

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'E': NEW DELHI)
(THROUGH VIDEO CONFERENCING)**

**BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER**

**ITA No:- 5728/Del/2017
(Assessment Year: 2011-12)**

ACIT, Circle-76(1), New Delhi.	Vs.	National Highway Authority of India (NHAI), New Delhi.
APPELLANT		RESPONDENT
PAN No: AAATN1963H		

Revenue By : Ms. Rakhi Vimal, Sr. DR
Assessee By : Shri Atul Ninawat, CA

Per Anadee Nath Misshra, AM

(A) This appeal by Assessee is filed against the order of Learned Commissioner of Income Tax (Appeals)-41, New Delhi, ["Ld. CIT(A)", for short], dated 23.06.2017 for Assessment Year 2011-12. Grounds taken in this appeal of Assessee are as under:

"1. Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee was not liable to deduct tax at source from non-refundable sums paid under any name by NHAI to the concessionaries when such paid to compensate the decrease of toll collection from expected toll collection during the concession period?"

1.1 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee was not liable to deduct tax at source from non-refundable sums paid under any name by

NHAI to the concessionaries particularly when such sums have been paid as per Concession Agreement from securing rights of NHAI?

1.2 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee was not liable to deduct tax at source from non-refundable sums paid under any name by NHAI to Concessionaires who have no interest in property so created except personal privileges therein particularly when Concession Agreement do not vest or create any proprietary ownership of Concessionaries in the project or part thereof?

1.3 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee was not liable to deduct tax at source from non-refundable sums paid under any name by NHAI to Concessionaires who are forbidden in any manner to sell, transfer assign, mortgage, charge, create any lien or otherwise encumber or deal with the project except to collect toll during the concession period?

1.4 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the project was implement by the assessee & concessionaries in joint venture particularly when the nature of Concession Agreement, in legal terms, suggest it as license agreement?

1.5 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the non-refundable sums paid under any name by NHAI to the concessionaries are capital in nature and thus, the same are beyond the purview of section 194C of the Income Tax Act.

1.6 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the concessionaries is not an agent of NHAI and thereby clearly ignoring the fact that in the entire concession period, the Concessionaries is nothing but a constructive agent of NHAI?

2. That the order of the CIT(A) being erroneous in law and on facts needs to be vacated and the order of the AO be restored.

3. That the appellant craves leave to add or amend any one or more of the ground of the appeal as stated above as and when need for doing so may arise."

(B) In this appeal filed by Revenue, in essence the only issue in dispute is whether the assessee was liable to deduct tax at source under Section 194C of Income Tax Act, 1961 ("I.T. Act", for short) in respect of non-refundable sums paid under any name by the

assessee to the concessionaries. At the time of hearing before us, the representatives of both sides; namely Ms. Rakhi Vimal, Senior Departmental Representative ("Sr. DR", for short) for Revenue and Shri Atul Ninawat, C.A. the Authorized Representative for the assessee, were in agreement that the issue in dispute is covered in favour of the assessee and against Revenue by order dated 10th April, 2017 of Co-ordinate Bench of Income Tax Appellate Tribunal, Delhi ("ITAT", for short) in the assessee's own case for Assessment Year 2010-11 in ITA No. 4438/Del/2013; and also by order of Jaipur Bench of ITAT, for Assessment Year 2004-05 vide order dated 23rd September, 2016. For ease of reference, the relevant portions of the aforesaid orders dated 10th April, 2017 and 23rd September, 2016 are reproduced below:

Relevant portion of order dated 10th April, 2017

*".....We thus hold that the authorities below were not justified in coming to the conclusion that grant given by the assessee to concessionaire as a contract payment and not in the nature of grant / subsidy given by the assessee for building, operating and maintaining the toll road with thus observation that relationship between assessee and concessionaries is that of contractor builder or a contractor-maintainer, concessionaires is that of contractor builder or a contractor-maintainer, concessionaires are not the owner of the assets for the purpose of Income Tax Act the words "grant has been issued as it is not expected to be returned back and that relationship between the assessee and the concessionaire is that of contractor-builder or contractor-maintainer. **The nature of work between the assessee and the concessionaires, as discussed above, does not support the above observations made by the Assessing Officer to justify his action for applications of the provisions of section 194C of the Act on the capital grant subsidy given by the assessee to its concessionaries as per concession agreement on BOT basis based on the policies of Government of India and treating it to be a contractual payment. We thus, while setting aside orders of the authorities below, direct the assessing office to accept the claim of the assessee that provisions of section 194C of the Act are not applicable on the capital grant subsidy given by the assessee to its concessionaires. The grounds are accordingly allowed.**"*

Relevant portion of order dated 23rd September, 2017

*“The contention of the assessee in substance is that from the terms of the agreement **it can be inferred that the payments made to the concessionaires in the form of ‘Grant’ would not attract the provisions of section 194C. Essentially these payments are in the nature of contribution in the joint ventures.** We have gone through the terms of the agreement. **The inference drawn by the AO is that the ‘Grant’ is nothing but payment to the contractor is mis-placed.** As per section 194C, the payment is required to be made to the contractor but in the given case payment is not made to the contractor. The agreement cannot be stated to be purely a contract agreement but it is a contract agreement of joint venture. **Hence, we do not see any infirmity in the order of Id. CIT(A), therefore, the same is hereby upheld.”***

(B.1) Neither side has brought any materials for distinguishing the facts and circumstances of the case for Assessment Year 2011-12 (to which this appeal pertains) from facts and circumstances of Assessment Years 2010-11 and 2004-05 (to which the aforesaid orders dated 10th April, 2017 and 23rd September, 2016 pertain respectively). Neither side has brought any materials for our consideration to persuade us to take a view in this appeal in different from the view taken by ITAT in aforesaid orders dated 10th April, 2017 and 23rd September, 2016. Neither side has brought any materials for our consideration to persuade us to interfere with the aforesaid impugned appellate order dated 23.06.2017 of the Ld. CIT(A).

(C) In view of the foregoing, and respectfully following the aforesaid orders dated 10th April, 2017 and 23rd September, 2016 of ITAT in assessee’s own case; we decline to interfere with the aforesaid impugned appellate order dated 23.06.2017 of the Ld. CIT(A).

Accordingly, the issues in dispute in grounds of appeal in the present appeal before us are decided in favour of the assessee and the appeal filed by Revenue is dismissed.

(D) In the result, appeal of Revenue is dismissed.

The order was already pronounced orally in the open court on 16/03/2021 in the presence of representatives of both sides after conclusion of hearing. Now this order in writing is signed today on 18/03/21.

Sd/-
(SUDHANSHU SRIVASTAVA)
JUDICIAL MEMBER

Sd/-
(ANADEE NATH MISSHRA)
ACCOUNTANT MEMBER

Dated: 18/03/21
(Pooja)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	