

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDI GARH

ITA-242-2016 (O&M)
Date of decision: - 09.12.2016

Pr. Commissioner of Income Tax, TDS-II, Chandigarh

... Appellant

Versus

The Senior Manager (Finance), Bharat Heavy Electricals
Ltd., Jhajjar.

... Respondent

CORAM: HON'BLE MR. JUSTICE S. J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: - Mr. Yogesh Putney, Advocate,
for the appellant.

Mr. Piyush Kaushik, Advocate,
for the respondent.

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S. J. VAZIFDAR, C. J. (ORAL)

This is an appeal against the order of the Income Tax Appellate Tribunal dismissing the appeal filed by the appellant against the order of the Commissioner of Income Tax (Appeals) allowing the respondent/assessee's appeal against the assessment order. This appeal pertains to the assessment year 2012-2013.

2. According to the appellant, the following substantial questions of law arise: -

"(i) Whether on the facts and in the circumstances of the case, the Ld. ITAT is right in law in holding that in view of proviso inserted by Finance Act, 2012 with effect from 01.07.2012 to Section 201(1) of the Income Tax Act, 1961, the respondent-assessee cannot be held to be deemed to be an assessee in default as the sub-

contractors have already offered the payments to tax ignoring that the proviso was inserted by the Finance Act, 2012 with effect from 01.07.2012 to Section 201(1) of the Income Tax Act, 1961 which cannot be made applicable to the case of the respondent-assessee as the issue in the present case relates to the assessment years 2012-13?

(ii) Whether on the facts and in the circumstances of the case, the Ld. ITAT is right both on facts and law in holding that the nature of work carried out by sub-contractors to be mere a work within the meaning of Section 194C and the work carried does not fall under professional and technical service provided within the meaning of Section 194J read with Explanation 2 to section 9(1)(vii) of the Income Tax Act, 1961?

(iii) Whether on the facts and in the circumstances of the case, the Ld. ITAT was right in law in applying the case of Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CIT reported as [2007] 293 ITR 226 (SC) which has no application in as much as even if the sub-contractors have offered the payments received from the respondent-assessee to tax in that eventuality also the respondent-assessee cannot escape from levy of interest and penalty in accordance with the provisions of Income Tax Act, 1961?

(iv) Whether on the facts and in the circumstances of the case, the Ld. ITAT is right in recording perverse findings contrary to material on record and held that the sub-contracted activities entrusted by Bharat Heavy Electricals Ltd. are neither professional nor technical service ignoring the material that the same could only be done with the human intervention involving qualified professionals, engineers, highly

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technical staff and consultants having full expertise in their field?"

3. The appeal is admitted on questions (ii) and (iv). Question (iii) is linked to question (i). Questions (ii) and (iv) are linked to each other.

4. Re: Question (ii)

On 07.02.2012, a TDS inspection was conducted under Section 133A of the Income Tax Act, 1961 (in short the Act) on the respondent. The Assessing Officer found that the respondent had made payments to five contractors in respect of various contracts and deducted tax in respect thereof under Section 194C of the Act. The Assessing Officer found that all the contracts involved the provision of professional and technical services which fall within the ambit of the provisions of Section 194J of the Act and not under Section 194C. The question, therefore, is whether the amounts paid under the contracts constitute fees for professional or technical services attracting Section 194J or whether they constitute payments to contractors attracting the provisions of Section 194C.

Both the learned counsel relied upon the provisions of one of the contracts entered into between the respondent and M/s PCP International Limited, Chandigarh, dated 04.12.2009. They stated that the other contracts are identical. We will, therefore, refer to that contract alone in this judgement.

5. Sections 194C and 194J in so far as they are relevant read as under: -

"Payments to contractors.

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

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as the contractor) 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.

Explanation - For the purposes of this section -

(i) "specified person" shall mean -

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

(iv) "work" shall include -

(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.

Fees for professional or technical services.

194-J. (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-

(b) fees for technical services, or

Explanation - For the purposes of this section -

(b) "fees for technical services" shall have the same meaning as in Explanation 2 to clause (vi i) of subsection (1) of section 9.

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".

6. Admittedly, the respondent had deducted TDS under Section 194C at the rate of 2% and paid the same over to the government treasury. However, if TDS was to be deducted under Section 194J at 10%, the respondent would be an assessee in default. We must add here that the respondent's alternative contention, however, is that in any event the recipient of the amounts paid by the respondent had already paid tax at the highest rate.

7. The Assessing officer held as follows: The contracts were not only for the erection and installation work, but also for the commissioning, testing and trial operation of the various equipments and other related machinery and that under the terms of the contract it is the duty of the contractor to provide all types of labour, supervisors, engineers,

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inspectors, measuring and testing equipments, testing and commissioning for the execution of the project as per the specifications of the respondent. Under clause 38.1 of the Special Conditions of Contract, the contractor was to deploy all the skilled workmen to carry out the work as per the specifications. Therefore, the contractors were required to employ qualified engineers and highly skilled manpower to execute certain activities so as to provide fault-free services to the respondent. The contractors were, therefore, providing technical services to the respondent which attract the provisions of Section 194J. This conclusion was in view of the provisions of the contract which require testing, trial operation and commissioning. The nature of the trial operation was such that it could not be handled by labourers and could only be handled by qualified engineers, supervisors and technicians. Thus, the level of human intervention was high and sophisticated. He accordingly held the respondent to be an assessee in default under Section 201(1A) of the Act for having failed to deduct the tax at source and invoked the provisions of Sections 200 and 201 read with Rule 30 of the Income Tax Rules, 1962.

8. The CIT (Appeals) construed the provisions of the contract and came to the conclusion that it was in the nature of a contract for work and labour to be carried out under the supervision of the respondent's officers and employees. It was further held as follows. The scope of the work given to the sub-contractors is for erection, testing, commissioning and trial operation and handing over of boiler units, electrostatic precipitators etc which involved construction work, welding, erection, alignment, transportation of equipment and materials

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with the help of machines which did not fall within the scope of technical services as defined in Explanation - 2 to Section 9(1)(vii) of the Act. The services of qualified engineers and skilled manpower were utilized for this purpose which was inevitable. What the respondent was to get from the contractor was a physical output, the tangible structure and not merely the services of the qualified engineers/staff. The word 'merely' appears to be inadvertent. What was meant is that the services were required in connection with the works contract. Merely because technical personnel are employed in the execution of the contract it does not follow that the contract is one for technical services. The CIT (Appeals) also held in favour of the respondent on the alternative contention.

The Tribunal in effect confirmed these findings.

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.

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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 1 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 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

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and trial operation. In other words, their services were not engaged per-se for the benefit of the 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 for 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 his 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

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conditions on behalf of the appellant to contend to the contrary is not well 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/TND/960 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 for BHEL'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. 56.2 free of cost exclusively for BHEL's services. Further, M/s PCP has also confirmed that they will be deploying additional manpower, if required at no extra cost to BHEL, for timely completion of work."

14. The deployment of 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

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categories of labour, specified consumables, tools and tackles required for complete and satisfactory 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 respondent's 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.

16. Mr. Putney then relied upon clause 27.4 which reads as under: -

"27.4 All electrical equipment, connections and wiring for construction power, its distribution and use shall conform to the requirements of Indian Electricity Act and Rules. Only electricians licensed by the appropriate statutory authority shall be employed by the contractor to carry out all types of electrical works. All electrical appliances including portable electric tools used by contractor shall have safe plugging system to source of power and be appropriately earthed."

17. He relied upon the provision that only electricians with certain qualifications and licenses shall be employed by the contractor. This is a contractual stipulation insisted upon by the respondent to ensure that the equipment supplied by the contractor is of the requisite quality and specifications. It is to ensure that the contractor complies with its obligations under the contract. It does not provide for the provision of technical assistance to the respondent.

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18. He then relied upon clauses 39.1, 39.2, 39.5 and 39.11 which read as under: -

"39.0 SUPERVISORY STAFF AND WORKMEN

39.1 The contractor shall deploy all the skilled workmen like millwright fitters, welders, crane-operators, drivers, gas cutters, riggers, sarangs, masons, carpenters, electricians, helpers and instrument technicians to carry out the works as per specifications. In addition to skilled, semi-skilled and unskilled workmen required for all the works, suitable workmen required for handling and transporting of equipment from site storage to erection site, erection, testing and commissioning as contemplated under this specification shall be deployed. Only fully trained and competent men with previous experience on the job shall be employed. They shall hold valid certificates wherever necessary.

BHEL reserves the right to decide on the suitability of the workers and other personnel who will be deployed by the contractor. BHEL reserves the right to insist on removal of any employee/workman of the contractor at any time, if they find him unsuitable. The contractor shall remove him forthwith.

39.2 The supervisory staff including qualified Engineers deployed by the contractor shall ensure proper out-turn of work and discipline on the part of the labour put on the job by the contractor. They should in general see and ensure that the works are carried out in a safe and proper manner and in coordination with other labour and staff deployed directly by BHEL or other contractors of BHEL or BHEL's client/other agency. Contractor has to arrange for an experienced electrical engineer conversant with electronic circuits

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for operation and maintenance of induction heating machines for P/T-91 welding.

39.5 The contractor shall deploy the necessary number of qualified and approved full time electricians at his cost to maintain his temporary electrical installation till the completion of work.

39.11 The Contractor has to ensure deployment of qualified Level -2 NDT Engineers and Welding Engineers exclusively for the welding works envisaged under the Package works."

19. By clause 39.1, the respondent required the contractor to deploy skilled workmen and technicians not under a contract for the supply of technical services, but, as the clause itself states, 'to carry out the works as per the specifications'. The contractor was bound to carry out the work as per the specifications to safeguard against any defective work and to ensure that the work is of the requisite quality. The respondent was entitled to insist upon the contractor carrying it out in the correct manner which would include the work of the contractor itself being done and supervised by qualified personnel.

By clause 39.2, the respondent required the contractor to depute supervisory staff including qualified engineers not under a contract for the supply of such staff, but as stated in the clause itself by ensuring 'proper out-turn of work and discipline on the part of the labour put on the job by the contractor'. The clause also required the contractor's supervisory staff to ensure that the work is carried out in a proper manner and in coordination with the respondent's personnel. The contractor is also required by the clause to

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arrange for the experienced electrical engineers. These requirements are also not under the contract for the supply of such personnel, but for the personnel to ensure that the contractor executes the work in a timely and a proper manner.

For the same reason, clauses 39.5 and 39.11 are also of no assistance to the appellant for they merely require the deployment of the necessary number of qualified electricians and qualified engineers. The deployment of the personnel is not under a contract for the supply of services/technical services, but to ensure the due and proper execution of the work by the contractor.

20. Mr. Putney then relied upon clauses 46.4, 46.13, 46.16 and 46.18 which read as under: -

"46.0 TESTING, PRE-COMMISSIONING, COMMISSIONING AND POST-COMMISSIONING.

46.4 The contractor shall make all necessary arrangements including making of temporary closures on piping/equipment for carrying out the hydro-static testing on all piping equipment covered in the specification at no additional cost. The contractor shall carry out the required test on the pipelines such as Hydraulic Test (as per IBR requirement/instruction of BHEL), of various piping systems, Ultrasonic Test for weld defects and finding thickness, Dye penetrant test, Magnetic particles test for Weld defects and materials defects etc. All facilities (manpower, materials, equipment, consumables etc.) including proper approaches wherever required shall be provided by the contractor for satisfactory conduction of above test. Special equipment such as magnetic particle tester, Metal scope for analysis of weld material of T/P-91 pipings, ultrasonic test kit and engineers required for these tests shall be arranged by the contractor

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alongwith Qualified technician within finally accepted rates.

All required tests (Mechanical and electrical) indicated by BHEL and their clients for successful commissioning are included in the scope of these specifications. These tests/activities may not have been listed in these specifications.

46.13 The contractor shall carry out any other tests as desired by BHEL engineers on erected equipment covered in the scope of this contract during testing and commissioning to demonstrate the satisfactory completion of any part or whole of work performed by the contractor.

46.16 During this period though the BHEL's/client's staff will also be associated in the work, the contractor's responsibility will be to arrange for the complete requirement of supervision, consumables, labour, T&P and IMTEs required till such time the commissioned units are taken over by the BHEL's customer.

46.18 It shall be the responsibility of the contractor to provide workmen of various categories in sufficient numbers alongwith Engineers/Supervisors including necessary consumables, T&P, IMTEs etc. during pre-commissioning, commissioning and post commissioning period to assist in commissioning of equipment and attending any problem in equipment erected by the contractor till handing over. The rates Quoted shall include all these contingencies also.

Association of BHEL's/Client's staff during above period will not absolve contractor from above responsibilities."

21. These are usual clauses in such contracts. The testing, pre-commissioning, commissioning and post-commissioning are required to be carried out by a contractor to satisfy the customer that the work has been executed in a proper manner; that the equipment has been installed as required and that its performance meets the parameters specified in the contract. The personnel that are required to test and commission the plant and equipment perform their functions not under a contract for the supply of technical services to the customer, but to satisfy the customer on behalf of the contractor that the plant and equipment has been duly supplied as per the contractual specifications. Indeed, this entire exercise would require the deployment of technical personnel, but what is important to note is that the technical personnel are deployed not for and on behalf of the customer, but for and on behalf of the contractor itself with a view to ensuring that the contractor has supplied the equipment as per the contractual specifications. Everything done in this regard is to this end and not to supply technical services to the customer.

22. The contract entered into between the respondent and each of the contractors, therefore, did not involve the supply of professional or technical services at least within the meaning of Section 194J. The consideration paid under the contracts, therefore, was not for the professional or technical services rendered by the contractors to the respondent. Section 194J is, therefore, not applicable to the present case.

23. It is not necessary to consider Mr. Putney's submission that the contracts do not fall under Section 194C. The submission if accepted would be self destructive of the

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Revenue for then the assessee would not have been liable to deduct tax at source at all and would, therefore, be entitled to a refund. As we mentioned earlier, Section 194J is not a residuary clause. In other words, it is not that if a contract does not fall within the ambit of Section 194C, it must be deemed to fall within the ambit of Section 194J. Sections 194C and 194J are independent provisions. In view of our finding that the contract does not fall within Section 194J, the dismissal of the appeal would follow in any event. The respondent has not denied that the present case falls under Section 194C. Had the respondent contended that Section 194C is also not applicable, it would have been necessary to consider whether the contract falls within the ambit of Section 194C. As the respondent has accepted that it falls within Section 194C and has complied with its obligations thereunder, we refrain from deciding the issue as to whether it falls within Section 194C.

24. Faced with this, Mr. Putney relied upon the judgement of the Supreme Court in Commissioner of Income Tax Vs Bharti Cellular Ltd., (2011) 330 ITR 239 (SC), where the Supreme Court held as under: -

"11. Before concluding, we are directing CBDT to issue directions to all its officers, that in such cases, the Department need not proceed only by the contracts placed before the officers. With the emergence of our country as one of the BRIC countries and with the technological advancement matters such as present one will keep on recurring and hence time has come when Department should examine technical experts so that the matters could be disposed of expeditiously and further it would enable the Appellate Forums, including this Court, to

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decide legal issues based on the factual foundation. We do not know the constraints of the Department but time has come when the Department should understand that when the case involves revenue running into crores, technical evidence would help the Tribunals and Courts to decide matters expeditiously based on factual foundation. The learned Attorney General, who is present in Court, has assured us that our directions to CBDT would be carried out at the earliest."

He contended that the matter ought to be remanded to the Assessing Officer to examine technical experts on this issue and that it was not necessary for any of the authorities under the contract to proceed only by the contracts which were placed on record.

25. The contention is not well founded. Firstly, the department never made an application for examining an expert. Secondly, it is not the department's case that there was any material other than the contracts which required consideration. Apart from raising this contention, no such case was made out even before us at the hearing of this appeal. The case before us merely requires a construction of the contract. The extent of human intervention that was relied upon by the department is based on the provisions of the contract itself. Based on these provisions, it was contended that the human intervention contemplated under the contract constituted the consideration payable thereunder to be for professional and technical services. On the other hand, before the Supreme Court, the case was entirely different as noted in paragraph 6 of the judgement itself. As observed by the Supreme Court, in that case there was no expert evidence to show how human intervention takes place particularly during the process when the calls take place

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from one place to another. The illustration furnished by the Supreme Court was where Bharat Sanchar Nigam Limited (BSNL) has no network in Nainital, whereas it had a network in Delhi. The inter-connect agreement enables M/s Bharti Cellular Limited to access the network of the BSNL in Nainital and the same situation can arise vice-versa in the given case. The issue as to whether during such calls there is any manual intervention was one of the points which the Supreme Court opined required expert evidence. In the case before us, the nature of human intervention is reflected in the terms and conditions of the agreement itself. What was required to be considered is whether such human intervention constituted the provision of professional or technical services or not.

26. In these circumstances, questions (ii) and (iv) are decided in favour of the respondent.

27. In view thereof, it is not necessary to decide questions (i) and (iii).

28. The appeal is, therefore, dismissed.

(S. J. VAZIFDAR)
CHIEF JUSTICE

(DEEPAK SIBAL)
JUDGE

09.12.2016

Amodh

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No

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