

IN THE INCOME TAX APPELLATE TRIBUNNAL
MUMBAI BENCH "B", MUMBAI
BEFORE SHRI MAHAVIR SINGH (JUDICIAL MEMBER)

AND

SHRI ASHWANI TANEJA (ACCOUNTANT MEMBER)

I.T.A.No.1617 /Mum/2014	- AY 2006-07
I.T.A.No.1618/Mum/2014	- AY 2007-08
I.T.A.No.1619/Mum/2014	- AY 2008-09
I.T.A.No.1620/Mum/2014	- AY 2009-10

Navi Mumbai Municipal Corporation (NMMC), Belapur Bhavan, Ground Floor, CBD Belapur, Mumbai-14	V/s	ITO (TDS) 2(4), Mumbai
PAN :AAALC0296J		
Appellant		Respondent

Appellant by	Ms Aasifa Khan
Respondent by	Shri Suman Kumar

Date of hearing	09-03-2017
Date of order	17.03.2017

ORDER

Per Ashwani Taneja, AM:-

These appeals pertain to same assessee for different years involving identical issues, therefore, these were heard together and are being disposed of by this common order.

2. First, we shall take up appeal for AY 2006-07 in ITA No.1617/Mum/2014 filed by the assessee against the order passed by Commissioner of Income-tax

(Appeals)-14, Mumbai [hereinafter called CIT(A)] dated 13-12-2013 against the order u/s 201(1) / 201(1A) of the Income-tax Act, 1961 dated 25-03-2011, on the following grounds:-

1) *“The Learned Commissioner of Income tax (Appeals) -14, Mumbai on the facts and in the circumstances of the case and in Law erred in confirming the order of ITO TDS 2(4), in passing the order u/s. 201(1)/201(1A) raising a demand of Rs. 90,598/- being short fall of TDS observing that the appellant is required to deduct tax at source in terms of section 194J of the Act as against tax deducted u/s. 194C of the Act on payments made to Mangal Anand Healthcare Ltd of Rs. 26,88,335.*

2) *The Learned Commissioner of Income tax (Appeals) -14, Mumbai on the facts and in the circumstances of the case and in law erred in observing that this contracts cannot be the contracts in routine or normal manner but for which technical service has been rendered and provisions of section 194 r.w.s. (1)(vii) of explanation -2 are attracted.”*

2. Similarly in remaining three appeals, i.e. for AYs 2007-08, 2008-09 and 2009-10 also, the assessee has taken identical grounds for agitating the action of lower authorities in holding that assessee ought to have deducted tax at source u/s 194J and not u/s 194C as has been deducted by the assessee with respect to following payments:-

Name of the party	Nature of work	A.Y. 2006-07	A.Y. 2007-08	A.Y. 2008-09	A.Y. 1009-10
Mangak Anand Health Care Ltd	For providing Sonograph X-ray machines owned by them to the hospital owned by the appellant including supply of operating manpower and material / consumables and comprehensive annual	26,88,335	33,36,869	21,92,160	Nil

	maintenance contract.				
Gharpure Engg & Constrn (P) Ltd	For contract work on turnkey basis including civil construction , designing, constructing and erecting and commissioning of Sewerage Treatment Plan including operation and maintenance at Nerual, Navi Mumbai.	Nil	47,73,66,795	25,82,15,045	30,33,651
HN Bhatt & Co	For contract work on turnkey basis including civil construction, designing, constructing and erecting and commission of Sewerage Treatment Plan including operation and maintenance at Vashi Navi Mumbai.	Nil	55,62,24,358	14,36,11,380	4,19,95,163
Ramky Infrastructure Ltd	For contract work on turnkey basis including civil construction, designing, constructing and erecting and commission of Sewerage Treatment Plan including operation and maintenance at Airoli Navi Mumbai	Nil	27,80,00,250	26,30,34,887	Nil

3. During the course of hearing, Ld.Counsel of the assessee argued the case vehemently and submitted that the nature of activities carried out by the recipient would show that payment made by the assessee was on account of work arising out of contractual obligations. It is not the case of rendering of technical or professional services. Therefore, provisions of section 194J are not applicable. It was submitted that these jobs were composite activities. These jobs were not performed by technical experts only. Majority of the activities were carried out by unskilled labourer also. Comprehensive contract services were rendered by technical and non technical persons. Under these circumstances, invoking of provisions of section 194J was not justified. Ld.Counsel took us through various pages of the paper book which comprise of work order issued by the assessee to aforesaid parties. Various bills issued by these parties showing that these bills were raised for the work performed by them as part of contractual obligations. In support of the claim, the Ld. Counsel relied upon the following judgements: _

PCIT vs Senior Manager, Finance, Bharat Heavy Electricals Ltd 390 ITR 322 (P&H)

DDRC, SRL Diagnostic Pvt Ltd vs ITO 157 ITD 92

Moradabad Chartered Accountants vs CBDT 132 Taxman.com 284 264 ITR 374 (All)

Bharat Forge Ltd vs Department of Income-tax, ITAT, Pune Bench, order dated 31-01-2013

Sky Cell Communication Ltd 251 ITR 54 (Mad)

Parasrampur Synthetic Ltd 20 SOT 248 (ITAT, Delhi)

Gujarat State Electricity Corporation Ltd vs ITO 82 TTJ 456 (ITAT, Ahmedabad)

ITO vs Fino Fintech Foundation (ITAT,Mumbai ITA Nos 595 & 5952/Mum/2014 order dated 22-06-2016

CIT vs M/s Delhi Transco Ltd (Delhi HC) order dated 06-08-2015

4. On the basis of aforesaid judgements, Ld. Counsel vehemently argued that the aforesaid judgements made by the assessee would fall in the definition of 'work' as defined u/s 194C and would not fall within the scope of section 194J.

5. Per contra, Ld. DR vehemently supported the orders of the lower authorities and submitted that the activities performed by the payees were in the nature of technical services rendered by them and would, therefore, attract provisions of section 194J. Thus, assessee ought to have deducted tax u/s 194J. Therefore, requested for confirming the order of Ld. CIT(A).

6. We have gone through the orders passed by the lower authorities and evidences produced before us and also perused the judgements cited by both the parties. We have examined the nature of payments made by the assessee and the activities performed by the payees with the help of work orders issued to them by the assessee as well as copies of bills issued by them narrating details of work done by them.

7. The brief background of the assessee is that assessee is a local self-governed body which came into force under Mumbai Municipal Provincial Act, 1949. It has been noted by the AO in the order passed by him that since assessee is a local authority, it does not have any object of carrying out a business to make profits. However, it collects various taxes / fee, etc to meet out its expenses for provisioning of civic services. Under these circumstances, it has made payment for various purposes and deducted tax u/s 194C. The AO was of the opinion that tax should have been deducted u/s 194J.

8. In the case of payment to Mangak Anand Healthcare, Mumbai, work order was issued by the assessee dated 09-01-2004 wherein contract was awarded to the said person by the assessee for running x-ray and sonography services in all four MCH centre for a period of 5 years from the date of signing of the agreement. Thus, the said party was to provide aforesaid services of x-ray and sonography, etc. at the hospitals run by the assessee. The rates were fixed by the assessee in the work order on per patient basis. Our attention was also drawn upon the agreement entered with the said party for providing these services. Perusal of the said agreement shows that assessee entered into a contract with the said party for providing these services during the contract period at the pre-defined rates. The aforesaid contract was drafted in such a manner that obliges the said party to provide various services on comprehensive basis. It is noted from perusal of para 12 of the said contract that the said party would employ skilled, semi-skilled and unskilled personnel in sufficient numbers to carry out its services at the required rate of progress and of quality to ensure workmanship of the degree specified in the contract for timely fulfilling the obligations of the said party under the contract. Various other clauses of this agreement clearly suggest that there was obligation of carrying out work by the said person in return of a pre-decided rates payable by the assessee. The overall terms and conditions of the contract and other facts brought before us indicate that it would fall within the nature of 'work' as stipulated in section 194C.

9. Similarly, with respect to the other parties also, viz. Gharpure Engineering & Construction (P) Ltd and Ramky Infrastructure Ltd also, perusal of their bills, work orders and agreements clearly indicate that assessee assigned them contract work on turnkey basis for carrying out variety of jobs of civil construction, etc. None of the jobs carried out by these persons would

fall in the scope of section 194J. The activities performed by these parties would clearly fall within the definition of 'work' as stated in section 194C. Our view is supported by the judgement of Hon'ble Punjab & Haryana High Court in the case of PCIT vs Senior Manager, Finance, Bharat Heavy Electricals Ltd (supra), wherein similar agreements and contracts were analysed by the Hon'ble High Court and it was held that such case would fall within the definition of 'work' as envisaged in section 194C and would not fall u/s 194J. Relevant portion of the judgement is reproduced below:-

"9. Mr. Putney, learned counsel appearing on behalf of the appellant firstly sought to demonstrate that the contract falls within the ambit of section 194J. He further sought to establish that the contract does not fall under Section 194C. It must be noted here that if a contract does not fall under Section 194C it does not follow that it falls within the ambit of Section 194J. Section 194C is not a residuary clause. The respondent would therefore be entitled to succeed even if it is established that the contract does not fall within the ambit of Section 194J. If the contract also does not fall under Section 194C there would be no liability on the part of the respondent to deduct tax at source at all. The respondent has, however, not contended that the contract does not fall within Section 194C. It would be appropriate, therefore to first examine whether the contract falls within Section 194J. In our view it does not

10. *Before referring to the clauses in the contracts entered into between the respondent and the contractors relied upon by Mr. Putney in support of his contention that it falls within the ambit of Section 194J, it is necessary to refer to some of the other provisions thereof as well. The various contracts entered into between the respondent and the contractors are identical. Clause I provides that the contractors are to execute the work of erection, testing, commissioning and trial operation of power cycle piping, boiler and LP piping packages for units in Haryana and in accordance with and subject to the terms and conditions contained in the*

contract and the document incorporated therein such as the instructions to tenderers General Conditions of Contract and General Conditions to of Contract and Special Conditions.

Clause 5 provides that in consideration of the payments made by the respondent the contractor undertook to execute, construct and complete the works, in conformity in all respects with the terms and conditions specified in the agreement.

Clause 7 requires the contractor to complete the execution of the works to the entire satisfaction of the respondent and within the period stipulated in the contract. The relevant provisions of the General Conditions of Contract are also relevant in this regard.

A rate schedule is also for the material and not for the supply of any technical services. There is a schedule for the deployment of manpower. Many of them we will assume are technical personnel. What is important is that the schedule is one of deployment of these personnel at the site for executing the work, namely, the work of erection, testing commissioning and trial operation. In other words, their services were not engaged per se for the benefit of respondent. They were in fact engaged by the contractor itself for its own benefit for executing the contract as required by the terms and conditions thereof.

11 The Special Conditions of Contract are also relevant. They also enumerate the list of major tools and plants to be provided by the contractor, at its own cost. There is no reference to the contract being or one of providing technical services. There is a detailed reference in clause 40 which again enumerates the equipment that is to be supplied. There is no similar clause in respect of the deployment of technical personnel. There is a similar schedule for the deployment of manpower as the one under the General Conditions of Contract. Clause 46 of the special conditions contains detailed provisions regarding the testing pre-commissioning commissioning and post commissioning in

respect of the equipment to be supplied. Mr. Putney had relied upon clause 46.13 which we will refer to later while dealing with this submissions.

12. The contract read as a whole, therefore, is for the purposes set out in clause 1 thereof itself, namely, erecting, commissioning testing and trial operation of the said equipment in accordance with and subject to the terms and conditions of the contract. All the other provisions are with a view to ensuring the same. In other words, the other provisions of the contract are to ensure that the contractors erect test commission and conduct trial operation of the equipment in accordance with their obligations under the contract. Once that is seen, it is clear that the reliance upon the terms and conditions on behalf of the appellant to contend to The contrary is not will founded,

13. Mr. Putney firstly relied upon the following clause:-

"4. M/s; PCP confirmed that the manpower deployment plan submitted by them alongwith the offer and subsequently vide letter No. PCP/TNDI9GU dated 26.06.2009 is tentative and reconfirmed that the adequate manpower including supervisors will be deployed at site for timely completion of work. BHEL further pointed out that manpower and Qualified Supervisors (or BEEL's use as per clause no. 56.2 of the NIT have not been included in their deployment plan. M/s. PCP confirmed that they will deploy manpower as per clause No 502 free of cost exclusively for BHEL services. Further. M/s PCP has also equipment that they will be deploying additional manpower if required at no extra cost to BHEL for timely completion of work.

14. The deployment manpower is precisely for the purposes stated in clause 4, namely, for timely completion of work. The work is the erection, testing, commissioning and trial operation of the equipment. In other words, the contract is not for the provision of technical services. That the equipment requires inputs from technical personnel is another matter altogether: That input is entirely for and on behalf of the contractor and not on behalf of the respondent. The input is not to enable the respondent to run the machinery on its own, but to enable the contractor to supply the requisite equipment.

15. Clause 19.17, relied upon by Mr Putney. reads as follows:--

"19.17 'WORK' or 'CONTRACT WORK' shall mean and include supply of all categories of labour. specified

consumables, tools and tackles required for complete site transportation handling, stacking, storing erecting,' testing and commissioning of the equipment to the entire satisfaction of BHEL.

Thus the supply of labour, material and equipment is for the satisfactory site transportation handling, stacking, storing, erecting, testing and commissioning of the equipment to the respondents satisfaction. In other words, the labour, employees. tools and tackles are not supplied under the contract but for the purpose of executing the contract as per the contractual stipulations."

10. Similarly, identical view has been taken in the other judgements relied upon by the Ld.Counsel. Thus, taking into account all the facts and circumstances of the case and judgments relied upon by the parties before us, we are of the opinion that TDS u/s 194C has rightly been deducted by the assessee. TDS was not required to be deducted u/s 194J. As a result, grounds raised by the assessee in all the four appeals are allowed.

11. In the result, all the appeals are allowed.

Order was pronounced in the open court on 17th March, 2017.

Sd/-

sd/-

(MAHAVIR SINGH)	(ASHWANI TANEJA)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Mumbai, Dt : 17.03.2017

pk/-

Copy to :

1. The appellant
2. The respondent
3. The CIT(A)
4. The CIT
5. The Ld. Departmental Representative for the Revenue, "B", Bench

(True copy)

By order

ASSTT.REGISTRAR, ITAT, MUMBAI BENCHES