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14 January 2020

Payments towards up-linking, bandwith and broadcasting charges subject to TDS under section 194C

Payments on account of up-linking charges and broadcasting charges is purely contractual in nature and does not amount to providing technical services.

The Calcutta High Court held that payments made to multi-system operators on account of up-linking charges & down-linking charges, bandwidth and air-time charges is purely contractual in nature and does not amount to providing technical services, accordingly withholding tax under section 194C and not under section 194J of the Income tax Act, 1961 should be applicable.

Facts of the case:

Media World Wide Pvt. Ltd.[1] (taxpayer) is in the business of media broadcasting and telecasting. It had entered into an up-linking service agreement with Multi System Operators for up-linking, bandwidth services and air-time service charges. While making the payment, taxpayer deducted tax at source in accordance with Section 194C of the Income tax Act, 1961 (the Act) which deals with withholding tax on payment to contractor for carrying out any work. A survey was conducted in the office premises of the taxpayer and all document and records called for were provided by the taxpayer to the Assessing officer (AO). Subseqnetly the AO passed the order that the payments to Multi System Operators towards up-linking, bandwidth and air-time charges are covered by Section 194J of the Act since such payments were in nature of fees for professional and technical services and taxpayer was held responsible for short deduction of tax and so penalty was imposed under the Act.

An appeal was preferred by the tax payer before the CIT(A) wherein CIT(A) held that such services provided by multi-system operators were related to broadcasting and telecasting and specficially covered by the definition of 'work' in explanation (iv) to Section 194C of the Act.

Income-tax Department preferred second appeal before the Tribunal wherein Tribunal held that the case is covered in favour of taxpayer relying on the decision in M/s Sristi Television[2] wherein it has been held that tax on payments towards broadcasting to multi-system operators is deductible under Section 194C of the Act.

The Income-tax department challenged the Tribunal order to the High Court.

Decision of High Court:

The Calcutta High Court noted the following various provisions of the tax law:

- Explanation (iv) of Section 194C of the Act provides that 'work' shall include broadcasting and telecasting including production of programmes for such broadcasting and telecasting.
- Section 194J and 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

[1] [TS-7-HC-2020(CAL)] ITA no. 23 of 2015 (Calcutta HC)
[2] ITA Nos.1297/KOL/2012 & 276/KOL/2013

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or like project undertaken by the recipient or consideration which would be income of the recipient chargeable under the head 'salaries'.

The High Court agreed with the submission of learned senior counsel for the taxpayer 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.

Further High Court has discussed following judicial precedents:

- Bharti Cellular Ltd.[3] wherein it has been held that 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.
- ESTEL Communication (P) Ltd.[4] wherein it has been held that provision of section 9(1)(vii) does not apply to mere payment for internet bandwidth even if the use of internet facility may require sophisticated equipment as it does not mean that technical services were being rendered by the payee. It was a simple case of purchase of internet bandwidth by the assessee.
- Skycell Communications Ltd. & Ors.[5] wherein it has been held 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.
- DE Beers India Minerals (P) Ltd.[6] wherein it has been held that 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. Further it service should be that could derive an enduring benefit and utilize the knowledge and know-how on his own in future without the aid of the service provider.
- UTV Entertainment Television Ltd.[7] wherein it has been 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.
- Kotak Securities Ltd.[8] wherein the Supreme Court has been held that if it is only separate, exclusive or customized service rendered by human effort that would come within the ambit of the expression 'technical services'. 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.

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[3] (2009) 319 ITR 139
[4] (2009) 318 ITR 185
[5] (2001) 119 Tax Mann 496
[6] (2012) 21 Tax Mann 214
[7] (2017) 399 ITR 443
[8] (2016) 383 ITR 1

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The High Court has held that in the instant case payment towards up-linking and broadcasting programmes in electronic media is purely contractual in nature and taxpayer has right to avail the benefit only so long as the contract subsists. The said payments do not amount to providing 'technical services' and hence section 194J is not attracted. Further held that definition of work includes broadcasting and telecasting and therefore, Section 194C would apply to the facts of the case.

Additionally, the High Court held that imposition of penalty by the tax officer was not defensible as the relevant records of the tax deductee were produced and the Commissioner has observed that the deductee companies have paid the entire tax amount payable after claiming tax credit for the tax deducted at source. The High Court relied on the decision of Supreme court in the case of Hindustan Coca Cola Beverages Pvt. Ltd.[9] wherein it has been noted that Circular no.275/201/95-IT (B) dated January 29, 1997 declares that no payment visualized under Section 201(1) of the 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 companies.

Observation:

The High Court has elucidate the difference between standard facility provided and technical services rendered. Relying on judicial precedents, the Court has explained payments that could be covered as services for carrying out work under section 194C vis-à-vis services that could be fees for technical services covered under section 194J.

The High Court took into consideration that the service provider companies with which the taxpayer entered into agreements held licence from the Central Ministry pursuant to which they had created a platform for Up-linking and broadcasting of programmes in the electronic media. It was 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 the High Court's opinion, was provided by such service providers and the payments they receive cannot be termed as 'fee for technical services'.

The High Court also took into consideration that, '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.'

[9] (2007) 293 ITR 226 (SC)

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