आयकर अपीलीय अधिकरण, मुंबई "एफ " खंडपीठ

Income-tax Appellate Tribunal " F "Bench Mumbai

सर्वश्री राजेन्द्र, लेखा सदस्य एवं पवन सिंह, न्यायिक सदस्य

Before S/Sh. Rajendra,Accountant Member & Pawan Singh, Judicial Member

आयकर अपील सं./I.T.A./5951 & 52/Mum/2014,निर्धारण वर्ष /Assessment Year: 2011-12

Income tax Officer(TDS)(OSD)-1(2) Room No.812, K.G. Mittal Hospital Bldg., Charni Road Mumbai-400 002.	Vs.	**Fino Fintech Foundation**/M/s. Financial Inclusion Network & Operation Ltd.(**Now known as Fino Paytech Limited)** Tarun Bharat, Plot No.38/39, Sector No.30, Near Sanpada Railway Station, Navi Mumbai-400 075. **PAN:AABCF 1125 D/AAACF 9869 D**

(अपीलार्थी **/Appellant**) (प्रत्यर्थी / **Respondent**)

Revenue by: Shri K. Ravi Ramachandran-DR

Assessee by: None

सुनवाई की तारीख **/ Date of Hearing: 20.06.2016**

घोषणा की तारीख / **Date of Pronouncement: 22.06.2016**

आयकर अधिनियम,1961 की धारा 254(1)के अन्तर्गत आदेश

Order u/s.254(1)of the Income-tax Act,1961(Act)

लेखा सदस्य राजेन्द्र के अनुसार PER RAJENDRA, AM-

Challenging the orders,dated 14.07.2014 and 18.07.2014 of CIT(A)-14, Mumbai,the Assessing Officer (AO) has filed the present appeals raising various grounds.

ITA No.5951/M/2014:

2.Assessee company was providing Banking services in extreme rural areas where it is not economical for the Commercial banks/Scheduled banks to open their Branches.The company would provide the banking services through its network of agents,through whom the customers could do Banking business by use of device called "Point of Transaction Machine(POT)". The transactions of the beneficiary/customers are settled at the end of the day by connecting the POT to the Bank Server and the transactions of the beneficiary gets reflected in the beneficiary's bank account.On verification of the P&L account the AO found that the assessee had incurred major expenditure under the heads enrollment charges,AMC charges,POT usage charges and rent for POT machines. He called for details in that regard and observed that the assessee had considered the enrollment and AMC charges as contract,that the major payments were made to the sister concerns namely financial inclusion network and operations limited (Rs.26.98 crores). The assessee had not deducted any tax for the said payment,as Nil-deduction-certificate,u/s.197 of the Act was issued to it by the

deductee. He further found that the said certificate was issued for a sum of Rs.18 crores. He observed that the nature of the activities of the assessee were technical,that for such services the service provider must have provided technical/professional services,that the expenses incurred under the heads enrollment expenses and AMC charges were covered by the provisions of section 194J of the Act, that the assessee had claimed those expenditure as contract expenses and had deducted tax as per provisions of section 194C of the Act.Vide his show cause notice,dt.13.2.2013,he directed the assessee to explain as to why on enrollment expenses and AMC charges TDS u/s. 194J was not deducted and why it should not be considered that it had committed default u/s. 201(1) and 201(1A) of the Act.

3.After considering the submission of the assessee,he held that it was providing services for opening bank accounts to different banking institutions in rural areas,that for opening bank accounts it was taking help of its sister concerns and others,that the service-providers would mobilise technical manpower for opening the bank accounts, that they would prepare bio-metric and demographic particulars of the customers and put the same in bank network, that the services of capturing photos and finger-prints by web camera and scanner required highly technical skill and specified soft ware,that the procedure could not be performed by non technical person, that payment for such services would attract section 194 of the Act. He further held that the assessee had not deducted TDS on Rs.26.98 crores, that the deducteee had submitted nil deduction certificate (u/.197 of the Act,dt.17.6.2010), that the certificate was issued for Nil-deduction for payment/credit under contract for an amount of Rs.18 crores,that the assessee had not deducted tax for Rs.26.98 crores. Finally, he held that the assessee was in default u/s. 201/201A of the Act.The tax payable u/s.194J of the Act, along - with the interest u/s. 201(1A),was calculated at Rs.22.74 lakhs (short fall u/s. 201(1) Rs.64, 582/- and interest u/s. 201(1A) Rs.22.10 lakhs).

4.Aggrieved by the order of the AO the assessee preferred an appeal before the First Appellate Authority (FAA).Before her,it was argued that it had hired services of service provider as a contractor for doing the said composite work, that one of the service providers had obtained a certificate u/s.197 for non- deduction/short deduction of tax made by the assessee to it, that mere use of technology and /or technical equipments while providing the services, would not make it as a technical service, that payment made under the head enrollment expenses and AMC charges were in nature of contract, that the tax was rightly deducted u/s.194C of the Act, that the AO had not given the credit for lower deduction of tax

certificate obtained u/s. 197 of the Act. The FAA referred to the provisions of section 194J and relied upon the cases of Manmohan Das (59 ITR 699);Indian Medical Association (AIR 1996SC550);International Clearing and Shipping Agency(241ITR172)and Associated Cement Co.Ltd. (201 ITR 435).She held that in the case under consideration the services provided to the assessee were manual in nature,that there was no specific skill required to provide the services,that the services rendered by the parties to the assessee were not in the nature of fee for professional services, that the services rendered by the service providers were also not in the nature of managerial, technical or consultancy services, that mere use of technology would not make it technical services,that provision of section 194J were not applicable to the payments made to the parties,that in order to cover u/s. 194J it was necessary that there must either be acquisition or use of technical knowhow which was provided by a human element,that there was no acquisition of technical expertise/knowhow by the assessee,that the even the AO was not sure about the fact that whether the service provided was professional services or technical services, that the parties were contractors executing contracts for projects undertaken,that the provisions of section 194C were applicable.Finally,she deleted the demand raised by AO.

5.During the course of hearing before us the Departmental Representative (DR) relied upon the order of the AO and stated that preparing biometric and demographic particulars of banking customers was technical service,that provisions of section 194J of the Act was applicable. As stated earlier none appeared on behalf of the assessee.

6.We have perused the material before us.We find that the AO was of the opinion that TDS was to be made as per the provisions of section 194J of the Act and not as per the provisions of section 194C,that one of the service provider i.e.sister concern had supplied nil-tax-deduction certificate to the assessee,that the FAA held that service availed by the assessee were in the nature of a contract and that there was no acquisition of technical knowhow by the assessee.

6.1. We find that in the case of Delhi Transco Ltd.(380 ITR 398),the Hon'ble Delhi High Court has defined the word technical services while dealing with the section 194 J of the Act,in the following manner:

> *"Section 194J of the Income-tax Act, 1961, provides for deduction of tax at source from fees for technical services. Technical services consist of services of technical nature when special skills or knowledge relating to technical field are required for their provision, managerial services are rendered for performing management functions and consultancy services relate to provision of advice by someone having special qualification that allow him to do so. What*

constitutes technical services cannot be understood in a rigid formulaic manner. It will vary from industry to industry. There will have to be a specific line of enquiry for determining what in a particular industry would constitute rendering of a technical service."

Facts of the case were that the assessee had entered into a bulk power transmission agreement on 21.07.2004, with the Power Grid Corporation India Ltd. (PGCIL). In one of the preamble clauses of the agreement, it was recorded that the assessee was desirous of receiving energy through power grid transmission system on mutually agreed terms and conditions. Under clause 8 of the agreement, it was agreed that the transmission charges would be paid to PGCIL by the assessee for transmitting private sector power through PGCIL lines under the guidelines of the Central Electricity Regulatory Commission. Clause 10 stated that the transmission tariff and terms and conditions for the power to be transferred by PGCIL would be in terms of the notification to be issued by the Commission from time to time. On the commissioning of the new transmission system the assessee was to pay the provisional transmission tariff in line with the tariff norms issued by the Commission. The tariff was subject to adjustment in terms of the Commission notification. The wheeling of the transmission power was to be in terms of the Commission guidelines. The agreement came into force with effect from 01.04 2002, and was to remain valid for a period of five years, that is, up to 31.03. 2007. A survey was carried out in the business premises of the assessee under section 133A on 2201.2009. It was noticed that the assessee had deducted tax at source at 2% u/s. 194C of the Act on the wheeling charges paid to PGCIL. According to the AO, the value of these services could not be bifurcated from the total value paid by the assessee to PGCIL for transmission services in the name of wheeling charges. The transmission lines could not be of any use in isolation and without other associated services the transmission of electricity could not have been possible. Accordingly,he held that wheeling charges paid by the assessee were fees for technical services liable for tax deduction at source under section 194J . The Tribunal agreed with the assessee that what had been availed of by it from PGCIL was not a technical service.It was held that the assessee was not liable to be saddled with higher liability of tax deduction at source.Upholding the order of the Tribunal ,the Hon'ble Court held as under:

……that PGCIL was operating and maintaining its own system using the services of engineers and qualified technicians. PGCIL was in that process not providing technical services to others, including the assessee. A comparison could be made with the system of distribution of some other commodity like water. It might require the operation and maintenance of water pumping station and the maintenance of a network of pipes. However, what was conveyed through the pipes and the equipment to the ultimate consumer was water. The equipment and pipes have no doubt to be maintained by technical staff but that did not mean that a person to whom the water was distributed through using the pipes and equipment was availing of any technical service as such. Although the wheeling charges may be fixed by

the Commission, that by itself was not a determinative factor. Once it was accepted that all that PGCIL did was to transmit the electricity to the assessee through the network without any human intervention, it could not be characterised as a provision of technical services and sought to be brought within the fold of section 194J ."

We further find that in the case of Bharti Cellular Ltd.(319 ITR 139),the Hon'ble Delhi High Court has held that the expression "fees for technical services" in section 194J of the Income-tax Act, 1961,has the same meaning as given to the expression in Explanation 2 to section 9(1)(vii) of the Act.,that in the Explanation the expression "fees for technical services" means any consideration for rendering of any "managerial, technical or consultancy services",that the word "technical" is preceded by the word "managerial" and succeeded by the word "consultancy",that the expression "technical services" is in doubt and is unclear,that the rule of noscitur a sociis is clearly applicable,that it would mean that the word "technical" would take colour from the words "managerial" and "consultancy", between which it is sandwiched, that Both the words "managerial" and "consultancy" involve a human element,that both, managerial service and consultancy service, are provided by humans,that applying the rule of noscitur a sociis, the word "technical" in Explanation 2 to section 9(1)(vii) would also have to be construed as involving a human element.In that matter the AO was of the opinion that interconnect/port access charges were liable for tax deduction at source in view of the provisions of section 194J of the Act and that these charges were in the nature of fee for technical services.

If both the judgments are considered objectively, it becomes clear that the provisions of section 194J of the Act would be applicable only if any managerial, technical or consultancy services are provided to an assessee and that mere use of technology would not make any service managerial/technical or consultancy service.In the case under consideration use of technology is there,but,it does not mean that it was not a contract.Thea ssessee had rightly deducted TDS as per the provisions of section 194C of the Act.We do not find any legal or factual infirmity in the order of the FAA.So,confirming her order,we decide effective ground of appeal against the AO.

ITA 5952/M/2014

7.The assessee was engaged in activity of financial inclusion, providing enrollment services to different banking institutions.The AO found that the assessee had made payment to various parties after deducting tax u/s. 194C of the Act. The AO following his order in the case of Fino Fintech Foundation held that enrollment expenses fell within the definition of technical /professional fees as provided u/s. 194J of the Act. He held that the assessee was in default

u/s.201 of the Act.The total demand inclusive of interest u/s. 201(1A),was worked at Rs.1. 43crores.

8. The assessee preferred an appeal before the FAA and following her order in the case of Fino Fintech Foundation,she deleted the additions.

9.Before us, the Departmental Representative (DR) made the same submissions that were made in the case of Fino Fintech Foundation.

Following the order of that assessee effective ground in this case is also decided against the AO.

As a result, appeals filed by the AO stands dismissed.

फलतः निर्धारिती अधिकारी द्वारा दाखिल की गई अपीलें नामंजूर की जाती हैं

Order pronounced in the open court on 22nd June,2016.

आदेश की घोषणा खुले न्यायालय में दिनांक 22 जून, 2016 को की गई।

Sd/-	**Sd/-**
(पवन सिंह **/ Pawan Singh)**	**(राजेन्द्र / RAJENDRA)**
न्यायिक सदस्य **/ JUDICIAL MEMBER**	**लेखा सदस्य / ACCOUNTANT MEMBER**

मुंबई Mumbai; दिनांकDated : 22.06.2016.

Jv.Sr.PS.

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1.Appellant /अपीलार्थी **2.** Respondent /प्रत्यर्थी

3.The concerned CIT(A)/संबद्ध अपीलीय आयकर आयुक्त, **4.**The concerned CIT /संबद्ध आयकर आयुक्त

5.DR "G " Bench, ITAT, Mumbai /विभागीय प्रतिनिधि, खंडपीठ,आ.अधि.मुंबई

6.Guard File/गार्ड फाईल

सत्यापित प्रति //True Copy//

आदेशानुसार/ **BY ORDER,**

उप/सहायक पंजीकार **Dy./Asst. Registrar**

आयकर अपीलीय अधिकरण**,** मुंबई **/ITAT, Mumbai.**