INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI
BEFORE SHRI C.M.GARG, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 3091/Del/2014
(Assessment Year: 2011-12)

ITO, TDS, Rohtak	Vs.	Shandong Tiejun Electric Power Engineering Co. Ltd, Mahatma Gandhi Thermal Power Project, VPO-Khanpur Khurd, Jhajjar PAN:RTKS1237F
(Appellant)		(Respondent)

Revenue by :	Shri Kaushlendra Tiwari, Sr. DR
Assessee by:	None
Date of Hearing	03/08/2017
Date of pronouncement	24 /10/2017

ORDER

PER PRASHANT MAHARISHI, A. M.

1. This is an appeal filed by the Revenue against the order of the ld CIT(A), Rohtak dated 10.03.2014 for the Assessment Year 2011-12.

1. That the order passed by the Ld. AO is bad in law and facts and is liable to be quashed.

2. That the Ld. AO. AO erred in law and facts in treating the work under taken by the sub- contractor as covered u/s 194J of the act instead of correct section i.e. 194C of the act.

2.1 That the Ld. AO erred in law and facts in not considering the reply filed by the appellant in true sense of legislature. The definition of "fees of technical sendees" specifically excludes consideration of any construction, assembly, mining of other similar project from its purview. Therefore, the provision of section 194J has no applic lion to the payments made to the sub-contractor.

3. That the Ld. AG erred in law and facts in considering the sub-contractor as company of professionals where as the sub-contractor company is doing civil construction work and payment for that is covered u/s 194 C of the act only

3.1 That the Ld. AO erred in law and facts in considering the services. of professionals to be taken by the sub-contractor, as and when required by him. has been taken to have been engaged by the appellant."

2. The brief facts of the case is that appellant is a contractor engaged in execution of thermal power plant has taken a services of a sub-contractor M/s. IOT Engineering Project Ltd and on payments made to it Tax was deducted at source u/s 194C Income Tax Act. However, the ld Assessing Officer ITO (TDS), Rohtak was of the opinion that tax should have been deducted u/s 194J of the Income Tax Act. Therefore, the total payment of Rs. 12.46 crores was subjected to deduction u/s 194J @10% and after granting due credit, short deduction was worked out at Rs. 9973942/- u/s 201(1) of the Act. Interest thereon was also charged for short deduction of tax u/s 201(1A) of Rs. 3042052/- and thereafter, raised total demand of Rs. 13015994/- of the Act by passing orders u/s 201 and 201(1A) on 11.03.2013. Assessee challenged the same before the ld CIT(A) who vide order dated 10.03.2014 held that tax has rightly been deducted u/s 194C of the Act. He further held that in any case the tax has already been paid by the subcontractor therefore same cannot be recovered from the assessee.

3. The revenue aggrieved with the order of the ld CIT(A) has preferred appeal before us.

4. The Authorised Representative vehemently supported the order of the ld Assessing Officer. Despite notice none appeared before us for assessee and therefore the issue is decided on the merits of the case.

5. We have carefully considered the rival contentions and also perused the order of the ld CIT(A) who decided the issue as under:-

> "The submissions made by the AR before me in this regard are as under: -
>
> 4.1 Section 194J mandates deduction of tax at 10% in respect of payments made towards "fee for technical services''. Technical services has been defined in Explanation 2 to clause (vii) of sub-section (1) of section 9 as under:-
>
> > Explanation 2 - for the purpose of the clause, fees for technical services means any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of service 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".
>
> This shows that construction activity has been kept out of the purview of section 194J. The appellant's activities involve construction work like grounding including straightening, cutting, bending, excavating channel, laying, hitting the grounding electrodes into the ground, welding, painting etc. of wall equipment. It also includes erection, alignment, transportation of equipment and material. These are physical activities carried out with the help of men & machines. These are construction activities themselves, which are beyond the scope of technical services as defined in section 9.
>
> 4.2 The work entrusted to the sub-contractor is part of the contract offered to the assessee and hence the vendors are sub-contractor within the meaning of section 194C. Further, none of the vendors are professional as per the definition in section 194J. The amount paid to the vendors are either for erection, installation, fabrication and commissioning of some parts of the

Power Plant and hence cannot be claimed as technical services as per the definition of "Technical Services". The definition of "Technical Services" has specifically kept the following activities out of the purview of technical services:

(i) Construction

(ii) Assembly

(iii) Mining

(iv) Other similar project

In the instant case, the appellant is executing a works contract (Thermal Power Plant) for its customer. This involves men, machinery, material and other tangible and intangible in goods. For the construction of a Thermal Power Plant, the services of technical personnel including engineers is inevitable. The scope of the sub-contract was actual execution of work involving the services of technical personnel as well as non-technical personnel. However, what the appellant intended to get from its sub-contractor was a physical output, a tangible structure and not merely the services of its qualified, professional engineers/staff. The contract between the two parties is for work which clearly satisfies the provisions of section 194C and does not by any stretch of imagination attract the provisions of section 194J and the appellant's case is squarely covered by the decision of Hon'ble ITAT Ahmedabad Bench in Gujrat State Electricity Corporation Ltd. Vs ITO [2004] 82 TTJ 456 (T.AHD).

4.3 The sub-contractor M/s IOT Engineering Project Ltd. has already offered the payments received from the appellant to tax, as per the certificate and copy definition in section 194J. The amount paid to the vendors are either for erection, installation, fabrication and commissioning of some parts of the Power Plant and hence cannot be claimed as technical services as per the definition of "Technical Services". The definition of "Technical Services" has specifically kept the following activities out of the purview of technical services:

(i) Construction

(ii) Assembly

(iii) Mining

(iv) Other similar project

In the instant case, the appellant is executing a works contract (Thermal Power Plant) for its customer. This involves men, machinery, material and other tangible and intangible in goods. For the construction of a Thermal Power Plant, the services of technical personnel including engineers is inevitable. The scope of the sub-contract was actual execution of work involving the services of technical personnel as well as non-technical personnel. However, what the appellant intended to get from its sub-contractor was a physical output, a tangible structure and not merely the services of its qualified, professional engineers/staff. The contract between the two parties is for work which clearly satisfies the provisions of section 194C and does not by any stretch of imagination attract the provisions of section 194J and the appellant's case is squarely covered by the decision of Hon'ble ITAT Ahmedabad Bench in Gujrat State Electricity Corporation Ltd. Vs ITO [2004] 82 TTJ 456 (T.AHD).

4.3 The sub-contractor M/s IOT Engineering Project Ltd. has already offered the

payments received from the appellant to tax, as per the certificate and copy Department and there is no justification in creating additional demand alleging short deduction of tax. As per section 191 of the Act, a person shall be treated as assessee in default only when (i) he does not deduct tax at source as required under the Act from the payments made to the assessee; and (ii) the assessee has also failed to pay such tax directly. In the instant case, the sub-contractor M/s IOT Engineering Project Ltd. has directly paid the tax to the Department. In view of the above, the appellant cannot be deemed as an assessee in default and the disputed short deduction of tax cannot be demanded from the appellant as per the case law of Hon'ble Supreme Court in Hindustan Coca Cola Beverage (P) Ltd. V. CIT [2007] 163 Taxman 355.

5. I have carefully considered the issue and the submissions made by the AR. Section 194J mandates deduction of tax at 10% in respect of payments made towards "fee for technical services". Technical services has been defined in Explanation 2 to clause (vii) of sub-section (1) of section 9 as under:-

> Explanation 2 - for the purpose of the clause, fees for technical services means any consideration (including any lumpsum consideration) for the rendering of any managerial, technical or consultancy services (including the provision of service 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".

This shows that construction activity has been kept out of the purview of section 194J.

5.1 As per section 194C of the Act, any person responsible for paying any sum to any resident 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 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.

The scope of the work given to sub-contractor is 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 & inspection etc., illumination and communication work etc. These activities are undertaken with the help of men & machines, which are beyond the scope of technical services as defined in section 9 of the Act.

5.2 The work entrusted to the sub-contractor is part of the contract offered to the assessee and hence the vendors are sub-contractor within the meaning of section 194C. Further, none of the vendors are professionals as per the definition in section 194J. The amount paid to the vendors are either for erection, installation, fabrication and commissioning of some parts of the Power Plant and hence cannot be claimed as technical services as per the definition of "Technical Services". The definition of "Technical Services" has specifically kept the following activities out of the purview of technical services:

(i) Construction

(ii) Assembly

(iii) Mining

(iv) similar project

In the instant case, the appellant is executing a works contract (Thermal Power Plant) for its customer. This involves men, machinery, material and there tangible and intangible in goods. For the construction of a Thermal Power Plant, the services of technical personnel including engineers is inevitable. The scope of the sub-contract was actual execution of work involving the services of technical personnel as well as non-technical personnel. However, what the appellant intended to get from its sub-contractor was a physical output, a tangible structure and not merely the services of its qualified, professional engineers/staff. The contract between the two parties is for work which clearly satisfies the provisions of section 194C and does not by any stretch of imagination attract the provisions of section 194J and the appellant's case is squarely covered by the decision of Hon'ble ITAT Ahmedabad Bench in Gujrat State Electricity Corporation Ltd. Vs ITO (supra) where in it was held as under:

> "12. The scope and effect of section 9(l)(vii), as originally enacted had been elaborated in Departmental Circular No. 202, dated 5th July, 1976. Para 16.3 of the said Circular is published at pp. 624 and 625 of Income-tax Law By Chaturvedi & Pithisaria, Vol-I, is reproduced below :
>
> > "16.3 The expression "fees for technical services" has been defined to mean any consideration (including any lump sum consideration) for the rendering of managerial, technical or consultancy services, including the provision of services of technical or other personnel. It, however, does not include fees of the following types, namely:
> >
> > (i) Any consideration received for any construction, assembly, mining or like project undertaken by the recipient. Such consideration has been excluded from the definition on the ground that such activities virtually amount to carrying on business in India for which considerable expenditure will have to be incurred by a non-resident and accordingly it will not be fair to tax such consideration in the hands of a foreign company on gross basis or to restrict the expenditure incurred for earning the same to 20 per cent of the gross amount as provided in new section 44AD of the IT Act. Consideration for any construction assembly, mining or like project will, therefore, be chargeable to tax on net basis, i.e. after allowing deduction in respect of costs and expenditure incurred for earning the same and charged to tax at the rates applicable to the ordinary income of the non-resident as specified in the relevant Finance Act.
> >
> > (ii) Consideration which will be chargeable to tax in the hands of the recipient under the head "Salaries"."
>
> 13. It is clear from the aforesaid circular that the expression 'fees for technical services' does not include consideration for any construction, assembly, mining or like project undertaken by the

recipient. Such consideration has been excluded from the definition on the ground that such activities virtually amount to carrying on business for which considerable expenditure will have to be incurred by the receipt. A perusal of the operation and maintenance agreement executed between GSECL (appellant-company) and GEB clearly shows that the agreement was not only for providing of skilled and technical services relating to operation and maintenance of power plants but the entire business activities of operation and maintenance of power plants were entrusted to GEB, who had long standing experience in the field of operation and maintenance of power plants of similar capacity. The aforesaid contract requires GEB to carry out all or any of the activities required for operation and maintenance of power plants. Such agreement has been executed with a view to entrust the entire responsibilities of carrying out important part of business activities of power project, viz. to carry on the business activities of operation and maintenance of plants. A separate agreement has also been executed between the appellant-company and GEB on 22nd Jan., 1997, in relation to sale/distribution of electricity produced by the appellant-company as per the terrr.s of power project agreement. On a careful reading of the entire agreement dated 14th Oct., 1998, we are of the view the payment made by the appellant-company to GEB was a payment made for carrying out the mega project of entire operation and maintenance of power plants undertaken by the GEB. Such payment would came within the limb of exclusionary part, viz., "consideration for like project" excluded in the definition of "fees for technical services" given in Explanation 2 to section 9(l)(vii) of the Act. Such payment cannot also be treated as payment of fees for professional services as contemplated in section 194J.

It may now be relevant to reproduce main part of section 194C of the Act;

"194C. (1) Any person responsible for paying any sum to any resident (,hereafter in this section referred to as the contractor) for carrying out of a contract between the contractor and :

(a) the Central Government or any State Government; or

(b) any local authority; or

(c) any corporation established by or under a Central, State or Provincial Act;

or

d) any company; or. 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 in case of advertising,

(ii) in any other case two per cent,

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

The Hon'ble Apex Court has explained the meaning and scope of section 194C in the case of Associated Cement Co. Ltd. (supra) as under, at p. 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 subsection 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 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 have fallen outside the "work", but for its specific inclusion in the sub-section."

The agreement executed between the appellant-company and GEB is not an agreement simpliciter for acquiring technical services or professional services from them but it is an agreement requiring GEB to execute the work contract of operating and maintaining the mega power project. Such a contract will come within the ambit and scope of section 194C of the Act in view of the aforesaid judgment of Hon'ble Apex Court. The assessee had, therefore, rightly deducted tax at source as per section 194C of the Act.

15. The impugned orders passed by the CIT(A) and the Assessing Officer creating demand for alleged short-deduction of tax at source by invoking the provisions of

5.3 The basis of the AO to conclude that the scope of the contract comes under the provisions of section 194J since grounding, erection, testing& inspection etc. cannot be handed by labourers but only be done by qualified engineers etc. is misplaced and misconceived as what is executed by the subcontractors is erection/installation, commissioning, testing & inspection etc. which involves procurement of materials including equipments by the subcontractors, fabrication etc. and thereafter installation, testing 85 trial operation which is clearly in the scope of "work" as defined in section 194C of the Act.

Any work of this nature involves utilization of material and manpower. Manpower includes skilled professionals like engineers, technicians etc. and unskilled labour etc. Merely because professionals 85 skilled personnel were employed in the execution of the sub-contract does not mean, by any stretch of imagination, that the appellant got only technical services and not a physical output, as per the terms of the contract. What the appellant got from the sub-contractors was a physical output, a tangible structure and not merely the services of qualified engineers/staff. If the logic of the AO is applied then, even the execution of buildings/roads contracts etc., which employ engineers and skilled personnel, would amount to receipt of technical services and not execution of works contract. The case laws relied upon by the AR are relevant and applicable to the facts of the appellant.

5.4 In any case, the sub-contractor has already offered the payments received from the appellant to tax, as per the evidence furnished by the AR. As per section 191 of the Act, a person shall be treated as assessee in default only when (i) he does not deduct tax at source as required under the Act from the payments made to the assessee; and (ii) the assessee has also failed to pay such tax directly. In view of the above, the appellant cannot be deemed as an assessee in default and the disputed short deduction of tax cannot be demanded from the appellant as per the case law of Hon'ble Supreme Court in Hindustan Coca Cola Beverage (P) Ltd. V. CIT (2007) 163 Taxman 355. This

ratio has also been inserted subsequently w.e.f. 01.07.2012 as proviso to section 201 (1) of the Act

6. The ld ld Departmental Representative could not point out any error in the order of the ld CIT(A). In view of this we confirm the finding of the ld CIT(A) that tax on such payment to subcontractor was required to be deducted u/s 194C of the Act and same was complied with by the assessee. Therefore, there is no short deduction of tax at source u/s 201 of the Act and hence, there cannot be any interest liability u/s 201(1A) of the Act. Hence, we dismiss the appeal of the Revenue.

Order pronounced in the open court on /10/2017.

(C.M.GARG)
JUDICIAL MEMBER

(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: /10/2017
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi