

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

ITA-162-2018 (O&M)

Date of Decision: 22.1.2019

The Commissioner of Income Tax (TDS)-II, Chandigarh

....Appellant.

Versus

M/s Shandong Tiejun Electric Power Engineering Co. Ltd., Jhajjar

...Respondent.

**CORAM:- HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL.**

PRESENT: Mr. Yogesh Putney, Senior Standing Counsel,
for the appellant.

AJAY KUMAR MITTAL, J.

1. This appeal has been filed by the revenue under Section 260A of the Income Tax Act, 1961 (in short “the Act”) against the order dated 26.10.2017 (Annexure A-3) passed by the Income Tax Appellate Tribunal, Delhi Bench, 'G', New Delhi (hereinafter referred to as “the Tribunal”) in ITA No. 3091/Del/2014, for the assessment year 2011-12, claiming the following substantial questions of law:-

- a) Whether in the facts and circumstances of the case, the learned ITAT has erred in law in holding that the amount paid to sub-contractor M/s IOT Engineering Project Ltd. are beyond the scope of Technical services as defined in Section 194J r.w.

Section 9 of the Income Tax Act, 1961, ignoring the fact that the work entrusted upon the sub-contractor can be executed only by the qualified engineers including Civil Engineer, Testing Engineer & Safety Engineer and highly skilled technical staff as per the instructions and technical specifications given by the assessee?

- b) Whether in the facts and circumstances of the case, the learned ITAT has erred in law in comparing the construction of sophisticated thermal power plant with construction of a mere building?
- c) Whether in the facts and circumstances of the case, the learned ITAT has erred in law in relying upon the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. v/s CIT reported as (2007) 293 ITR 226 that payee had included the receipts from assessee in its return of income and the assessee company could not be treated as assessee in default in view of insertion of proviso under Section 201(1) w.e.f. 01.07.2012?

2. Briefly stated, the facts necessary for adjudication of the instant appeal as narrated therein may be noticed. The assessee is a contractor engaged in constructing Thermal Power Plant for Jhajjar Power Limited. On 2.2.2012, a TDS inspection was conducted under Section 133A of the Act and it was found that the assessee had made payments amounting to

₹ 12,46,74,283/- to sub-contractor, namely, M/s IOT Engineering Project

Limited during the financial year 2011-12 relevant to the assessment year 2011-12 and deducted tax at source of ₹ 24,93,486/- under Section 194C of the Act. During scrutiny, it was found that the sub-contractor had provided services within the ambit of 'Professional and Technical Services' as envisaged under Section 194J read with Explanation 2 to Section 9(1)(vii) of the Act. Accordingly, a show cause notice was issued to the assessee to explain as to why the tax at source was deducted under Section 194C instead of Section 194J of the Act on the payments made to the sub-contractor. In response thereto, the assessee submitted its reply by pleading that the scope of work given to the sub-contractor was construction work for grounding including straightening, cutting, unloading in the site, transporting to pre-assembly/erection site, alignment, welding, test and inspection, illumination and communication work etc. and that none of the vendors were professionals and covered within the definition of Section 194J read with Explanation 2 to Section 9(1)(vii) of the Act. The issue was examined by the Assessing Officer, who opined that the assessee was to deduct tax at source from the payments made to the sub-contractor under Section 194J of the Act. The Assessing Officer vide order dated 11.3.2013 (Annexure A-1) passed under Sections 201(1) and 201(1A) of the Act demanded tax and interest amounting to ₹ 1,30,15,994/- from the assessee on account of short deduction of tax at source under Section 194J of the Act. Feeling aggrieved by the order, Annexure A-1, the assessee filed an appeal before the Commissioner of Income Tax (Appeals), Rohtak [for brevity "the CIT(A)"]. The CIT(A) vide order dated 10.3.2014 (Annexure A-2) allowed the appeal and deleted the demand of tax and interest levied by the Assessing Officer under Sections 201(1) and 201(1A) of the Act.

Against the order, Annexure A-2, the revenue filed an appeal before the Tribunal. The Tribunal vide order dated 26.10.2017 (Annexure A-3) dismissed the said appeal. Hence, the present appeal by the revenue.

3. After hearing learned counsel for the appellant, we do not find any merit in the appeal.

4. It would be advantageous to reproduce Section 194C of the Act which is as under:-

“194C. (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor¹) 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.

2 to 7 XX XX XX

Explanation:- For the purposes of this section,—

(i) to (iii) XX XX XX

(iv) "work" shall include—

(a) to (d) XX XX XX

(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.”

5. As per Section 194C of the Act, any person responsible for paying any sum to any resident for carrying out any work, in pursuance to a contract between the contractor and a specified person shall deduct and deposit TDS at the specified rates and sum. As per Clause (iv)(e) of Explanation to Section 194C, 'work' shall include 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.

6. The contention of the revenue was that the amount which was paid to the sub-contractor M/s IOT Engineering Project Ltd. was for professional and technical services within the ambit of provisions of Section 194J of the Act read with Explanation 2 to Section 9(1)(vii) of the Act for which tax was to be deducted at the rate of 10% of the payments made.

7. It would, thus, be expedient to refer to these provisions for effective adjudication of the appeal. Section 194J of the Act mandates

deduction of tax at source at the rate of 10% in respect of payments made towards fees for technical services. The relevant portion thereof effective for the assessment year 2011-12 reads thus:-

“194J. Fees for professional or technical services.- (1)

Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of-

- (a) fees for profession services, or
 - (b) fees for technical services, or
 - (c) royalty, or
 - (d) any sum referred to in clause (va) of section 28,
- shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to ten per cent of such sum as income-tax on income comprised therein:

Provided that no deduction shall be made under this section.

XX XX XX

Explanation.- For the purposes of this section,-

- (a) XX XX XX
- (b) “fees for technical services” shall have the same meaning as in *Explanation 2* to clause (vii) of sub-section (1) of section 9.”

8. Explanation 2 to Section 9(1)(vii) assigns meaning to the expression 'fees for technical services' in the following term:-

“9. Income deemed to accrue or arise in India.-(1)

The following incomes shall be deemed to accrue or arise in India-

(i) to (vi) XX XX XX

(vii) Income by way of fees for technical services payable by-

(a) to (c) XX XX XX

Explanation 1.- XX XX XX

Explanation 2.- For the purposes of this clause, “fees for technical services” means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head “Salaries”.

9. *Explanation 2* to section 9(1)(vii) provides that for the purpose of clause (vii), 'fees for technical services' means any consideration (including any lump sum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of services of technical or other personnel) but does not include consideration for any construction, assembly, mining or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries'.

10. The aforesaid provision defines 'fee for technical services'.

However, it contains an exclusion part which is not termed 'fees for technical services'. The question whether the payment would come within the exclusion part of Explanation 2 or not would have to be established by the person who claims the exclusion which would depend upon the nature of the work performed.

11. Having analysed the legal provisions, we proceed to examine the factual matrix herein. The assessee was executing a works contract (Thermal Power Plant) for its customer. It included men, machinery, material, other tangible and intangible goods. For the said project, the services of technical personnel including engineers were inevitable. The scope of work given to the sub-contractor was construction work for grounding including straightening, cutting etc. material receipt from contractors stores or unloading in the site, transporting to pre-assembly/erection site, erection, alignment, welding, test and inspection etc., illumination and communication work. The assessee was getting a physical output, a tangible structure and not merely the services of its qualified, professional engineers/staff from the sub-contractor. The said activities were undertaken with the help of men and machines which were beyond the scope of technical services. The said contract between the assessee and the sub-contractor satisfied the provisions of Section 194C of the Act and did not attract the provisions of Section 194J of the Act. The Tribunal had, thus, rightly concluded that the case of the assessee fell under Section 194C of the Act and not under Section 194J of the Act.

12. Further, the Tribunal had noticed that the sub-contractor had already offered the payments received from the assessee to tax and, thus, there was no justification in creating additional demand on account of short

deduction of tax. Since, there was no short deduction of tax at source under Section 201(1) of the Act, therefore, there would be no liability of any interest under Section 201(1A) of the Act upon the assessee.

13. In view of the above, no error could be pointed out by learned counsel for the revenue in the findings recorded by the CIT(A) and affirmed by the Tribunal warranting interference by this Court. No question of law, much less, substantial question of law arise in the appeal.

14. Consequently, finding no merit in the appeal, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

January 22, 2019
gbs

(MANJARI NEHRU KAUL)
JUDGE

Whether Speaking/Reasoned

Yes

Whether Reportable

Yes