

IN THE HIGH COURT AT CALCUTTA  
Special Jurisdiction  
(INCOME TAX)  
Original Side

**ITA 23 of 2015**

**Commissioner of Income Tax, Kolkata - I (TDS)**  
**-Vs.-**  
**Media World Wide Pvt. Ltd.**

**Before: The Hon'ble The Chief Justice Thottathil B. Radhakrishnan**  
**&**  
**The Hon'ble Justice Arijit Banerjee**

For the appellant : Mr. Smarajit Roy Chowdhury, Adv.

For the Respondent : Mr. J.P. Khaitan, Sr. Adv.  
Mr. Ananda Sen, Adv.

Heard On : 12.12.2019

CAV on : 12.12.2019

Judgment On : 08.01.2020

**Arijit Banerjee, J.:-**

1. This is an appeal against the order dated 29<sup>th</sup> August, 2014 passed by the Income Tax Appellate Tribunal 'B' Bench, Kolkata in ITA No.1422/KOL/2012 A.Y. 2010-11. By the said order the Learned Tribunal

dismissed the department's appeal against the order dated 16<sup>th</sup> July, 2012 passed by the Commissioner of Income Tax (Appeals) – I, Kolkata in Appeal No.543/CIT(A) – 1/58(3)/11-12. By the said appellate order, the CIT had allowed the assessee's appeal against an order dated 29<sup>th</sup> July, 2011 passed by the ITO Wd. – 58(3), Kolkata ITNS – 51 under Sections 201(1)/201(1A) of the Income Tax Act (hereinafter referred as 'the said Act'), whereby the Assessing Officer had held that Section 194J of the said Act applied to the assessee and not Section 194C. Accordingly, the Assessing Officer had held the assessee liable on account of short deduction and interest thereon to the tune of Rs.1,46,36,656/-.

2. The brief facts of the case are that the assessee, at all material times, was engaged in the business of media broadcasting and telecasting. It had entered into an Up-linking Service Agreement with one ESSEL Shyam Communication Ltd. (ESCL) for Up-linking and Bandwidth Services as also an Agreement with one Celebrities Management Pvt. Ltd. (CMPL) for Air Time service charges. While making payment to such parties for the services rendered by them, the assessee deducted tax at source in accordance with Section 194C of the said Act. A survey was conducted in the office premises of the assessee company on 20<sup>th</sup> June, 2011. All documents and records as were called for by the Assessing Officer were supplied by the assessee. Subsequently, the assessment order was passed whereby the Assessing Officer held that the payments made by the assessee to the Multi System Operators on account of channel carriage fees and other payments related to the Up-linking charges and down-linking charges, Bandwidth and Air Time

charges are covered by Section 194J of the said Act since such payments were in the nature of fees for professional and technical services. The assessee was held responsible for short deduction and interest thereon. Penalty was also imposed on the assessee under Section 271C and 221(1) of the said Act.

3. At this juncture, it would be helpful and profitable to note the relevant provisions of the said Act. Section 194C in so far as the same is material for the present purpose, provides as follows:-

*“(1) Any person responsible for paying any sum to any resident (hereafter in this section referred to 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.”*

4. Explanation (iv) after sub-section (7) of Section 194(c) provides *inter alia* that ‘work’ shall include broadcasting and telecasting including production of programmes for such broadcasting or telecasting.

5. Section 194J of the said Act insofar as the same is relevant for the instant case, provides as follows:-

*“(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-*

*(a) Fees for professional services, or*

*(b) Fees for technical services, [or*

*[(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or]*

*(c) Royalty, or*

*(d) Any sum referred to in clause (va) of section 28,]*

*Shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to [ten per cent.] of such sum as income-tax on income comprised therein.”*

6. Explanation (b) at the end of Section 194J states that ‘fees for technical services’ shall have the same meaning as in Explanation 2 to Clause (vii) of sub-section (1) of Section 9. Explanation 2 to Section 9(1)(vii) of the Act provides that ‘fees for technical services’ means any consideration (including any lump sum consideration) for 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’.

7. The assessee preferred an appeal before the CIT against the order of the Assessing Officer. The CIT in its order held that the services of Up-linking, Bandwidth Services, Air Time and Channel Carriages to Multi System Operators were related to broadcasting and telecasting which is covered specifically by the definition of ‘work’ in Section 194C(iv)(b) in the Explanation part of the Section. Such services require use of sophisticated

equipment for transmission of the assessee's programmes and such equipment was made available to the assessee company for which it had made payments after deducting TDS under Section 194C of the Act. Learned CIT held that Section 194J is not applicable to the facts of the case. In coming to such conclusion, Learned CIT relied on decisions of various High Courts as well as the Income Tax Appellate Tribunal. Learned CIT further recorded that the assessee had provided the details of income tax assessment returns and the PANs of all the companies with whom it had entered into transactions which demonstrated that the said companies duly paid the requisite balance tax amount after allowing for deduction of tax at source at the rate of two per cent under Section 194C.

8. The department carried the matter by way of second appeal before the Income Tax Appellate Tribunal. The Learned Tribunal observed that the case was squarely covered in favour of the assessee by the decision of the Income Tax Appellate Tribunal, Kolkata in the case of M/s Sristi Television (ITA Nos.1297/KOL/2012 & 276/KOL/2013). The relevant part of that decision extracted in the order of the Learned Tribunal reads as follows:-

*“We find that the assessee produced various types of programmes / serials and news and these were telecasted / broadcasted through Multi System Operators for which payments were made to them under the head ‘carriage charges’. The assessee has duly deducted and paid tax under Section 194C of the Act. We agree with the Id. CIT (Appeals) that no technical services were involved in payment of carriage charges made by the assessee for broadcasting of the programmes produced by the assessee. The assessee produced various types of programmes /serials and news and these were telecasted / broadcasted through Multi System Operators. Payments in*

*this regard were made as carriage charges for which payment of tax was deductible under Section 194C of the Income Tax Act. As per definition of technical services given in Explanation to Section 9 of the Act, the deductee should have rendered managerial, technical or consultancy services. In this case, we find that there is no such finding of the Assessing Officer. The deductee has only telecasted the programmes produced by the assessee. In this case law referred to by the Id. CIT (Appeals) decision in the case of DCIT – vs – NNM ‘Securities Limited, IT AT held that if the assessee is using any facility of any one the same is not technical services. Hon’ble Punjab & Haryana High Court in the case of **Karukshetra Darpan (P) Ltd. –vs.– CIT (217 CTR 326)** has held that telecasting of the programme was covered under Section 194C of the Act.”*

9. Relying on the aforesaid decision of the ITAT, the Learned Tribunal dismissed the appeal of the department.

10. The Revenue has come up on appeal before us under Section 260A of the said Act. The appeal was admitted by an order dated 23<sup>rd</sup> September, 2015 on five substantial questions of law which essentially boil down to one issue, i.e., whether it is Section 194C of the said Act or whether it is Section 194J which applies to the facts of the present case.

11. We have heard Learned Counsel for the Revenue/appellant and Learned Senior Counsel for the assessee/respondent *in extenso*.

12. The moot question is whether the payments made by the assessee to the companies with which it had entered into contracts can be said to be remuneration for the rendering of any managerial, technical or consultancy services? Only then would it amount to payment of ‘fees for technical services’ and would attract Section 194J. We are in agreement with the submission of Learned Senior Counsel for the assessee that ‘technical services’ referred to in Section 9(1)(vii) contemplates rendering of a ‘service’

to the payer of the fee. Mere collection of a 'fee' for use of a standard facility which is available to everybody against payment of a fee, does not amount to the provider of the facility receiving fee for technical services. In the case of ***Commissioner of Income Tax v. Bharti Cellular Ltd. (2009) 319 ITR 139***, the Delhi High Court held that the expression 'technical services' has to be understood in the sense in which it is used in Explanation 2 to Section 9(1)(vii) of the Act and applying the rule of noscitur-a-sociis, the word 'technical' would take colour from the words 'managerial' and 'consultancy', between which it is sandwiched. Since the words 'managerial' and 'consultancy' involve a personal element, even the expression 'technical services' has to be understood as a service which predominantly involves a personal element. We are in agreement with this view of the Delhi High Court. The companies with which the assessee entered into agreements held licence from the Central Ministry pursuant to which they have created a platform for Up-linking and broadcasting of programmes in the electronic media. It is all mechanized and automated. Anybody desirous of taking advantage of such a platform can do so against payment of the prescribed fee. No 'technical service', in our opinion, is provided by such service providers and the payments they receive cannot be termed as 'fee for technical services'.

13. In ***Commissioner of Income Tax v. ESTEL Communication (P) Ltd. (2009) 318 ITR 185***, the Delhi High Court held that the assessee in that case was merely paying for an internet bandwidth to the deductee and then selling it to its customers. The use of internet facility may require sophisticated equipment but that does not mean that technical services

were being rendered by the deductee to the assessee. It was a simple case of purchase of internet bandwidth by the assessee from the deductee. The High Court upheld the Appellate Tribunal's decision that the provisions of Section 9(1)(vii) of the Act did not apply.

14. In ***Skycell Communications Ltd. & Ors. v. Deputy Commissioner of Income Tax & Ors. (2001) 119 Tax Mann 496***, the Madras High Court held that installation and operation of sophisticated equipment with a view to earning income by allowing customers to avail of the benefit by use of such equipment does not result in providing technical service to the customer for a fee. In the modern world, every instrument or gadget that is used to make life easier is the result of scientific invention or development and involves the use of technology. It would be absurd to suggest that every provider of every instrument or facility used by a person can be regarded as providing technical service. Collection of a 'fee' for use of a standard facility that is provided to all those willing to pay for it would not amount to receipt of fee for technical services.

15. In ***Commissioner of Income Tax v. DE Beers India Minerals (P) Ltd. (2012) 21 Tax Mann 214***, the Karnataka High Court held in the context of Section 9(1)(vii) of the Act that the technical or consultancy service rendered should be of such a nature that it makes available to the recipient technical knowledge, know-how and the like. The service should be such that results in transmitting technical knowledge, etc., so that the payer of the service fee could derive an enduring benefit and utilize the knowledge and know-how on his own in future without the aid of the service provider.

16. In ***Commissioner of Income Tax (TDS) v. UTV Entertainment Television Ltd. (2017) 399 ITR 443***, a Division Bench of the Bombay High Court held that when services were rendered as part of a contract accepting placement fees or carriage fees, they were similar to services rendered against payment of standard fees paid for broadcasting of channels on any frequency. The High Court upheld the Commissioner's finding that if the contract was executed for broadcasting and telecasting the channels of the assessee, the payment was covered by Section 194C of the Act. When placement charges were paid by the assessee to the cable operators and multi-system operators for placing the signals on a preferred bandwidth, it was a part of work of broadcasting and telecasting covered by Sub-clause (b) of Clause (iv) of the Explanation 2 to Section 194C.

17. In the case of ***Commissioner of Income Tax v. Kotak Securities Ltd., (2016) 383 ITR 1***, the Hon'ble Supreme Court held that it is only separate, exclusive or customized service rendered by human effort that would come within the ambit of the expression 'technical services' appearing in Explanation 2 to Section 9(1)(vii) of the said Act. In the absence of such distinguishing feature, service, though rendered, would be merely in the nature of a facility offered or available which would not be covered by Section 194J of the Act. It was observed that 'technical services' like 'managerial' and 'consultancy' services would denote seeking services to cater to the special needs of the consumer as may be felt necessary and the service provider making them available. It is this feature that would distinguish a service provided from a facility offered. While the former is exclusive to the seeker of the service, the later, even if termed as a service, is

available to all for a charge and would therefore, stand out in distinction to the former.

18. We are of the view that the deductees in the instant case simply carried out a contractual work of up-linking and broadcasting programmes made or produced by the assessee in the electronic media by permitting the assessee to avail the benefit of requisite electronic set up against payment of a fee. It is purely contractual in nature and the assessee has the right to use the set up only so long as the contract subsists and the facilities offered by the deductees do not amount to providing 'technical services' and hence, the payments they received from the assessee cannot be termed as 'fees for technical services'. Therefore, Section 194J is not attracted.

19. In our considered opinion, it is Section 194C which would apply to the facts of case. The definition of 'work' under that Section is inclusive and specifically includes broadcasting and telecasting. The deductees do broadcasting and telecasting work for the assessee and therefore, Section 194C would apply to the facts of this case. The assessee rightly deducted tax at source at the rate prescribed in Section 194C of the Act and there is no short deduction. We find no infirmity in the order under appeal. The decision of the Hon'ble Supreme Court and the decisions of the other High Courts referred to above clearly support this view.

20. In any event, imposition of penalty on the assessee by the Assessing Officer is not defensible. The relevant tax records of the deductee companies were produced and the CIT found that the said companies have paid entirety of the tax payable after giving credit for the tax deducted at source. It is not

that because of the assessee making deductions under Section 194C, the Revenue has suffered any loss. In the case of ***Hindustan Coca Cola Beverages Pvt. Ltd. v. Commissioner of Income Tax, (2007) 293 ITR 226 (SC)***, the Hon'ble Supreme Court noted Circular no.275/201/95-IT (B) dated January 29, 1997, issued by the Central Board of Direct Taxes. The said circular declares that no payment visualized under Section 201(1) of the Income Tax Act should be enforced after the tax deductor has satisfied the Officer-in-Charge of TDS that taxes due have been paid by the deductee- assessee.

21. For the aforesaid reasons we find no ground to interfere with the order of the Learned Tribunal which is impugned before us. The appeal is accordingly dismissed without any order as to costs.

22. Urgent certified photocopy of this judgment and order, if applied for, be given to the parties upon compliance of necessary formalities.

I agree.

**(Thottathil B. Radhakrishnan, CJ.)**

**(Arijit Banerjee, J.)**