

**IN THE INCOME TAX APPELLATE TRIBUNAL  
NAGPUR BENCH, NAGPUR**

**BEFORE SHRI G.D. AGRAWAL, PRESIDENT  
AND SHRI MAHAVIR SINGH, JUDICIAL MEMBER**

**I.T.A. Nos.102/Nag/2017 to 106/Nag/2017  
Assessment Years : 2011-12 to 2015-16**

The Project Director, National Highways Authority of India, Ram Nagar, Hill Top, Nagpur. PAN : AAATN1963H.	Vs.	Income Tax Officer, TDS Ward 2(1), Nagpur.
(Appellant)		(Respondent)

**I.T.A. Nos.107/Nag/2017 to 111/Nag/2017  
Assessment Years : 2011-12 to 2015-16**

The Project Director, National Highways Authority of India, Ram Nagar, Hill Top, Nagpur. PAN : AAATN1963H.	Vs.	Income Tax Officer, TDS Ward 2(1), Nagpur.
(Appellant)		(Respondent)

**Stay Application No.01/Nag/2018  
(In ITA Nos.102/Nag/2017 to 111/Nag/2017)  
Assessment Years : 2011-12 to 2015-16**

The Project Director, National Highways Authority of India, Ram Nagar, Hill Top, Nagpur. PAN : AAATN1963H.	Vs.	Income Tax Officer, TDS Ward 2(1), Nagpur.
(Appellant)		(Respondent)

Appellant by : Shri Rajesh Loya, CA.  
Respondent by : Shri R.K. Baral, Senior DR.

Date of hearing : 07.03.2018  
Date of pronouncement : 07.03.2018

## ORDER

### PER BENCH :

These ten appeals by the assessee for the assessment years 2011-12 to 2015-16 have been directed against the order of learned CIT(A)-2, Nagpur dated 28<sup>th</sup> February, 2017. The assessee has also filed stay application No.01/Nag/2018.

2. At the outset, learned counsel for the assessee took up the stay application and when this stay petition was argued, it was gathered that ultimately, the issue has to go back to the file of the Assessing Officer for fresh adjudication and hence, we called these appeals for hearing with the consent of learned CIT-D. Hence, these appeals were taken up for hearing.

3. The only common issue in these five appeals of the assessee is against the order of learned CIT(A) confirming the action of the Assessing Officer in holding the assessee liable for collection of TCS under Section 206C(1C) of the Income-tax Act, 1961 (hereinafter 'the Act'). For this, the assessee, in all the five years, has raised identically worded grounds, and the grounds as raised in ITA No.102/Nag/2017 for assessment year 2011-12 read as under :-

*"1. That the order passed u/s 206C(6A) and 206C(7) by the learned Income Tax Officer TDS Ward 2(1), Nagpur is bad in law and wrong on facts and the learned CIT(A) erred in confirming the same.*

*2. That the learned CIT(A) and AO erred in law and on facts in holding that the assessee is liable for collection of TCS u/s 206C(1C). On the facts and circumstances of the case, the assessee has neither granted a lease or a licence or transferred any right or interest for the use of toll plaza.*

*3. That the learned CIT(A) erred in law and on facts in disregarding the fact that the assessee was not the owner of the toll plaza and that there was no*

*separate agreement of grant of lease or licence or any other contract of transfer of any right or interest in any toll plaza between the assessee and the concessioners and hence the transaction was not covered under the purview of the provisions of Section 206C(1C) and was highly unjustified in confirming the action of the AO. On the facts and circumstances of the case, the action of the learned authorities in invoking Section 206C(6A) and holding the assessee to be an assessee in default is highly unjustified and wrong on facts.*

*4. That the learned CIT(A) erred in law and on facts in confirming the action of AO of holding that the assessee is in default u/s 206C(1A) on account of non collection of tax at source (TCS) on the amount received by the concessioner as entry fee at the toll plaza from the vehicles passing by. On the facts and circumstances of the case the learned authorities failed to appreciate that the assessee was not the person who was collecting the entry fee at the toll plaza as the same was being done by the concessioners on (Build, operate and transfer) BOT basis in accordance with the Concession Agreement executed between them and the assessee.*

*5. Without prejudice to Ground No.2 & 3, the learned CIT(A) erred in law and on facts in holding that the TCS should have been collected on the toll revenue collected and belonging to the concessioners. On the facts and circumstances of the case, the TCS, if required to be collected, would be on the concession fees of Rs.1/- as per the concession agreement.*

*6. That the learned CIT(A) erred in law and on facts in confirming the action of AO of charging interest u/s 206C(7) of the Income Tax Act. The interest charged is improper."*

4. Similarly in respect to other five appeals, which are in respect to the dispute of TDS u/s 194C of the Act, learned CIT(A) confirmed the action of the Assessing Officer in holding that the assessee is in default u/s 201(1) of the Act and consequent charging of interest u/s 201(1A) of the Act on account of non-deduction of TDS u/s 194C of the Act on the amount paid as grant by the assessee to the concessionaires, who deposited into escrow account. For this also, the assessee in ITA

No.107/Nag/2017 for assessment year 2011-12 has raised the following grounds :-

*“1. That the order passed u/s 201(1) by the learned Income Tax Officer TDS Ward 2(1), Nagpur is bad in law and wrong on facts and the learned CIT(A) erred in confirming the same.*

*2. That the learned CIT(A) erred in law and on facts in confirming the action of AO of holding that the assessee is in default u/s 201(1) on account of non deduction of tax at source u/s 194C on the amount paid as grant by the assessee to the concessioners into the Escrow Account. On the facts and circumstances of the case, the learned authorities failed to appreciate that the payment was in the nature of a capital grant being Viability Gap Funding (VGF) and was outside the purview of Section 194C and that no TDS was deductible on same.*

*3. (a) That the learned CIT(A) erred in law and on facts in confirming the action of AO of holding that the toll collection deposited in escrow account belongs to the assessee and further erred in holding that the withdrawals from this toll collection by the BOT contractor (concessioner) is towards cost of project and is payment made by the assessee to the BOT contractor and that such withdrawals are liable to deduction of tax at source (TDS) u/s 194C.*

*(b) On the facts and circumstances of the case and the explanation offered the learned authorities should have appreciated that the entire toll collection is done by concessioners and assessee has no right in the collection amount. The action of the learned CIT(A) in treating the assessee as assessee in default for non compliance with section 194C is highly unjustified and wrong. The order is liable to be set aside.*

*4. That the learned CIT(A) erred in law and on facts in confirming the action of AO of charging interest u/s 201(1A) of the Income Tax Act. The interest charged is improper.”*

5. The grounds in first set of five appeals is against holding that the assessee is liable collection of TCS u/s 206C © of the Act and for second set of five appeals the issue is against holding the assessee in default for non deduction of TDS u/s 194C of the Act and for all the five years facts are and circumstances are also identical.

6. At the outset, learned counsel for the assessee stated that the assessee is a public authority constituted u/s 3 of the National Highways Authority of India Act, 1988 and referred to as National Highways Authority of India (NHAI). The authority is a body incorporated under the Ministry of Road Transport and Highways of the Government of India and it is the assigned the function of NHAI to develop, maintain and manage national highways and other highways vested in or entrusted to it by the Central Government. NHAI carried out the functions of development, maintenance and management of national and other highways through contractors appointed by it and called as concessionaires. Concessionaires are appointed under the Concession Agreement executed between NHAI and the concerned concessionaire as per the provisions of National Highways Authority of India Act, 1988. The learned counsel explained that under the concession agreement with NHAI, the concessionaire is granted exclusive right, licence and authority to construct, operate and maintain the project highways and regulate the use thereof by third parties for a specified period and transfer the said project to NHAI upon termination of completion of specified term of agreement. Accordingly, the concessionaire is entitled to levy, collect an appropriate fees from the vehicles and persons liable for payment of fee for using the project highways or any part thereof and refuse entry of any vehicle if the fee due is not paid. The project highway includes all project highways and its subsequent development in accordance with the agreement. Thus, according to learned counsel, it includes any toll plaza even if such toll plaza happens to be built subsequent to the date of execution of the concession agreement.

7. In view of this background, learned counsel explained that a concession agreement was executed between NHAI and Ashoka Highways (Bhandara) Ltd. (AHB) on 18.09.2007 for design, engineering, financing, construction, operation and maintenance of the project on existing carriageway from Km.405 to Km.485 on Chhattisgarh/Maharashtra border i.e., of Wainganga Bridge Section of National Highway No.6 and widening thereof to 4-lanes on section of NH-6 in the state of Maharashtra on build, operate and transfer (BOT) basis. This project is granted to the concessionaire for a period of 20 years with a total project cost of ₹424 crores. Similarly, another concession agreement was executed between NHAI and Oriental Nagpur Bye Pass Construction Pvt.Ltd. on 5<sup>th</sup> October, 2009 for four-laning of Madhya Pradesh/Maharashtra Border – Nagpur section of NH-7 from Km.652 to Km.729 including construction of Kamptee-Kanhan and Nagpur Bypass and maintenance of already 4-laned section from Km.14.585 to Km. 36.6 of NH-7 in the state of Maharashtra under the NHDP Phase-II on design, build, finance, operate and transfer (DBFOT) basis. This project is granted for a period of 27 years with a total project cost of ₹1170.052 crores.

8. Further, the learned counsel explained the fact that as per Clause VII, concession fee of chapter II – grant of concession of the concession agreement-1 and as per Article 26, concession fee of part IV – financial covenants of the concession agreement to any consideration of the grant of concession under this agreement, the concession fee payable by the concessionaire to the NHAI is ₹1 per year only during the term of agreement. As per the agreement, the right of collection of fee from user was granted to the concessionaire which is exclusively their income and no amount is paid to NHAI nor NHAI has any right over such amount. As per Schedule G of CA-1 and Article 27 of the CA-2, user fee from the COD to the transfer date, the concessionaire shall have the sole and exclusive right to demand, collect and appropriate fee from

the users subject to and in accordance with the agreement. As per agreement CA-1 and CA-2, an escrow account was required to be opened in a nationalized bank by the concessionaire and the methodology of the amount to be deposited and withdrawn in the escrow account is guided by the national policy and also by the agreement between the parties. Consequently, the concessionaire deposited revenue including loan finance in the escrow account. Similarly, the withdrawals were also made by the concessionaire for the purpose specified in the agreement. The returns of income were filed by the concessionaires accordingly.

9. But, the Department raised the demand of ₹32,60,85,371/- holding that the assessee NHAI is the real and actual owner of toll plaza and liable to collect TCS u/s 206C(1C) of the Act on the toll amount collected by the concessionaire. Further, according to the Assessing Officer, the assessee has not deducted any TDS also u/s 194C of the Act on equity grant and the collection utilized for the project asset. The details of TCS amount was ₹9,31,29,095/- and interest at ₹1,82,67,273/-. Similarly, the TDS demand was ₹16,32,42,170/- and consequent interest of ₹5,14,46,832/-. Accordingly, the Assessing Officer held the assessee liable for TCS u/s 206C(1C) of the Act and assessee in default u/s 201(1) and 201(1A) of the Act. Aggrieved, assessee filed appeal before the CIT(A) who sustained the order of the Assessing Officer. Aggrieved, now the assessee is in appeal before the Tribunal.

10. In view of above facts, the learned counsel for the assessee made arguments that the Assessing Officer has wrongly mentioned in page 3 of the assessment order vide his show cause notice dated 15<sup>th</sup> January, 2015 that the project belongs to NHAI and the escrow account is a project account. Further, the Assessing Officer has mentioned that the escrow account is opened jointly in the name of NHAI, concessionaire

and the representative of lenders consortium. Learned counsel referred to page 3 and the relevant paragraph reads as under :-

*“A close reading of the escrow account shows that this is an account maintained for the purposes of completion of the project. In this account, funds are pulled either from the NHAI or from lenders or from the contractor. The toll collections made are also credited to this account. The account is debited as and when any expenditure is made from this account towards the cost of the project. Thus in a way the so called escrow account is a project account. The project belongs to NHAI. Therefore, the amounts of toll collections credited in this account are nothing but the amounts collected by the Concessionaire on behalf of NHAI by virtue of the concessionaire agreement. This makes it amply clear that TCS has to make on this toll collection which the NHAI failed to do.”*

12. Further, learned counsel stated that the Assessing Officer at page 8 of the assessment order held that the assessee is the real and actual owner of the highway project and toll plaza etc. and also held that NHAI has granted the right to levy fee/collection of toll to the concessionaire. In the relevant paragraph 7, the Assessing Officer observed as under :-

*“After carefully considering the replies of the TAN holder/assessee and after going through various clauses of the agreement I am of the considered view that the concession agreement specifically mentions that an exclusive right or license is being granted to the concessionaire and this includes the right to levy fee or in other words collect toll. It is, therefore, inferred that the TAN holder is the real and actual owner of the highway projects and the toll plazas etc. The terms and conditions of the “concession agreement” towards granting the rights to operate the toll plaza and the collection of fee etc. are of the same nature which are akin to the lease and license agreement to transfer the interest of toll collection rights of the project to the concessionaire for the limited period. Since the concessionaire were given the commercial rights of collecting the toll, on behalf of the NHAI, for limited period, it was liable to collect*

*TCS on such toll collected. In view of the above discussed position, TAN holder, NHAI, Nagpur, ought to have collected TCS on toll collected and deposited in the escrow account.”*

13. According to learned counsel, the Assessing Officer misconstrued the facts and has not properly appreciated the agreement with the concessionaire and the mechanism and also the purpose of opening the escrow account. Similarly, in respect to the applicability of provision to Section 194C of the Act, the learned counsel stated that NHAI has granted the right of concession to concessionaire to develop the project and nowhere a contract for work was granted to the concessionaire and accordingly, no payment was made by NHAI to the concessionaire so as to attract the liability of TDS u/s 194C of the Act. Similarly, learned CIT(A) also overlooked the facts of the case and has not considered the facts properly as observed in pages 32 to 34 in paragraph 7.1 as under:-

*“7.1 The appellant has further submitted that NHAI is a signatory to the ‘Escrow Account’ to provide assurance to the bankers that the toll receipts will be appropriated in a prescribed manner and that does not mean that there is a receipt of such amount by NHAI. Further that as laid down in the concession agreement no amount has been remitted to the ‘Consolidated Fund of India’ by NHAI. Therefore, in view of the specific finding recorded by the Hon’ble ITAT Nagpur Bench, Nagpur in para-12 of its order, the appellant was specifically asked to furnish the ‘Escrow Account’ and explain whether or not NHAI has remitted any amount to the Consolidated Fund of India. However, the appellant could not furnish the ‘Escrow Account’ which is jointly held by NHAI and the concessionaires for verification. The appellant has also contended that the toll fee is being collected by the concessionaires under the authority of NHAI but such collection is not deposited in ‘Escrow Account’ jointly held by the NHAI and the concessionaire but such collection receipts are deposited in a separate account opened by the concessionaires himself. This contention of the appellant suffers from inherent contradiction in as*

*much as that if the toll collection deposits are not being deposited in 'Escrow Account' jointly held by NHAI and the concessionaires, in that case there arise no question of NHAI being signatory to such account and to exercise the authority of appropriation of funds in the agreements. In fact, the appellant could not furnish the actual 'Escrow Account' which is jointly held by NHAI and the concessionaires. Therefore, in the absence of such account, the direction contained in the order of the Hon'ble ITAT Nagpur Bench, Nagpur that whether amount has been transferred from 'Escrow Account' to the 'Consolidated Fund of India' by NHAI could not be given effect for want of verification of such 'Escrow Account' as referred in the concession agreements. Thus, the appellant has failed to discharge his onus with reference to the finding of the Hon'ble ITAT Nagpur Bench, Nagpur as regards to the collection and deposit of toll fees in 'Escrow Account' and remittance of such amount to the 'Consolidated Fund of India'."*

14. In view of these facts, learned counsel for the assessee made a plea that all these ten appeals can go back to the file of the Assessing Officer for examining the agreements as well as examining the issue of escrow account, whether it is opened in the joint name or in the name of the contractor.

15. When this proposition was put to learned Senior DR, he fairly conceded the position and stated that the issue can be examined by the Assessing Officer afresh in the light of the agreements and also after examining the escrow account.

16. After hearing the rival contentions and going through the facts and circumstances of the case, we are of the view that let the issue be remitted to the file of the Assessing Officer for examining whether the escrow account is opened by the concessionaire in its own name or jointly. The Assessing Officer will also examine whether the concessionaire has been granted contract of developing project highway by which project asset shall be created on BOT basis and what

will be the use of the project asset so developed by the concessionaire for the purpose of his business including collection of toll to compensate the project expenditure and the profit thereon. The Assessing Officer will also examine whether the concessionaire is entitled to collect toll in view of the terms of the agreement and who has the right to levy fee/toll and who has granted this by the central government or by NHAI. Alternative contention of the assessee also needs examination whether the fee as has been prescribed at ₹1 per annum which is payable by the concessionaire to NHAI in consideration of grant of the project highway on BOT basis. This also requires examination. Similar are the facts relating to the issue of TDS under Section 194C of the Act. In terms of the above directions, we restore these ten appeals to the file of the Assessing Officer for fresh examination. The stay application of the assessee has thus become infructuous.

17. In the result, all the appeals of the assessee are allowed for statistical purposes.

Decision pronounced in the open Court on 07.03.2018.

Sd/-  
(G.D. AGRAWAL)  
PRESIDENT

Sd/-  
(MAHAVIR SINGH)  
JUDICIAL MEMBER

Dated : 07.03.2018  
VK.

**Copy of the order forwarded to :**

1. The Appellant
2. The Respondent
3. Concerned CIT
4. The CIT(A)
5. D.R.

Assistant Registrar