

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 2575 OF 2019

TLG India Pvt. Ltd.

.. Petitioner

v/s.

Deputy Commissioner of Income Tax
(TDS)-2(3) and Ors.

.. Respondents

Mr. J.D. Mistri, Senior Counsel a/w Ms. Fereshte Sethna, Mr. Mrunal Parekh, Mr. Mansukh Ravaria, Mr. Ameya Pant and Mr. Rishabh Dubey i/b DMD Advocate for the petitioner
Mr. PC. Chhotaray for the respondents

**CORAM : M.S. SANKLECHA &
NITIN JAMDAR, J.J.**

DATED : 18th NOVEMBER, 2019

P.C.

1. Parties were put to notice that on 15th October, 2019 that this Petition is likely to be disposed of at the stage of admission. Today, at the request of the parties, this Petition is being disposed of finally at the stage of admission.

2. This petition under Article 226 of the Constitution of India challenges three orders dated 9th September, 2019 passed by the respondent no.1 – Income Tax Officer under section 201(1) and 201(1A) of the Income Tax Act, 1961 (the Act). The three

impugned orders under Section 201(1) and 201(1A) relate to Assessment Years 2017-18, 2018-19 and 2019-20. The demand made consequent to the above orders for the three assessment years aggregates to Rs. 94 crores. (approximately)

3. The identical/ common basis of the three impugned orders adverse to the petitioner is (two fold) as under:-

(a) the petitioner did not deduct the tax at source under the appropriate head of technical services under Section 194J of the Act (having made the deduction under Section 194C of the Act) on payment made to digital platforms such as M/s. Google India Pvt. Ltd. and others. This for advertisement placed by the petitioner for its clients on their platforms; and;

(b) the petitioner did not deduct tax from provision made for payments to the various domestic suppliers. This resulted in dis-allowance of expenses under Section 40(a)(ia) of the Act on account of not having suffered tax deduction at source under Section 194J of the Act.

Thus on the above two heads, the petitioner has been declared as “assessee in default” and demand of tax has been made by the respondent no.1 – Income Tax Officer.

4. The basis of the challenge to three impugned orders dated 9th September, 2019 is that they have been passed in the breach of principles of natural justice. This in as much as the petitioner’s submission of not being liable to deduct tax under Section 194J of the Act in respect of Advertisements put on digital platforms has not been considered in its entirety, including what according to the petitioner, are binding decisions of Courts and Income Tax Appellate Tribunal (the Tribunal). Thus, making the impugned orders non-speaking orders and, therefore, in breach of principles of natural justice. Besides, the impugned orders are also being assailed on the ground that it has been passed in colourable exercise of jurisdiction and/or in exercise of power for collectoral purposes as is evident, according to the petitioner, by the manner in which the impugned orders were passed. It is submitted that the respondent no.1 - Income Tax Officer passed the impugned orders only with the object of scuttling the Petitioner’s application for issue ‘nil’ tax

deduction certificates issued under section 197 of the Act to be issued to the Petitioner's customers on payments to be made to the petitioner. This, it is submitted the respondent no.2 would have been on the facts of the petitioner's case, obliged to grant in the absence of the impugned orders which incorrectly makes a demand of tax on the petitioner.

5. At the very outset, Mr. Chhotarey, the learned Counsel for the respondent objected to the petition being entertained as an alternative remedy of an appeal under Section 246A of the Act from the three impugned orders to the Commissioner of Income Tax is available. In support, reliance was placed upon the decision of the Supreme Court in *CIT Vs. Chabildas Agarwal*, 357 ITR 357. Thus, according to him, this Petition be dismissed, leaving it open to the Petitioner to avail of the efficacious alternative remedy available under the Act.

6. It is a settled position that non interference on the ground of alternative remedy is a self-imposed restriction, but in some cases, such as breach of principles of natural justice, the Court may

entertain a petition. In fact, the decision cited by the respondent of the Supreme Court in *Chabildas Agarwal (supra)*, the Court had recognized certain exceptions to the self-imposed rule of not entertaining a petition where alternative remedy is available and one such exception is where the order has been passed in breach of principles of natural justice. Thus, in this case, we would restrict ourselves only to examining the Petitioner's grievance of breach of principles of natural justice in passing the three impugned orders viz: non-speaking order and improper exercise of jurisdiction to achieve collateral purposes. Therefore, if on examination of the case on the above touchstone alone, if we find merits in the Petitioner's submission on even one of two, will we exercise jurisdiction, else will dismiss the petition on ground of alternate remedy.

7. The brief facts leading to this petition are as under.

(a) The petitioner is an advertising agency, which enables its clients to place/ display their advertisement on various media viz: print, T. V. etc. The Petitioner recover amount from its clients and makes payment to media owners for the advertisement of its clients, on its media. At the time of making payment, the Petitioner's clients

deduct tax at source under Section 194C of the Act and the petitioner again deducts tax at source under Section 194C of the Act while making payment to the media owners.

(b) However, on 24th May, 2019 show-cause notices for the Assessment Year 2017-18, 2018-19 and 2019-20 were issued by the respondent no.1 to the petitioner. The above notices called upon the petitioner to show-cause as to why it should not be treated as an assessee in default under Section 201(1) and 201(1A) of the Act for:-

- (i) failure to deduct tax on payments made to media owners for the services the media owners provided to the Petitioner under Section 194J of the Act; and
- (ii) failure to deduct tax on provisions for expenses, which it has itself disallowed under Section 40(a)(ia) of the Act.

Thus, resulting in short payment of tax to the Revenue.

(c) The petitioner responded to the above show-cause notices contesting the premise therein, that there is a short deduction of tax. However, by three orders dated 31st May, 2019 passed by the respondent no.1 under Section 201(1) and 201A of the Act, the show cause notices were confirmed. The petitioner was declared as

an assessee in default under Section 201(1) and 201(1A) of the Act for the Assessment Years 2017-18, 2018-19 and 2019-20.

(d) Being aggrieved by the three orders dated 31st May, 2019, the Petitioner challenged them by filing Writ Petition No.1788 of 2019 in this Court on the ground of breach of principles of natural justice. This, in as much as the material relied upon in the orders dated 31st May, 2019 passed under Section 201(1) and 201(1A) of the Act, was not given to the petitioner at any the time before passing the order dated 31st May, 2019. Thus, this Court by an order dated 29th July, 2019 passed in Writ Petition No. 1788 of 2019 set aside the three orders dated 31st May, 2019 and restored the issue to the respondent no.1 - Income Tax Officer (TDS) raised in show-cause notices dated 24th May, 2019 for consideration afresh after sharing the material on which the respondent no.1 seeks to rely upon for passing an order under Section 201(1) and 201(1A) of the Act. The order dated 29th July, 2019 of this Court in Writ Petition No. 1788 of 2019 further directed the petitioner to file its representation along with desired evidence with the respondent no.1 within a period of 6 weeks from 29th July, 2019. This to enable the Respondent No.1 – Income Tax Officer to pass a final order on the show-cause notices

dated 24th May, 2019.

(e) At about the same time, the petitioner also instituted Writ Petition No.1719 of 2019 challenging Certificates dated 4th June, 2019 issued under Section 197 of the Act issued by Respondent No.2 – the Dy. Commissioner of Income Tax. The challenge in Writ Petition No. 1719 of 2019 was to the partial rejection of the application for nil tax deduction at source to be done by its customers being rejected and instead directing the deduction at the rate of 1% in case of payments being made to the petitioner under Section 194H and 194C of the Act and 1.5% in respect of 194(IB) and 194J of the Act. The aforesaid decision was primarily arrived at by the respondent no.2 placing reliance on the tax orders dated 31st May, 2019 passed under Section 201(1) and 201A of the Act relating to Assessment Years 2017-18, 2018-19 and 2019-20 by Respondent No.1 – Income Tax Officer. This Court by an order dated 29th July, 2019 in Writ Petition No.1719 of 2019 set aside the order dated 4th June, 2019 as it found that the same was influenced by the order dated 31st May, 2019 of respondent no.1 under Sections 201(1) and 201A of the Act to deny Nil rate of tax deduction on amounts receivable by the petitioner from its customers. However, as the

order dated 31st May, 2019 had been set aside in Writ Petition No.1788 of 2019, the respondent no.2 – Deputy Commissioner of Income Tax was directed to undertake a fresh exercise on the petitioner's application under Section 197 of the Act. Further, the above order i.e. on the Petitioner's application under Section 197 of the Act, should be passed within 4 weeks from the date of order dated 29th July, 2019 in Writ Petition No.1719 of 2019.

(f) It would thus be noticed from the above facts that this Court by in order dated 29th July, 2019 in Writ Petition No. 1719 of 2019 had directed the parties to file its representation in respect of proceedings under Sections 201(1) and 201(1A) of the Act by 9th September, 2019 to enable the Respondent No.1 – Income Tax Officer to pass an order thereon. So far as the proceedings relating to Writ Petition No. 1719 of 2019 in respect of order dated 4th July 2019 under Section 197 of the Act is concerned, this Court by order dated 29th July, 2019 granted to Respondent No.2 – Deputy Commissioner of Income Tax four weeks from that date to pass an order on application under Section 197 of the Act. Thus, from the time lines provided in the two orders dated 29th July, 2019, it is clear that the two proceedings were not linked.

(g) Thereafter, the respondent No.2, took out a Notice of Motion (L) No.451 of 2019 in Writ Petition No.1719 of 2019 seeking extension of 4 weeks time granted by order dated 29th July, 2019 to issue the certificates under Section 197 of the Act. In its affidavit in support, Respondent No.2 – Deputy Commissioner of Income Tax had stated that the time to issue the certificate under Section 197 be extended till a fresh order under Section 201(1) & 201(1A) of the Act is passed consequent to the order dated 29th July, 2019 in Writ Petition No. 1788 of 2019.

(h) This Court by order dated 3rd September, 2019 in the above Notice of Motion (L) No. 451 of 2019 extended the time to issue orders / certificates under Section 197 of the Act upto 9th September 2019. It further recorded its refusal to link passing of the fresh order under Section 197 of the Act with the orders to be passed in case of assessment for Assessment Year 2017-18 which is an attempt of the Revenue (this in the context of the affidavit filed by the Respondent no.2 – Deputy Commissioner of Income Tax, which is in effect the orders passed under Section 201 and 201A of the Act).

(i) On 9th September, 2019 the petitioner filed its detailed representation in respect of present proceedings under Section

201(1) and 201(1A) of the Act with the respondent no.1 – Income Tax Officer pointing out the reason why, according to the petitioner it is not an assessee in default. In the said representation, it was the petitioner's contention that the payments made by it to TV, print, electronic and other medias for displaying of advertisement of the petitioner's clients were not in the nature of fees for technical services. Therefore, the payments made by the petitioner to the media owners cannot be subjected to deduction of tax at source under section 194J of the Act. In particular, the principal submissions of the petitioner that it was not a assessee in default were as under:-

(i) In view of CBDT Circular No. 715/1995 dated 8th August, 1995, which *inter alia* provides that the requirement of tax deduction at source would apply only when a client makes a payment to advertising agency. It would not apply when the advertising agency in turn makes payment to the media owner i.e. print and electronic media. Thus, no requirement to deduct tax at source.

(ii) Without prejudice to the above, as a matter of abundant caution, the petitioner had deducted tax at source under Section 194C of the Act while making payment to the media

owners. This as the payments made for advertising was for carrying out any work as it stands covered by definition of work in Section 194C of the Act. The service provided by the media owners is not in the nature of technical services but in the nature of work. Thus, 194C of the Act being more specific, it would be would be appropriately covered by the CBDT Circular No.720/1995 dated 30th August, 1995. Further, reliance was also placed upon the decision of this Court in CIT v/s. UTV Entertainment (2017) 88 Taxmann.Com 214, wherein it was held that Section 194C of the Act is more specific and is to be applied in preference to Section 194J of the Act.

(iii) Section 194J of the Act would have no application to the present fact as the sine-qua-non for rendering of technical services is human intervention in enabling the petitioner (service receiver) to utilize the service. This can only be established by leading of technical evidence in support of the same. In support, reliance was placed upon the decision of the Supreme Court in the case of *Commissioner of Income Tax Vs. Bharati Cellular Ltd.* 330 ITR 239 wherein it has been held that

in the absence of an expert evidence in support of the Revenue's stand it is impossible to show that human intervention was necessary in providing the service, before Section 194J of the Act could be applied. In fact consequent to the above, the CBDT had issued Instructions bearing No.5/11 dated 30th November, 2011. This was relied upon in the representation to contend that the Assessing Officer has to take the opinion of technical expert and bring it on record to establish that human intervention was necessary so as to provide the service, for tax to be deducted under Section 194J of the Act. No such exercise was done by the Revenue.

(iv) In any event, the petitioner did place reliance upon an opinion of a technical expert viz. one Mr. Kamleshwar Bhatt of M/s. I2K2 Network Ltd. to support its contention that the online advertisement as availed by the Petitioner does not require any human intervention or assistance. Thus, it is not a technical service. Therefore, no deduction of tax under Section 194J of the Act is called for.

(v) The petitioner has placed reliance upon the decision of the Tribunal in the case of *ITO Vs. Right Florist Pvt. Ltd.*

(2013) 32 *taxmann.com* 99 wherein identical nature of service was held to not fall under Section 9(1)(vii) of the Act as a technical services. This as on examination of identical services of online advertisement on a search engine is a service and not requiring human intervention. Therefore, is not in the nature of technical services. It is pertinent to note that the Petitioner pointed out that in the earlier order dated 31st May, 1999, (which was set aside by this Court's order dated 29th July, 2019), this decision was disregarded on the ground that payment was made to non-resident, failing to appreciate that it had in terms, dealt with the issue of technical services and on identical facts found that services are not in the nature of technical services.

(vi) The Petitioner placed reliance upon the certificate provided M/s. Google India Pvt. Ltd., (which forms the bulk of the payment) that it had, in fact, paid the taxes on the payment received by them, thus in terms of proviso to section 201(1) of the Act, the petitioner could not be considered an assessee in default. In support, reliance is also placed upon the decision of the Supreme Court in Hindustan Coca Cola

Beverage (P) Ltde., v/s. CIT 293 ITR 226 and of the Tribunal in the case of Vodafone Essar Ltd.v/s. ACIT 2011 (9) ITR 182, wherein it has been held that where the appropriate taxes have been paid by the payee / deductees, then the taxes cannot be recovered again from the deductor / payer such as the Petitioner; and

(vii) So far as disallowance under Section 40(a)(ia) of the Act is concerned, the Petitioner pointed out that this disallowance was of a mere provision. There is no requirement to deduct tax in respect of provision made, which is being reversed in the next year. This would amount to deducting tax towards the liability of another person, even when he does not acknowledge the same. Reliance was placed upon a decision of Delhi High Court in DIT v/s. Eriession (ITA 106/02) and Gujarat High Court in PCIT v/s. Sangli Infrastructure Ltd. (2018) 96 Taxmann.com 370.

(ix) The above submissions were filed on 9th September, 2019. No query and/or clarification was sought by the Revenue but immediately on receipt of the representation, the respondent no.1 passed the three impugned orders all dated

9th September, 2019 holding that the petitioner is an assessee in default under Section 201(1) and 201(1A) of the Act for the Assessment Years 2017-18, 2018-19 and 2019-20. This for *inter alia* having failed to deduct tax at source on payments made to M/s. Google India Pvt. Ltd. and other like suppliers under Section 194J of the Act.

8. On examination of the three impugned orders which are identical in nature, we find that it does not consider much less deal with the following contentions of the petitioner :-

(i) the petitioner's contention of Supreme Court decision in Bharati Cellular Ltd. (supra) and the consequent CBDT Circular No.5/11 on which the petitioner placed reliance was not even adverted to much less considered. The aforesaid binding decision was ignored without any reason. So also, the petitioner's evidence of an expert was not considered in the impugned order. In fact, it gives no reason why it seeks to ignore the same or why it does not seem it necessary to obtain an evidence of technical expert with regard to human intervention before holding that Section 194J of the Act is

applicable as technical service is provided by the media owners.

(ii) Section 194C of the Act is the applicable provision, as it is more specific than 194J of the Act. This submission duly supported by CBDT Circular No.720 of 1005 and the decision of this Court in UTV Electronics (supra) holding that between Sections 194C and 194J of the Act, it is Section 194C of the Act, which is more specific and the same would apply.

(iii) The decision of the Tribunal in the case of Right Florists Pvt. Ltd. (supra), that it dealt with an identical fact situation in the context of examining the nature of services rendered – not being technical was ignored. This on the ground that the service provider was with Non-Resident. However, failing to deal with the specific submission made that the above decision on examining an identical situation had held that the service is not a technical service.

Thus, on the face of it, the impugned orders are in breach of natural justice being non-speaking orders and would warrant interference in writ jurisdiction. It is a clear case of a flaw in the

decision making process.

9. It is clear from the impugned orders that the aforesaid submissions of the petitioner were not considered by the respondent no.1 – Income Tax Officer while passing the three impugned orders. Mr. Chhotaray seeks to rely upon the affidavit-in-reply filed by the respondent no.1 to support the impugned orders by seeking to meet the petitioner's objections. This certainly cannot be permitted. As held by the Supreme Court in ***Mohinder Singh Gill Vs. Election Commissioner, AIR 1978 SC 851***, the order must speak for itself and cannot be improved upon by an affidavit. Moreover, it is pertinent to note that the impugned order was passed by one Mr. D. P. Maru i.e. a person different from the person who has filed an affidavit-in-reply i.e. Mr. Verma on behalf of respondent no.1. Thus, the views in this affidavit do not reflect the views of the officer who passed the three impugned orders. In any event, in law it cannot be used / relied upon to improve upon the three impugned orders dated 9th September, 2011 passed under Sections 201 (1) and 201A of the Act.

10. From the above, it is evident that the impugned orders are

non-speaking orders in as much as admittedly it has not considered the petitioner's submissions which go to the root of the matter. The object of natural justice is to ensure that parties views/ objections are taken on board and considered before it is rejected. At times, the reply filed by the respondent may require certain clarifications. This, clarification the authority must seek before taking any decision adverse to the party. The requirement of natural justice is only to ensure that the party's stand is effectively dealt with by the authorities under the Act. Mere ritualistic giving of hearing and reproducing the submissions made without understanding the party's case would not satisfy the test of natural justice. In this case, the Adjudicating Authority was of the view that evidence of M/s. Google (I) (P) Ltd., that it had paid the taxes, has not been filed in the appropriate form and manner. In such a case, the authority should ask the party concerned to submit the same in proper form and manner. It is only thereafter that, a view can be taken on the same. The Authorities of the State are not expected to take advantage of a citizen / assessee's ignorance. So also the technical evidence led is ignored without pointing out why it is not acceptable, by cross examining the technical expert or by leading contrary evidence. It is

not open to the Authority to ignore the evidence / submissions made by the party as it is not the object of quasi judicial authority to confirm their *prima facie* view, but the object is to find the correct facts and thereafter apply the law to those facts and take a decision in terms thereof. It must also be borne in mind that the petitioner had filed its reply as directed by the Court on 9th September, 2019 being the last date to file a representation. The respondent disposed of the same on 9th September, 2019. This in the absence of any statutory obligation or judicial directions to dispose of the show-cause notice by 9th September, 2019 itself. The Authority could take time, consider the submissions and call the party for further hearing before passing the impugned order.

11. It appears that the undue haste in passing the impugned orders dated 9th September, 2019 on the part of the respondent no.1 was only with the objective of using these orders declaring the Petitioner is an assessee in default, for the purposes of depriving the petitioner of its right to obtain certificates under Section 197 of the Act at Nil rate of tax deduction to be made by its customers. This is evident from the fact that on 29th July, 2019 when the Court set aside the

earlier three orders dated 31st May, 2019 issued under Section 201(1) and 201(1A) of the Act in Writ Petition No.1788 of 2018, the Court had directed the petitioner to make a representation along with supportive material before the respondent no.1 – Income Tax Officer (TDS) within a period of 6 weeks from that date which expires i.e. on or before 9th September, 2019. On the same date, i.e. on 29th July, 2019 this Court had in another Writ Petition No. 1719 of 2019 had set aside certificates dated 4th June, 2019 issued by the Deputy Commissioner of Income Tax – respondent no.2 under Section 197 of the Act. This *inter alia* on the ground that they were based upon the orders dated 31st May, 2019 issued under Section 201 and 201(1A) of the Act. The Court held that the orders dated 31st May, 2019 are set aside and the respondent no.1 will re-examine the issue and determine the rate of income tax to be deducted by the petitioner's customers while making payment to the petitioner. The aforesaid exercise had to be done within 4 weeks from 29th July, 2019.

12. The respondent Revenue thereafter took out a Notice of Motion bearing No. (L) 451/2019 in Writ Petition No.1719 of 2019 seeking

extension of time for issuing lower tax deduction certificate under Section 197 of the Act. In the affidavit in support filed by the Respondent No.2, the Dy. Commissioner of Income Tax, has clearly stated that demands are likely to be raised on passing of fresh orders under Section 201(1) and (1A) of the Act, which will impact the certificate to be issued under Section 197 of the Act. Therefore, time may be granted to issue certificates under Section 197 of the Act after orders are passed in Section 201(1) and 201(1A) of the Act. This Court by an order dated 3rd September, 2019 extended the time to issue the certificates under Section 197 of the Act upto 9th September, 2019. Therefore, it did not accept the Revenue's submission to extend the time till orders are passed under Section 201(1) and 201(1A) of the Act.

13. It is in the aforesaid circumstances, we note that when the petitioner filed representation on 9th September, 2019 in respect of the proceedings under Section 201 and 201(1A) of the Act, the respondent no.1 – the Income Tax Officer (TDS) in undue haste passed an order determining huge sums payable by the petitioner for the Assessment Years 2017-18, 2018-19 and 2019-20 for failure to

appropriately deduct tax. This entire exercise was done in undue haste as the respondent Revenue i.e. Respondent No.2 – the Dy. Commissioner of Income Tax was obliged to issue the tax deduction certificate under Section 197 of the Act before 9th September, 2019. It is only on determination of the petitioner's tax liability for the Assessment Years 2017-18, 2018-19 and 2019-20, could the respondent reduce the amount of tax to be deducted by the petitioner's customers while making payment to them. Thus, it seems likely that the entire exercise of passing the three impugned orders under Section 201 and 201(1A) of the Act was either a colourable exercise of power only with a view to ensure that no nil tax deduction certificate is issued under Section 197 of the Act or it could be on the basis of genuine misunderstanding of the respondent no.1 that he is required to pass an order before the certificate is issued under Section 197 of the Act. It was this undue haste that resulted in the Respondent No.1- the Income Tax Officer not dealing with the Petitioner's submissions in its entirety. Even otherwise, we are also unable to comprehend why the undue haste on the part of the respondent No.1 in passing the order under Section 201 and 201(1A) of the Act. This for the reason that even if the tax

deduction certificates were issued under Section 197 of the Act before an order was passed under Section 201(1) and 201(1A) of the Act, it was always open to the Revenue to cancel the earlier tax deduction certificate issued under Section 197 of the Act and issue fresh tax deduction certificates, in view of the orders under Section 201(1) and (1A) of the Act. Thus, the entire proceedings leading to the impugned orders dated 9th September, 2019 are vitiated for breach of natural justice and needs to be set aside.

14. There is one more issue in the impugned orders namely the dis-allowance made under Section 40(a)(ia) of the Act i.e. the requirement to deduct tax at the time of credit in the books of accounts i.e. even before the payment is made, is not suffering from breach of natural justice not having considered the Petitioner's submissions. However, as the impugned orders were passed in undue haste, in the absence of sufficient consideration being given to Petitioner's submission. We see no reason to split the impugned orders in two parts so as to relegate the petitioner to file an appeal in respect of dis-allowance under Section 40(a)(ia) of the Act and on the other issues entertain the Petition. In fact, this Court in its order

dated 29th July, 2019 passed in Writ Petition No.1788 of 2019 seeking to setting aside the orders dated 31st May, 2019 passed under Section 201 and 201(1A) of the Act for Assessment Years 2017-18, 2018-19 and 2019-20, had take a view that in such cases, splitting of an order may not be advisable.

15. In the above view, we set aside the three impugned orders dated 9th September, 2019 and restore it to the respondent no.1 (Income Tax Officer) for fresh disposal of the show cause notice dated 24th May, 2019. This after following the principles of natural justice i.e. due consideration of the Petitioner's submission by a speaking order.

16. The petition is allowed in the above terms.

(NITIN JAMDAR, J.)

(M.S. SANKLECHA, J.)