Direct Taxes since May 29, 1972 The judgment of the Supreme Court in Associated Cement gave an expansive definition to the expression work and rejected the attempt of the assessee in that case to restrict the expression work to works contracts Both before and after the judgment of the Supreme Court the expansive definition of the expression work co-existed with the Revenue's understanding that a contract for sale would not be within the purview of section 194C. The Revenue always understood. section 194C to mean that though a product or thing is manufactured to the specifications of a customer, the agreement would constitute a contract for sale, if (i) the property in the article or thing passes to the customer upon delivery; and (ii) the material that was required was not sourced from the customer/purchaser, but was independently obtained by the manufacturer from a person other than the customer. The rationale for this was that where a customer provides the material, what the manufacturer does is to convert the material into a product desired by the customer and ownership of the material being of the customer, the contract essentially involves work of labour and not a sale. Parliament recognized the distinction which held the field both

administratively in the form of circulars of the Central Board of Direct Taxes and judicially in the judgments of several High Courts to which a reference has been made earlier. Consequently, the principles underlying the applicability of section 194C as construed administratively and judicially in decided cases, find statutory recognition in the Explanation. The Finance Bill of 2000 states, was in the nature of a clarification. Where an explanatory provision is brought to remove an ambiguity or to clear a doubt, it is reflective of the law as it has always stood in the past. Where, as in the present case an Explanation is introduced statutorily to adopt an understanding of the law both in the form of the circulars of the Board of Direct Taxes and in judicial decisions. Parliament must be regarded as having intended to affirm that intent. In the present case, the intent has held the field for over three decades...

33. The reason that a specification or requirement is enunciated by the assessee constitutes a matter of business expediency A purchaser who desires to get the product, which he intends to sell under his brand name, or trademark, manufactured from a third party would be interested in ensuring the quality of the product. The trade-mark has associated with it an assurance of the quality of the goods which are marketed traceable to the origin of the goods. Associated with the trade-mark is the goodwill and reputation which is associated with the at This is particularly so in the case of a pharmaceutical product where the ultimate consumer is legitimately entitled to ensure that her health is not prejudiced by the consumption of a product not meeting prescribed standards. The owner of a mark, therefore, introduces specifications to ensure that the product meets the standards justifiable associated with the reputation in the mark. The specification

ensures the observance of standards. Similarly, a clause relating to exclusivity is not inconsistent with a transaction of a sale. Here again, much depends upon the nature of the product Restrictive covenants of this kind are intended to protect the intellectual and other property rights of a party which markets its goods by requiring a manufacturer to observe norms of specification and exclusivity. The law is, therefore, consistent with the transaction being regarded as a transaction of sale, provided that the requirements of a contract of sale are met. They are in this case. The contract entered into by the assessee is not a contract for carrying on any work within the meaning of section 194C."

32. In the above binding judgment, the Hon'ble Court while examining clause (e) as introduced by the Finance (No.2) Act, 2009, noted that it contains a positive affirmation that the expression *'work'* will cover manufacturing or supplying a product, according to the requirement or specification of a customer, by using material purchased from such customer. It has also been noted by the Hon'ble High Court that clause (e) has placed the position beyond doubt by incorporating language to the effect that the expression 'work' shall not include manufacture or supply of a product according to the requirement or specification of a customer by using material which is purchased from a person other than such customer. The Hon'ble Court made it abundantly clear that the fact that specifications were provided by the assessee to the manufacturer / supplier would make no difference to the legal position. It noted that, (i) the agreement in the instant case, was on a principal to principal basis, (ii) the manufacturer had his own establishment where the product was manufactured, (iii) the material required in the manufacture of the article or thing was obtained by the manufacturer from a person other than the assessee, (iv) the property in the articles passed upon the delivery of the product manufactured, and (v) until delivery, the assessee had no title to the goods. On these principles, the Hon'ble High Court accordingly held that the provisions of Section 194C were not

applicable, and more particularly the agreement did not fall within the definition of *'works contract'* as laid down in Explanation to Section 194C of the Act.

33. The Ld. AR Shri Vijay Mehta has rightly pointed out to us that, the case of the assessee is on much better footing than the facts involved in the above cited judgments. It is noted that all the above features (i) to (v) were present in the SOR agreements in question in the present case. Apart from the foregoing, as already noted by us, in the present case, the assessee is not accustomed to providing specifications or designs to the suppliers. It is also not a case that the suppliers are manufacturing the goods at the instance of the assessee. Further, the goods supplied are not under the brand/name of the assessee and instead bear the brand/mark/name of the respective supplier/original manufacturer. Hence, the ratio laid down in the above judgment, when coupled with the foregoing facts, is held to be applicable with more force in the present case of the assessee.

34. For the reasons set out above therefore, we do not see any reason to interfere with the order of the Ld. CIT(A) in holding that the payments made under the SOR agreements did not fall within the ambit of Section 194C of the Act and therefore the assessee did not have any liability to deduct tax at source on such payments u/s 194C of the Act. Accordingly, all the grounds raised by the Revenue stands dismissed.

Order pronounced in the open court on this 02/12/2022.

Sd/-	Sd/-
(AMARJIT SINGH)	**(ABY T. VARKEY)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

मुंबई Mumbai;
दिनांकDated : 02/12/2022.
Shubham Lohar, (PS)

आदेशकीप्रतिलिपिअग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी/ The Appellant
2. प्रत्यर्थी/ The Respondent.
3. आयकरआयुक्त(अपील) / The CIT(A)-
4. आयकरआयुक्त/ CIT
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, मुंबई/ DR, ITAT, Mumbai
6. गार्डफाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापितप्रति //True Copy//

उप/सहायकपंजीकार /(Dy**.**/Asstt**.**Registrar**)**
आयकरअपीलीयअधिकरण, मुंबई / **ITAT, Mumbai**