INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA No. 798 & 799/Del/2013
(Assessment Year: 2009-10 and 2010-11)

DCIT TDS), 13A, Subhash Road, , Dehradun	Vs.	The Joint Secretary Organizing Committee for Winter Games, 2009, IHM Campur, Garhi Cantt, Dehradun PAN: AAAA01473G
(Appellant)		(Respondent)

ITA No. 626 & 627/Del/2013
(Assessment Year: 2009-10 and 2010-11)

The Joint Secretary Organizing Committee for Winter Games, 2009, IHM Campur, Garhi Cantt, Dehradun PAN: AAAA01473G	Vs.	ACIT, TDS, Dehradun
(Appellant)		(Respondent)

ITA No. 1576/Del/2015
(Assessment Year: 2010-11)

The Joint Secretary Organizing Committee for Winter Games, 2009, IHM Campur, Garhi Cantt, Dehradun PAN: AAAA01473G	Vs.	JCIT, TDS, Dehradun
(Appellant)		(Respondent)

Revenue by :	Shri Amit Jain, Sr. DR
Assessee by:	Shri Ashwani Taneja, Advocate Shri Somil Agarwal, Adv Shri Saurabh Goyal, CA
Date of Hearing	25/07/2018
Date of pronouncement	15/10/2018

O R D E R

PER PRASHANT MAHARISHI, A. M.

1. These are the five appeals pertaining to the same assessee. In four appeals for two assessment years preferred by assessee and revenue are concerning short deduction of tax u/s 201(1) and Interest u/s 201 (1A) of the Income Tax Act involving similar issues and one appeal preferred by assessee against confirmation of penalty u/s 271C of the act for AY 2010-11 . These appeals are argued issue wise by both the parties together and, hence, these are disposed of by this common order.

2. ITA No. 626 and 627/Del/2013 are filed by the assessee against the order of the ld Commissioner of Income Tax (CIT(A)) dated 03.11.2012 for Assessment Year 2009-10 and 2010-11 respectively , wherein, he has held that the assessee is required to deduct tax at source u/s 194C of the Act on payment made to different parties. The assessee contested before him that the

order passed by the ld Assistant Commissioner of Income tax (TDS) (ACIT(TDS)) , Dehradun passed u/s 201(1) read with section 201(1A) of the Act on 30.03.2011 is not sustainable. The ld AO has also filed appeals for two assessment years contesting the finding of the ld CIT (A) that the assessee is not required to deduct tax at source of payment made to foreign companies' u/s 195 but u/s 194C of the Act. The ld AO further aggrieved against the finding of the ld CIT (A) that the assessee is not required to deduct tax at source on payment to the State Trading Corporation of India Ltd u/s 194C as the contract was for supply of the equipment and not for work.

3. Briefly stated the facts are that the assessee is engaged in organizing SAF winter games, 2009(games) in Uttrakhand and is involved in development of infrastructure facilities such as stadiums, ice skating rink, development of Ice skiing slopes, ancillary sports facilities and other infrastructure for games. Survey u/s 133A of the Act was conducted on 31.01.2011 and it was noticed that assessee is required to deduct tax at sources on payment made to various parties, which has not been deducted. Summons u/s 131 of the Act was also issued to the Accounts Officer of the assessee. The ld AO noted that the assessee has

made a payment to foreign party in France/ Italy on which no tax is deducted u/s 195 of the act. The assessee has contested that payment was made for the purchase of equipments and therefore, no tax is required to be deducted. The ld AO rejected the contention of the assessee and on reading of the contract held that the payment is covered u/s 9(1)(vii) of the Act as fees for technical services. Hence, provision of section 195 of the Act applies and the assessee should have deducted tax at source of Rs. 297045/- @10.5575%. He further charged interest u/s 201(1A) of the Act.

4. Further, he noted that the assessee has made various payments to other parties and it was noted by him these parties are engaged in construction work for games and TDS u/s 194C of the Act should have been made on payments to them. Assessee explained that these are government departments and payments are made to these agencies in the form of grants based on utilization of funds. Hence, it was contended that no tax was required to deduct. The ld AO rejected the contention of the assessee holding that payments are made by the assessee for construction work of various infrastructure facilities. He further held that grants are not shown that it has been transferred

without any control etc. He further held that the payments made to various concerns are subject to TDS u/s 194C of the Act. He therefore, held that TDS @2% should have been deducted and worked out short deduction of Rs. 2806886/- and interest thereon of Rs. 1018645/-.

5. In the above payment, assessee has also made payment of Rs. 8.69 crores to State Trading Corporation India Ltd., for which assessee submitted that payment are for import of equipments along with installation and commissioning charges and no tax is required to be deducted thereon. AO also rejected this argument holding that assessee has imported material/ equipment from other through STC and it has acted as agent of the assessee and incurred various incidental expenses such as duty, clearance charges, freight and other expenses , which are covered u/s 194 C of the act.

6. Consequently, orders u/s 201(1) and 201(1A) of the Act were passed on 30.03.2011 for AY 2009-10. Identical are the facts for AY 2010-11.

7. Aggrieved assessee preferred appeal before the ld CIT (A) for both the years and the ld CIT (A) also passed orders in both the cases on the same date.

8. The ld CIT (A) with respect to the payment to foreign parties, he considered the submission of the assessee that along with the foreign companies and the Indian company a consortium was formed where the clear responsibilities were laid down. The foreign company was to supply the equipment for which separate invoices were raised therefore, according to the assessee it is payment for sale of goods, hence, contract for sale and not contract for work. The assessee further stated that consortium is an association of person and foreign party has merely sold goods to the assessee tax was not required to be deducted on that. In view of this, the ld CIT (A) held that as the payment is made to a consortium and the whole payment was to be made for the purpose of the work, tax is required to be deducted at source on the payment made but same is not covered by the provision of section 195 of the Act, but covered u/s 194C of the Act. He accordingly directed the ld AO to compute the shortfall. The revenue is aggrieved with this finding and has preferred appeal before us. The assessee, is also aggrieved with direction of the ld CIT (A) to compute TDS applying the provisions of section 194C of the Act hence, it is in appeal.

9. With respect to payment made to other public sector undertakings, assessee submitted that payments have been made in connection with various works relating to construction of the infrastructure works for the winter games and funds were provided to these entities as grant without calling for any tenders or certificate for utilization. It was further stated that these recipients got the work done by engaging the services of various contractors and deducted tax at source on the payment made by them to those contractors. It was further submitted that there was no contract entered into with these entities by the assessee and no bills have been raised by those parties on the assessee and it is merely a disbursement of grant, which does not constitute consideration for any work-defined u/s 194C of the Act. Ld CIT (A) rejected this contention of the assessee and held that assessee is required to deduct tax on the payment made to these entities as the payment is for the consideration for work actually done by these parties. He further held that the contractor engages the services of sub-contractor for getting work done and deduct tax on the payment made to sub-contractor, cannot absolve the original payee from tax deduction on payment made to contractor. He therefore, upheld the applicability of

provisions of section 194C of the Act. Assessee aggrieved has filed appeal before us.

10. The next issue was with respect to payment made to State Trading Corporation of India for supply of material. As the invoices raised by STC showed that the payment has been made for import of equipment along with incidental jobs including custom clearance, handling charges etc, AO held that on the whole payment tax is required to be deducted u/s 194C of the Act. Assessee submitted before the ld CIT (A) that STC has undertaken to import and supply the equipment as per the requirement of the assessee and the assessee has purchased the material on which no tax is required to be deducted, as it is a contract for sale of goods. The ld CIT (A) held that as the Assessing Officer himself held that tax was required to be deducted with reference to only incidental expenses but computed the TDS on the supply of material also. In view of this, he held that no tax is required to be deducted on this sum. The revenue aggrieved with this finding, has preferred appeal before us.

11. The ld Authorised Representative vehemently submitted that when the payments have been made to a foreign party for

purchase of the goods, no tax is required to be deducted. He further referred to the decision of Hon'ble Supreme Court in DIT Vs. Linde AG Linde Engineering Division 73 Taxmann.com 212 (SC) and submitted that per circular No. 7 of 2016 dated 07.03.2016, no tax is required to be deducted as the consortium fulfills the conditions as laid down in para 3 of that circular. In view of this, he submitted that the ld CIT (A) has wrongly held that tax is required to be deducted u/s 194C of the Act. In short his argument was that tax is not at all required to be deducted either u/s 195 or u/s 194C of the Act. He further relied on several decisions. He further stated that property in the equipment has passed outside India, which is evident from the fact that customs duty was paid by the assessee itself and assessee became owner of the goods prior to its shipment in India. Hence, no income arises to the recipient in India.

12. With respect to the payment made to other parties, he stated that assessee is merely a pass through entity that has been granted sum for organizing the South Asian Winter Games and it did not enter into any contract with the parties to whom payments have been made. He further stated that all the recipient of the sum has in turn given contracts to the various sub contractors and

they have already deducted tax at source on payments made by them to such sub contractors. He further vehemently relied on paper book page No. 34 which is a copy of letter dated 14.03.2011 and stated that payments were made as grant to these parties and those parties have sent their utilization certificate for the amount utilized during the financial year. These executing agencies raise no bills; no payments were also made according to works completed but it is advances. He further stated that only lump sum grant was issued for getting the work done and utilization received. He therefore, stated that liability of TDS does not arise in these cases.

13. He also submitted that all these concerned agencies have already included the above amount in their income and already paid taxes on these incomes. He therefore, stated that if in such a situation, if tax is recovered from the assessee, it would be an exercise in futility as on the one hand the assessee is required to pay the tax and on the other hand, the payee would be required to claim the refund. He vehemently relied upon the decision of the Hon'ble Supreme Court in Hindustan Coca Cola Beverages pvt. Ltd Vs. CIT 293 ITR 226 for this proposition. He further

relied upon his submissions made at page No. 1 to 15 of the paper book also.

14. The ld Departmental Representative (DR) vehemently supported the order of the ld AO and submitted that with respect to the payment to the foreign party stated to be made towards purchase of goods is in fact payment made to an Indian party which is an AOP for the complete work and not only for sale of goods, then payments made such consortium should have been subjected to TDS. AOP circular is for AO of AOP to decide how it is to be taxed; it has no relevance as far as the liability of assessee for TDS is concerned. With respect to the other payment, he submitted that assessee is the party who got the work executed and made the payment. Therefore, provisions of section 194C of the Act are clearly applicable to the facts of the case. He submitted that even if the recipients has deducted tax on the works contract executed by sub-contractors cannot absolve the assessee from its duty to deduct tax at source on payment made to them. He further stated that in case of STC the tax should have been deducted by the assessee on total sum including the payment for purchase of goods as STC has incurred several

expenditure on behalf of assessee, which amounts to carrying on of the work as per provisions of section 194C of the Act.

15. We have carefully considered the rival contentions and perused the orders of the lower authorities. The brief facts of the case are that assessee is a body registered under The Societies Registration Act set up for organizing the South Asian Winter Games 2009. It is implementing agency for the games. The ld AO has conducted survey u/s 133A of the Act and found that on several payments assessee has failed to deduct tax at source and therefore, the orders u/s 201(1) and 201(1A) of the Act were passed. Ld CIT (A) granted part relief. Various issues arising in the appeal are dealt with hereinafter.

16. On payment made to foreign companies, who are members of the consortium AOP who won the bid, the ld AO held that tax is required to be deducted u/s 195 of the Act and the ld CIT (A) held that these are the payment made to an AOP and therefore, tax is required to be deducted u/s 194C of the Act. The assessee has entered into a consortium agreement with two foreign companies and one Indian company for rendering services with respect to construction of water storage and installation of ski lift and comprehensive maintenance for three years. The assessee

has stated that the consortium has demarcated duties with respect to each of the parties. The foreign parties were only to supply various equipments and Indian party was to install those equipments. The assessee submitted the agreement of the consortium, which is placed at page No. 48 of the Paper book. According to the agreement, scope of the services by the various parties is described in Appendix A. On reading of the scope of services, it is apparent that Snow star SPA was to supply various equipments and the scope of services of Pomagamsky SA was to supply various equipments and warranty for equipments. The Indian party Spaceage Power Ltd was to install and perform the civil work. The payment was also specified separately as per clause 7 of the agreement. Each of the party was also responsible for the work carried out by them. The services are also specified in clause 1 of the agreement. The responsibility is also mentioned at page No 78 to 80 of their agreement. In such a contract, it was an issue whether the consortium constitutes and association of person i.e. a separate entity for charging of the tax or whether each of the members is liable on their individual share of the contract. This aspect has been clarified by the CBDT by issuing Circular No. 7/ 2016 dated 07.03.2016 wherein, para NO. 3 it

has laid down certain conditions and on fulfilling such conditions the consortium will not be treated as an AOP. In the present case all the members are independently responsible for executing their work. The foreign parties are required to supply the equipments only along with the warranty. Further, the payments have been made directly to those parties and naturally, each of them individually charged to tax on their profits or losses. It is apparent that the common management is only for administrative convenience. Assessee has also made payment directly to the foreign equipment suppliers. It is not shown to us that any of the conditions stated in that circular are not fulfilled. In view of this, we hold that assessee has made payment to the foreign parties independently, directly and it shall be chargeable to tax in their own hands. Now the issue arises is that whether payment made to them is subject to deduction of tax u/s 195 in the hands of those parties or not. The assessee has shown bills raised by those parties placed at page No. 99 to 100 of paper book. The custom duty has also been paid by the assessee. The bills have also been raised by those parties on the assessee itself. The payments are also made as advances through letter off credits. On looking at the various bills, it is found that goods

have been shipped by those parties from outside India. It is not shown by the revenue that title of the goods has passed in India. Contrary to that, it is consistently claimed by the assessee that title in the goods has passed outside India. Further though ld AO has held that tax is required to be deducted t sources on such payments but it is not shown that how the income of foreign parties who supplied equipments are chargeable to tax in India. In view of this, it is apparent that title in the goods have passed from the suppliers to the assessee outside India at the port of shipment. In view of this, it is not controverted that no income has accrued to those parties in India in terms of provisions of section 5 and section 9 of the Act, therefore, provisions of section 195 does not apply to these payments. In view of this, we hold that assessee was not required to deduct Tax at source either u/s 194C or section 195 of the Act on payments made to Snowstar SPA Italy and Pomagalsky SA. In view of this ground No. 1 to 3 of the appeal of the assessee are allowed.

17. Coming to the issue of various payments made by the assessee to various parties which are public sector undertaking such as

i. Uttranchal Jal Sansthan,

ii. Uttranchal Power Corporation Ltd,

iii. Uttar Pradesh Nirman Nigam Ltd,

iv. Winter Gems Federation of India,

v. Gharwal Mandal Vikash Nigam Ltd.

The assessee has made these payments as an advance to the parties for carrying out various works with respect to the Winter games 2009. These payments are required to be tested u/s 194C of the Act and whether tax is required to be deducted at source on such payments. According to the provisions of section 194C of the Act, tax is required to be deducted under following circumstances:-

i. Tax is required to be deducted by the person who is responsible for payment to any resident.

ii. Such payment has to be for the sum for carrying out any work as defined under explanation (iv) of the Act.

iii. The payment has to be in pursuance with the contract between the contractor and specified person. Specified person has been defined under explanation (i) of the section.

iv. The tax is required to be deducted at the earliest point of time of credit to the account of contractor or the payment.

v. The provisions specify the prescribed percentage of tax deduction.

vi. It is deduction of tax on gross sums paid unless otherwise specified u/s 194C (3) of the act.

18. On plain reading of the above section it is clear that assessee is a specified person covered under explanation (i)(g) being a society registered under the Societies Registration Act 1860. Therefore, the liability for deduction of tax rests on the assessee.

19. Further, all the parties to whom payment have been made are residents and therefore, they are the recipients and receipts by them is subject to deduction of tax at source.

20. The assessee has made payment to all the parties, to some of them as advance and to some of them on various letters issued by the assessee. Therefore, the fact of the payment is also proved.

21. The payment to the various parties has been made on account of carrying on of certain work by them. The assessee is also specifically form for the object of preparation for and holding the South Asian Federation Winter Games in February 2009 allotted to Indian Olympic Association. The functions of the assessee are

to collect funds through grants for furtherance of the aims and objectives of the society. Assessee has stated that grants are received by the assessee and in turn, it are disbursed to the various recipients who were appointed as executing agencies to get the work done through contractors. Further, those agencies have also submitted their utilization certificate for the amount utilized by them. Based on the above fact it is apparent that assessee is an implementing agency on behalf of Indian Olympic Association for preparation of these games. No doubt, the assessee has received the funds as sponsorship and grants but the responsibility is on the assessee to execute the entire infrastructure for the games. Though the contractor may be identified and engaged by the other organization, however, the implementation and utilization is the sole responsibility of the assessee. Otherwise, there is no other reason for the formation of the above society. The society itself was registered on 06.02.2008. Further, the payments to above companies/ PSu have been made by the assessee. Therefore, it is clear that assessee is the person responsible for payments of sums to those PSUs. In view of this it is apparent that the contract is between the recipient of the income and the assessee. Hence, according to

us the assessee is responsible for TDS u/s 194C of the act on payment made to these parties.

22. Merely because the assessee is provided grant for onward distribution to these parties does not exclude the assessee from the liability for deduction of tax at source u/s 194 C of the act, as the assessee is responsible for making payments to these parties and in fact, undeniably assessee has made the payments and obtained utilization certificates.

23. Furthermore, it cannot be a reason for non-deduction of tax at source that recipient of the income have onward distributed the work to the sub contractors and recipient of the income have in turn deducted the tax at source on payment made by them to those sub- contractors. According to the provision of 194C of the Act even, the contractor is also required to deduct tax at source on payment made to their sub contractors.

24. In view of this we hold that payment made to the above parties are subject to tax deduction at source u/s 194C of the Act and assessee is liable to deduct tax at source u/s 194C of the Act. Therefore, to this extent we uphold the order of lower authorities.

25. Next clinching, alternative argument made by the assessee is that all the recipient of the income has already confirmed that they have received the grant. Such certificates are placed in the paper book from page No. 126 to 179 of the paper book. We have perused the same. The argument of the assessee is that if tax is recovered from the assessee it becomes refundable in the hands of the recipient. To mitigate such an impact the proviso has been added u/s 201 of the Act w.e.f. 01.07.2012 which provides that any person who fails to deduct tax in accordance with chapter XVII of the Act, shall not be deemed to be an 'assessee in default' on fulfillment of certain condition. The above amendment is on similar line as argued by the appellant. Though the above amendment has come in to effect from /7/2012 but Honourable Delhi high court has held in Ansal Landmark Townships Limited in 161 /2015 held that

> *"11. The first proviso to Section 210 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished*

his return of income under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfillment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner."

Therefore respectfully following the decision of Honourable Delhi High court we set aside the order u/s 201 of the Act with a direction that assessee may submit the requisite prescribed detail in specified manner before the ld Assessing Officer and then ld AO may decide the issue and, if found in accordance with the law, shall not treat the assessee in default u/s 201 of the Act. With respect to the interest u/s 201(1A) of the Act similar proviso is also added and AO may work out, based on the details furnished by the assessee, appropriate interest in accordance with law. In view of this ground No. 4 and 5 of the appeal is allowed accordingly.

26. With respect to the payment of the State Trading corporation (STC), it is apparent that the equipment have been purchased by

the assessee as identified by it through STC. The STC has incurred certain expenditure with respect to import of those goods. The assessee has placed correspondence at page No. 122 and 123 of the paper book. According to that correspondence, the state trading corporation has facilitated import of certain equipment for the assessee and for clearance of the equipment has incurred certain expenditure. The ld CIT (A) has held that no tax is required to be deducted on the above sum. On careful consideration of the orders of the lower authorities, the STC had undertaken to import and supply the equipment as per the requirement of the assessee. For the purpose of import of these goods, the STC incurred certain expenditure such as installation commissioning charges, handling charges, insurance, and other payments. In this case, it is not the claim of the assessee that STC has supplied the goods. In fact, STC has arranged for the import of the goods as per requirement of the assessee. In view of this, it is apparent that assessee has given work to the STC for import of the material. Hence, according to us it is apparent that such payment falls under the provisions of section 194C(3) of the Act and tax is required to be deducted on the basis of the invoice value stated therein. The invoices are not place before us. Hence,

we set aside this matter back to the file of the ld Assessing Officer with a direction to assessee to produce the bills of STC etc before ld AO who will examine them. If the invoice value shows the value of the material separately then assessee is required to deduct tax at source only on the invoice value excluding the value of material. Findings given by us with respect to the payment to the PSU with respect to Proviso to section 201 shall also apply mutatis mutandis to this payment also. Accordingly, the ground no. 2 of the appeal of the revenue is set aside to the file of the ld AO.

27. In the result the appeal of the assessee and the revenue for AY 2009-10 and 2010-11 on the issue of demands raised on the assessee by order u/s 201(1) and 201(1A) of the Act for both the years are disposed off with above direction.

28. Now we come to the appeal of the assessee against the order of the CIT(A), Dehradun dated 24.12.2014 passed for AY 2010-11 wherein, the penalty u/s 271C of the Act of Rs. 1152461/- levied by the JCIT, TDS, Dehradun vide order dated 25.03.2013 is confirmed.

29. The assessee submits that it has a bonafide belief that payment made is not subject to TDS with respect to the PSU and STC. It

was stated that there was a reasonable cause for non-deduction of tax at source. Hence, no penalty can be levied.

30. The ld DR supported the orders of the lower authorities.

31. We have carefully considered the rival contentions and perused the orders of the lower authorities. On looking to the facts of the case as discussed by us in appeal of the assessee and revenue in 201(1) and 201(1A) proceedings above, we find that the belief of the assessee is bonafide and failure to deduct tax at source u/s 194C of the Act is for a reasonable cause. The ld Assessing Officer could not show any contemptuous conduct on part of the assessee for non-deduction of tax at source. There could also not be any reason for non-deduction as assessee has made most of the payments to the public sector undertaking. The Hon'ble Supreme Court in the case of CIT Vs. Bank of Nova Scotia in 380 ITR 550 has approved the decision of the Hon'ble Delhi High Court wherein, it has been held that it is necessary to establish 'contumacious conduct' on the part of the assessee for failure to deduct tax at source for levy of penalty u/s 271C of the act. In the present case, all the recipients have also furnished a certificate that they have received the payment. In view of this, we reverse the order of the ld CIT (A) confirming the levy of the

penalty of Rs. 1152461/- u/s 271C of the Act in absence of any finding to show contumacious conduct on the part of the assessee. Ld OA id directed to delete the penalty-levied u/s 271C of the act. Accordingly, appeal of the assessee in ITA No. 1576/Del/2015 for AY 2010-11 is allowed.

32. Accordingly, ITA No. 626 and 627/Del/2013 filed by the assessee are partly allowed and ITA No. 798 and 799/Del/2013 filed by the AO are partly allowed. ITA No. 1576/Del/2015 for AY 2010-11 filed by the assessee is allowed. Hence, all five appeals are disposed off.

Order pronounced in the open court on 15/10/2018.

Sd/-	Sd/-
(AMIT SHUKLA) JUDICIAL MEMBER	(PRASHANT MAHARISHI) ACCOUNTANT MEMBER

Dated:15/10/2018
A K Keot

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1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi

Date of dictation	
Date on which the typed draft is placed before the dictating member	
Date on which the typed draft is placed before the other member	
Date on which the approved draft comes to the Sr. PS/ PS	
Date on which the fair order is placed before the dictating member for pronouncement	
Date on which the fair order comes back to the Sr. PS/ PS	
Date on which the final order is uploaded on the website of ITAT	
date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the order	