Bombay High Court Bda Ltd. vs Income-Tax Officer (Tds) on 8 March, 2004 Equivalent citations: (2006) 201 CTR Bom 413, 2006 281 ITR 99 Bom Author: B Marlapalle Bench: B Marlapalle, M Gaikwad JUDGMENT B.H. Marlapalle, J. 1. These are appeals by the assessee, M/s. BDA Limited, a public limited company incorporated under the Companies Act, 1956. It has a distillery at Aurangabad and purchases materials required for bottling and marketing the foreign made Indian liquor, including the printing and packing material. M/s. Mudranika, another establishment was supplying the printed labels to be wrapped on the bottles to the assessee. The Income-tax Officer (TDS) visited the factory premises of the assessee by exercising powers of survey under Section 133A of the Income-tax Act, 1961 ("the Act", for short), and served summons to produce books of account in relation to the TDS for the financial years 1995-96 and 1996-97 on October 8, 1997, and more particularly payments made to M/s. Mudranika, the supplier of printed material from whom printed labels were purchased. Notice of hearing was given on the same day and the date for the same was fixed as October 9, 1998, during the course of which the assessee submitted all the required documents along with books of account and denied the liability of TDS for the financial years 1995-96 and 1996-97 under Section 194C of the Act in respect of the printed labels purchased from M/s. Mudranika. It had contended that the transaction with M/s. Mudranika was a contract for sale and not works contract. However, the Income-tax. Officer confirmed the demand of Rs. 40,481 and Rs. 79,134 for the first and second year, respectively, under Section 201(1A) of the Act. By way of interest under Section 201(1) of the Act, a further amount of Rs. 11,132 for the first year and Rs. 9,892 for the second year was also sought to be recovered, thus making a total of Rs. 1,40,639 by order dated January 16, 1998. This order came to be challenged before the Commissioner of Income-tax (Appeals) ("the CIT(A)"), Nagpur, in Appeal No. CIT(A)-1/NAG/75/ABAD/1999-2000, and it came to be dismissed vide his order dated April 4, 2000. It is pertinent to note that, a composite appeal was filed for both the financial years and it came to be decided accordingly. The assessee, therefore, filed one single appeal before the Income-tax Appellate Tribunal. There was no objection recorded by the office of the Tribunal in entertaining a single appeal and non-payment of court fees for both the years. However, the appeal came to be placed before the single Bench (judicial Member), who proceeded to decide the appeal only for the financial year 1995-96, on the ground that, two separate sets for two financial years were not filed, and payment of fees for both years was not remitted. The Tribunal did not take cognizance of the appeal for the financial year 1996-97, and, by its order dated May 31, 2002, dismissed the appeal only for the first year. 2. Subsequently, Miscellaneous Application No. 47/PN/2002 came to be filed, purportedly as an application for review of the order dated May 31, 2002. It was contended for the first time that, the single Bench did not have jurisdiction under Section 252(2) and (3) of the Act to decide the demand for the financial year 1995-96 as the assessed income for the same year of the assessee was to the tune of Rs. 2,13,33,830. This application came to be rejected by order dated May 27, 2003, and the Tribunal noted that, in spite of several

opportunities having been granted, none remained present before it for the assessee to argue the review application, and adjournments were sought from time to time without putting in counsel's appearance on behalf of the assessee. It was further observed that, when the appeal was submitted in Form No. 36, Column Nos. 3(A) and 3(B) were kept blank, thereby not declaring income or assessed income. A photocopy of the assessment order was sought to be brought on record, but without making any formal application for addition, which was prohibited as per Rule 29 of the Income-tax Appellate Tribunal Rules. The Tribunal also observed that, the point of jurisdiction was required to be raised when the appeal was being heard by the single Bench and it could not have been so done by way of a review application subsequently. The assessee had submitted to the jurisdiction of the Tribunal, and it was not entitled to object to the same after the appeal was dismissed. In this regard, the Tribunal relied upon the decision of the Rajasthan High Court in the case of Jaipur Udhyog Ltd. v. CIT . 3. The following issues of law arise for our consideration in these two appeals. (a) Whether the supply of printed labels by M/s. Mudranika to the assessee amounted to contract for sale, or works contract ? (b) Whether the single Bench of the Tribunal had jurisdiction to hear and decide the appeal for the financial year 1995-96 ? and (c) Whether the Tribunal was right in ignoring the appeal for the financial year 1996-97 on the ground that, no separate appeal was filed and fees was not paid for the said year ? 4. Shri Sharma, learned Counsel for the assessee, submitted that the supply of printed labels by M/s. Mudranika was based on a specific purchase order, which clearly stated that, the assessee was not responsible for supply of raw material, etc., and the printing work was required to be carried out by the supplier in its own premises with the help of its own machinery and labour as well as raw material. Though the purchase order had given specifications of the labels required, that by itself would not make the transaction works contract, more so because M/s. Mudranika was not a captive unit of the assessee and it was supplying similar labels to many other companies/establishments as per their respective specifications. However, the Tribunal, in disregard to the well settled legal position and by relying upon the departmental circulars dated March 8, 1994, August 2, 1995 and August 8, 1995, proceeded to hold that, the transaction was a works contract. On the point of jurisdiction, Shri Sharma submitted that, the appeal was initially listed before the Division Bench, but by an administrative order, it came to be placed before the single Bench. Even if the assessee had not taken objection at the initial stage to the jurisdiction of the single Bench, it was necessary for the Tribunal itself to verify whether the assessed income of the assessee for the relevant year was less than rupees five lakhs, and if the assessee had not by any chance declared its income while filing the appeal, it could have been called upon to declare the same on the basis of the assessment order passed by the Income-tax Officer. There was no bar in taking such an objection on jurisdiction in a review application, as, such an application would only amount to correction of an error apparent on the face of the record inasmuch as the order passed by the single Bench was required to be recalled and the appeal was required to be placed before the Division Bench. Along with the review application, the assessee had

submitted a photocopy of the assessment order for the financial year 1995-96, and therefore, even in the absence of the assessee's counsel, it was necessary for the Tribunal to decide the issue regarding jurisdiction. Payment of fees is a procedural technicality and if it was noticed by the Tribunal that separate fees for the second year was required to be remitted, the office objection could have been raised and the assessee could have removed such objections within the time period granted. No such objection was ever raised till the appeal was decided for only one year and it was ignored for the second year. Even when the review application was filed, the assessee could have been called upon to remove the office objections and the appeal for the second year could have been decided on the merits, urged learned Counsel for the assessee. 5. Shri Sonawane, learned standing counsel for the Revenue, referred to the affidavit-in-reply filed in Tax Appeal No. 44 of 2003, and submitted that, the view taken by the Tribunal in dismissing the appeal and holding that the transaction for supply of printed labels amounted to "works contract", is well supported by a catena of decisions and, therefore, no interference is called for in the said view. In support of these submissions, he has relied upon the following decisions of this Court : (i) Sarvodaya Printing Press v. State of Maharashtra [1994] 93 STC 387 ; [1994] 2 Mah LJ 1322 [FB] ; and (ii) Sunflag Iron and Steel Co. Ltd. v. Addl CCE [2001] 3 Mah LJ 532. 6. On the other hand, Shri Sharma, learned Counsel for the assessee has relied upon the following decisions : (i) State of Himachal Pradesh v. Associated Hotels of India Ltd. ; (ii) State of Tamil Nadu v. Anandam Viswanathan ; (iii) Associated Cement Co. Ltd. v. CIT ; (iv) Andhra Pradesh State Electricity Board v. Collector of Central Excise ; (v) Income-tax Appellate Tribunal v. Deputy CIT (Assessments) ; and (vi) Birla Cement Works v. CBDT [2001] 248 ITR 216 (SC) : 2001 AIR SCW 1028. 7. Section 194C of the Act was brought into existence by the Finance Act, 1972, and with effect from April 1, 1972. Circular dated May 29, 1972 (see [1972] 84 ITR (St.) 99), was issaecr, inter alia, stating that the provisions of Section 194C would apply only in relation to "work contracts", and labour contracts and will not cover contracts for sale of goods. By subsequent circular dated September 26, 1972 (see [1972] 86 ITR (St.) 30), it was clarified that, the said section will not apply to transport contracts. Explanation III was inserted by the Finance Act, 1995, and with effect from July 1, 1995, so as to include in the expression "work" carrying of goods, and passengers by any mode of transport other than by railways. Based on the decision of the Supreme Court in the case of Associated Cement Co. Ltd. , three circulars, referred to hereinabove, and relied upon by the authorities/Tribunal below, came to be issued. In the case of Birla Cement Works [2001] 248 ITR 216 (SC), it was made clear that, the earlier decision in Associated Cement Co. Ltd.'s case was concerned with a work carried out through a contractor under a contract which further included obtaining supply of labour under a contract with a contractor for carrying out its work which would have fallen outside "work" but for its specific inclusion in the sub-section, and from July 1, 1995, Section 194C became applicable to transport contracts, and Section 194C was not applicable to the transport contracts before the insertion of Explanation III 8. Coming to the case at hand, we

must state at the threshold that, the Division Bench of the very same Tribunal, whose decision is under challenge in these appeals, decided on September 13, 2000, the case of Wadilal Dairy International Limited v. Asst. CIT [2002] 81 ITD 238 (Pune) (I. T. A. Nos. 642 and 643 of 1999) and took the view that, if a manufacturer purchases material on his own and manufactures a product as per the requirement of a specific customer, it was a case of sale and not a contract for carrying out any work. The fact that the goods manufactured were according to the requirement of the customer did not mean or imply that any work was carried out on behalf of that customer. Supply of printing and packing material to M/s. Wadilal Dairy International Limited was held to be a contract for sale and not a works contract, as the main purpose in buying packing material was to obtain goods for the purpose of packing and the fact that incidentally some printing was required to be done by the supplier was of no consequence. There was no works contract involved and accordingly, the provisions of Section 194C of the Act were not applicable. The appeal of the assessee was allowed and the view taken by the Revenue was set aside. 9. The case of State of Himachal Pradesh, came to be decided by a Constitution Bench. In para. 9 (page 1134), the court observed thus (page 479) : The difficulty which the courts have often to meet with in construing a contract of work and labour, on the one hand, and a contract for sale, on the other, arises because the distinction between the two is very often a fine one. This is particularly so when the contract is a composite one involving both a contract of work and labour and a contract of sale. Nevertheless, the distinction between the two rests on a clear principle. A contract of sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the principal object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale ; neither the ownership of materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel (Halsbury's Laws of England, 3rd edition, vol. 34, 6-7). 10. The apex court was considering the applicability of sales tax under the Punjab General Sales Tax Act. In fact, deduction of TDS under Section 194C is converse to the payment of sales tax under the Sales Tax Act framed by the States inasmuch as if the contract is not covered for payment of sales tax, it is covered for deduction of TDS under Section 194C of the Act and vice versa. While distinguishing the transaction of sale contract from the works contract, the court observed (page 481) : From the decisions earlier cited it clearly, emerges that such determination depends in each case upon its facts and circumstances. Mere passing of property in an article or commodity during the course of the performance of the transaction in question does not render it a transaction of sale. For, even in a contract purely of work or service, it is possible that articles may have to be used by the person executing the work and property in such articles or materials may pass to the other party. That

would not necessarily convert the contract into one of sale of those materials. In every case the court would have to find out what was the primary object of the transaction and the intention of the parties while entering into it. It may in some cases be that even while entering into a contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction would not be one and indivisible, but would fall into two separate agreements, one of work or service and the other of sale. 11. In the case of State of Tamil Nadu v. Anandam Viswanathan , the assessee had supplied printed question papers to universities and other educational institutions in the country. The question was whether it was a "works contract", or "contract for sale" for the purposes of payment of sales tax under the Tamil Nadu General Sales Tax Act. In para. 27, the court stated (page 14 of [1989] 73 STC 1 and page 972 of AIR 1989 SC) : In our opinion, in each case the nature of the contract and the transaction must be found out. And this is possible only when the intention of the parties is found out. The fact that in the execution of a contract for work some materials are used and the property in the goods so used, passes to the other party, the contractor undertaking to do the work will not necessarily be deemed, on that account, to sell the materials. Whether or not and which part of the job-work relates to that depends, as mentioned hereinbefore, on the nature of the transaction. A contract for work in the execution of which goods are used may take any one of the three forms as mentioned by this Court in Government of Andhra Pradesh v. Guntur Tobaccos Ltd. . 12. In the case of Associated Cement Co. Ltd. , it was held that, the payment made to the labourers engaged by the contractor for loading the cement bags for transportation fall within the ambit of the term "any work", and therefore, TDS was deductible under Section 194C. In para. 5, the court noted (page 440) : We see no reason to curtail or to cut down the meaning of the plain words used in the section. 'Any work' means any work and not a 'works contract', which has a special connotation in the tax law. Indeed, in the sub-section, the 'work' referred to therein expressly includes supply of labour to carry out a work. It is a clear indication of the Legislature that the 'work' in the sub-section is not intended to be confined to or restricted to 'works contract'. 'Work' envisaged in the sub-section, therefore, has a wide import and covers 'any work' which one or the other of the organisations specified in the sub-section can get carried out through a contractor under a contract and further it includes obtaining by any of such organisations supply of labour under a contract with a contractor for carrying out its work which would have fallen outside the 'work', but for its specific inclusion in the sub-section. 13. It is not disputed that, M/s. Mudranika is an independent establishment engaged in the business of supplying printed packaging material to various establishments, and it is not a captive unit of the assessee. The assessee had issued a purchase order in favour of M/s. Mudranika for supply of printed labels as per the specifications provided by it, and the raw materials required for the same were not supplied by the assessee. M/s. Mudranika has been supplying such printed labels to other establishments as per their respective specifications. The printing

work was not being carried out in the premises of the assessee. This supply of printed labels cannot be compared and equated with the supply of printed question papers to universities and educational institutions. M/s. Mudranika would not print such labels with the specifications of the assessee beyond the quantity specified in the purchase order, and therefore, it was wrong on the part of the Tribunal to hold that, the labels printed by M/s. Mudranika to supply to the assessee could not be sold to any other establishments in the market. This finding regarding no marketability is based on a fallacious premise that, M/s. Mudranika was printing an unlimited number of labels. When the printing work was being carried in the premises of M/s. Mudranika, though as per the specifications of the assessee, the supply was limited to the quantity specified in the purchase order and it would not do such printing beyond the numbers specified in the same. There is nothing on record to show that, all other ancillary costs like the labels, ink, papers, screen-printing, screens, etc., were being supplied by the assessee to M/s. Mudranika. In the facts of this case, the supply of printed labels by M/s. Mudranika to the assessee was a "contract of sale" and it could not be termed as a "works contract". The Tribunal has rightly held in the case of Wadilal Dairy International Limited [2002] 81 ITD 238 (Pune) that, the supply of printed packing labels amounted to a "sale contract" and not a "works contract", and the same ratio is applicable in the instant case, as well. The single Bench of the Tribunal thus fell in gross error in holding that, the subject transaction was a "works contract", and therefore TDS was required to be deducted by the assessee under Section 194C of the Act. 14. It is true that, the assessee had not raised the point of jurisdiction before the single Bench when it argued its composite appeal and it had thus surrendered to the jurisdiction of the single Bench. If such a point was raised when the appeal was being heard by the single Bench, we would have, in the normal course, heard this as the preliminary issue, and if our finding was in the affirmative, the appeal could have been restored and remanded to the Tribunal for decision on the merits. As the issue of jurisdiction has been raised after the appeal was decided on the merits, we need not follow the said course. 15. Even though the assessee had left columns Nos. 3(A) and 3(B) blank in Form No. 36, the jurisdiction of the single Bench is governed by the statutory provisions, namely, Section 252(2) and (3) of the Act. Unless the assessed income for the relevant financial year in respect of the appellant was less than rupees five lakhs, the single Bench could not derive jurisdiction to decide the appeal. The office of the Tribunal was required to notify the objections so as to decide whether the appeal was required to be placed before the Division Bench or the single Bench by the learned President of the Tribunal. There may be deficiency in the procedural requirements by the litigants, but the Tribunal, while registering the appeal, is required to verify all procedural compliances, and if any deficiencies are noted, the same must be brought to the attention of the litigants or their counsel, and a specific period for compliances is required to be provided. If such compliances are not done by the parties concerned, they suffer the consequences. But the Tribunal cannot take a view that, because the assessee did not fill in the information in columns Nos. 3(A) and 3(B) in Form No. 36 of the appeal memo, its appeal was rightly

decided by the single Bench. At the same time, we agree with the view taken by the Tribunal that, once an appellant has surrendered to the jurisdiction, it cannot subsequently take objection on the same issue. In the instant case, the appellant had not taken objection to the jurisdiction of the Tribunal, and on the other hand, it had in its review application contended that, the appeal would not have been listed before the single Bench, as its assessed income for the relevant year exceeded rupees five lakhs. The objection was more on procedural requirements, and more particularly on the single Bench's powers. Along with the review application, a photocopy of the assessment order for the relevant year was brought on record by the assessee, and it was necessary to take cognizance of the same, while deciding the review application. The reasoning given by the Tribunal in rejecting the review application does not impress us. Under the circumstances, we answer the second issue in the affirmative. 16. Coming to the third issue, we find that, the approach of the Tribunal has been too technical. As observed a little while ago, it was necessary for the Tribunal's registry to notify the deficiencies, if any and such deficiencies would be even regarding the remittances of court fees or filing separate set of copies in view of subsequent procedural amendments, and more so, these amendments were not brought before us when the composite appeal was decided by the Commissioner of Income-tax (Appeals). Since the composite appeal was filed before the Tribunal, it was necessary for its registry to point out to the appellant the requirement of payment of separate court fees for the appeal pertaining to the financial year 1996-97. A remedy of appeal is a statutory remedy, and it could not be defeated on account of procedural deficiencies unless the litigant is negligent or adamant in not removing such deficiencies. Such deficiencies could be removed even after the appeal is decided and within the period specified. The procedural requirements for payment of court fees should not come in the way of deciding the appeal on the merits, once such appeals have been admitted. It was, therefore, necessary for the Tribunal to decide the appeal for the financial year 1996-97 on its own merits. However, that itself will not be a reason for us to remand the appeal for the second year, i.e., 1996-97, for deciding on the merits by the Tribunal, more so, when we have already decided the main issue and held that the supply of printed packing labels by M/s. Mudranika to the assessee amounted to "contract for sale" and not a "works contract". 17. In the result, we allow these appeals, and quash and set aside the orders dated May 31, 2002, and May 27, 2003, passed by the Tribunal, the order dated April 4, 2000, passed by the Commissioner of Income-tax (Appeals), Nagpur, in Appeal No. CIT(A)-l/NAG/75/ABAD/99-2000, and the order passed by the ITO (TDS) on January 16, 1998. If the assessee has already remitted the subject amount of TDS, the same shall be set-off in the future returns of the assessee. The costs in cause.