

Payment for testing, trial operation and commissioning work would attract sec. 194C TDS and not sec. 194J TDS

Summary – The High Court of Punjab & Haryana in a recent case of Senior Manager (Finance), Bharat Heavy Electricals Ltd., (the Assessee) held that Contracts entered into by assessee-company with various contractors to execute work of erection, testing, commissioning and trial operation of power cycle piping, boiler and LP piping packages for various units in State, amounted to works contract requiring deduction of tax at source under section 194C

Facts

- The assessee-company entered into contracts with various contractors to execute work of erection, testing, commissioning and trial operation of power cycle piping, boiler and LP piping packages for units located in Haryana.
- The assessee made payments to contractors after deducting tax at source as per provisions of section 194C.
- The Assessing Officer took a view that provisions of the contract required 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. He thus opined that contractors were providing technical services to the assessee which attracted the provisions of section 194J. Accordingly, the Assessing Officer held the assessee to be an assessee in default under section 201(1A) for short deduction of tax at source.
- The Commissioner (Appeals), however, was of view that services of the contractors were required in connection with the works contract. Merely because technical personnel were employed in the execution of the contract, it did not follow that the contract was one for technical services. He thus decided the matter in favour of assessee.
- The Tribunal confirmed the findings of the Commissioner (Appeals).
- On revenue's appeal:

Held

- Before referring to various clauses in the contracts entered into between the assessee and the contractors relied upon by revenue in support of its 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 assessee 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 assessee, the contractor undertook to execute, construct and complete the works in conformity in all respect 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 assessee and within the period stipulated in the contract.
- A rate schedule is also given for the material and not for the supply of any technical services. There is a schedule for the deployment of manpower. Many of them 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 the assessee. 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.
- 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.
- 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 well founded.
- 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. 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 assessee. The input is not to enable the assessee to run the machinery on its own, but to enable the contractor to supply the requisite equipment.
- 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 assessee'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.

- The revenue 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 assessee 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 assessee.
- By clause 39.1, the assessee 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 assessee 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 another clause, the assessee 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 assessee's personnel. The contractor is also required by the clause to 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.
- 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.
- 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, was not for the professional or technical services rendered by the contractors to the assessee. Section 194J is, therefore, not applicable to the present case.
- In the result, revenue's appeal is dismissed.