

**IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH
MUMBAI**

**BEFORE: SHRI ABY T VARKEY, JUDICIAL MEMBER
&
SHRI M.BALAGANESH, ACCOUNTANT MEMBER**

**ITA No.294/Mum/2022
(Assessment Year :2017-18)**

M/s. Cowtown Software Design Pvt. Ltd., (Formerly known as Nabhiraja Software Design Pvt.Ltd.,) 412, Floor-4, 17G Vardhaman Chamber Cawasji Patel Road Horniman Circle, Fort Mumbai – 400 001	Vs.	DCIT (TDS)-2(3), Mumbai Room No.718, Smt. K.G. Mittal Ayurvedic Hospital Building, Charni Road (W) Mumbai – 400 002
PAN/GIR No.AAECM6246R		
(Appellant)	..	(Respondent)

Assessee by	Shri Niraj Sheth
Revenue by	Shri Aditya Rai
Date of Hearing	15/07/2022
Date of Pronouncement	22/07/2022

आदेश / ORDER

PER M. BALAGANESH (A.M):

This appeal in ITA No.294/Mum/2022 for A.Y.2017-18 arises out of the order by the Id. Commissioner of Income Tax (Appeals)-49, Mumbai in appeal No.CIT(A)-59, Mumbai/10270/2018-19 dated 20/12/2021 (Id. CIT(A) in short) against the order of assessment passed u/s.201/201(1A) of the Income Tax Act, 1961 (hereinafter referred to as Act).

2. The only issue to be decided in this appeal is as to whether the Id. CIT(A) was justified in upholding the action of the Id. AO by considering the total transactions entered into by the assessee with Social Kinnect by construing it to be in the nature of professional services u/s.194J of the Act.

3. We have heard rival submissions and perused the materials available on record. The assessee is in the business of providing shared services to group companies which includes man power services and infrastructure services. Survey u/s.133A(2A) of the Act was conducted on 04/10/2018. During the course of survey, it was found that assessee had made certain payments to certain parties which were not in compliance with provisions of Chapter XVIIB of the Act. The survey revealed that certain payments made by the assessee were not subjected to deduction of tax at source or tax was deducted at a lesser rate, as the case may be. Accordingly, an order u/s.201/201(1A) was sought to be passed in the hands of the assessee treating the assessee as "assessee in default" u/s.201 of the Act by raising TDS demand and charging interest thereon u/s.201(1A) of the Act on the assessee.

3.1. The issue in dispute before us is with respect to payments made by the assessee company to Social Kinnect. We find that assessee company had entered into an agreement with Social Kinnect (vendor) whereby vendor would act as digital media agency for the assessee company. The said agreement envisaged provision of various services by Social Kinnect to the assessee such as e-mail services, web management, online media buying and management fees. During the year under consideration, the assessee had received single invoice specifying respective services provided by Social Kinnect. The sample invoices copies were duly

produced by the assessee before the Id. AO. The various services rendered by Social Kinnect to the assessee company and the rate at which tax has been deducted at source by the assessee company are detailed hereunder:-

- *“Email service - This is a marketing fees wherein the vendor sends email to the identified prospective customers at the time of launch of new project. This is contractual work attracting TDS @2% u/s 194C of the Act*
- *Web management - this is the facility in which the vendor is given a content to type on the web domain of the company as and when there is some update in the project details of the group. This is basically income in the hands of social kinnect of professional in nature wherein TDS is withheld and deposited @ 10% u/s 194J of the Act.*
- *Online media buying/influencer charges - This is the element of invoice which refers to the actual cost incurred by the vendor in buying the online space for advertisement. This is in relation to advertisement attracting TDS @2% u/s 194C of the Act.*
- *Management fees This is the component of the invoice in which social kinnect charges its fees at a specified percentages over the online media buying / influencer charges. This is basically income in the hands of social kinnect of professional in nature wherein TDS is withheld and deposited @ 10% u/s 194J of the Act.*

3.2. From the above details, it could be noticed that in respect of web management and management fees, the assessee has deducted tax at source @10% u/s.194J of the Act and for e-mail services and online media buying, influencer charges, the assessee had deducted tax at source @2% u/s.194C of the Act. The Id. AO observed that the entire payments would fall only within the ambit of professional services u/s.194J of the Act and accordingly, the assessee ought to have deducted tax at source @10%. Since assessee has deducted lesser

rate of tax by applying Section 194C of the Act as against Section 194J of the Act, the Id. AO for the difference of 8% treated the assessee as "assessee in default" by raising TDS demand thereon and levied interest thereon u/s.201(A) of the Act. This action of the Id. AO was upheld by the Id. CIT(A).

3.3. It is not in dispute that assessee made payment to Ad agency i.e. Social Kinnect. We find from the perusal of the agreement with Social Kinnect and scope of services defined therein, Social Kinnect would engage various professional artists for preparation and execution of the advertisement content and Social Kinnect would provide ultimate advertisement content on behalf of the assessee in digital platform. We find that there is no direct connection or direct agreement between assessee company and the professional artists who had assisted in advertisement content. The agreement with professional artists are only with the advertisement agency i.e. Social Kinnect and not the assessee. Hence, Social Kinnect while making payments to those professional artists, would be liable for TDS @10% u/s.194J of the Act as those professional artists are rendering professional services to Social Kinnect. The assessee had merely taken the services only from Social Kinnect. It is not the look out of the assessee to understand the source from where the Social Kinnect obtains its professional services. Once the advertisement content is provided by Social Kinnect in a digital platform, the assessee is bound to make payments to Social Kinnect for that advertisement content. This would constitute the payment made for carrying out any "work" falling within the ambit of provisions of Section 194C of the Act only. We find from the sample bills issued by Social Kinnect to the assessee, Social Kinnect had raised in its invoice two components of its charges - (i)

Seeking reimbursement of professional charges paid by it to various artists with mark up and (ii) its service charges. The assessee had in fact deducted tax @10% on the service charges component charged by Social Kinnect. In our considered opinion, even this payment would be liable for tax u/s.194C of the Act as admittedly Social Kinnect is not rendering any professional services to the assessee as detailed supra. The assessee had deducted excess TDS in the instant case in respect of this service charges paid to Social Kinnect. In respect of reimbursement sought by Social Kinnect with mark-up, the same is payable only pursuant to a contract of work entered into by the assessee with Social Kinnect which falls within the ambit of Section 194C of the Act and not u/s.194J of the Act. In this regard, the CBDT Circular No.714 dated 03/08/1995 would be relevant which is reproduced hereunder for the sake of convenience:-

**CIRCULAR NO.714,
CLARIFICATION REGARDING APPLICABILITY OF SECTION
194C/194J IN CASE OF ADVERTISING AGENCY
CIRCULAR NO.714, DATED 3-8-1995**

1. Finance Act, 1995 has amended section 194C dealing with tax deduction at source for carrying out any work by introducing Explanation III therein. By this Explanation, the expression "work" has been defined, inter alia, to also include—

(a) advertising;

(b) broadcasting and telecasting including production of programmes for such broadcasting and telecasting.

According to the amended provisions, tax is to be deducted at the rate of 1 per cent in cases of advertising and at the rate of 2 per cent in the other cases, of the sum as income-tax on income comprised therein.

2. The Act has also introduced section 194J and this section deals with deduction of tax at source from 'fees for professional or technical services'. This section prescribes deduction of tax at source at a rate of 5 per cent of the sum as income-tax on income comprised therein. The term "Professional Services" has been defined in the Explanation to this section to mean services rendered by a person in the course of carrying on legal, medical, engineering or the profession of accountancy or technical consultancy or

interior decoration or advertising or such activity as is notified by the Board for the purpose of section 44AA or of this section.

3. Representations have been received regarding the scope and meaning of the term "advertising" used in section 194C(1), where tax deduction at source has to be made at the rate of 1 per cent as against rate of 2 per cent in the other cases. It is clarified that advertising may be in print or electronic media, i.e., in newspapers, periodicals, radio, television, etc. In such cases the tax will be deducted at the rate of 1 per cent of the payment made for advertising including production of programmes for such broadcasting and telecasting to be used in such advertising. In all other cases of work of broadcasting and telecasting including production of programmes for such broadcasting and telecasting, where advertising is not involved, tax will be deducted at the rate of 2 per cent of the sum.

4. It is also clarified that the tax will be deducted at source under section 194J from payments made for professional services. Thus, when an advertising agency makes payments for professional services to a film artiste such as an actor, a cameraman, a director, etc., tax will be deducted at the rate of 5 per cent."

(Emphasis applied by us)

3.4. Further the CBDT vide Circular No.715 dated 08/08/1995 had also categorically clarified by giving reply to Question No.3 posed thereon which is reproduced hereunder:-

**CIRCULAR NO.715,
CLARIFICATIONS ON VARIOUS PROVISIONS RELATING TO TAX
DEDUCTION AT SOURCE REGARDING CHANGES INTRODUCED
THROUGH FINANCE ACT, 1995
CIRCULAR NO.715, DATED 8-8-1995**

The Finance Act, 1995, has enlarged the scope of income-tax deduction at source by making various amendments. In regard to the changes introduced through the Finance Act, 1995, a number of queries have been received from the various associations and professional bodies on the scope of tax deduction at source. It would be desirable to clarify the doubts by issuing a public circular in the form of question answers as under :

Question 1 : What would be the scope of an advertising contract for the purpose of section 194C of the Act ?

Answer : The term 'advertising' has not been defined in the Act. During the course of the consideration of the Finance Bill, 1995, the Finance Minister clarified on the Floor of the House that the amended provisions of tax deduction at source would apply when a client makes payment to an advertising agency and not when advertising agency makes payment to the

media, which includes both print and electronic media. The deduction is required to be made at the rate of 1 per cent. It was further clarified that when an advertising agency makes payments to their models, artists, photographers, etc., the tax shall be deducted at the rate of 5 per cent as applicable to fees for professional and technical services under section 194J of the Act.

Question 2 : Whether the advertising agency would deduct tax at source out of payments made to the media ?

Answer : No. The position has been clarified in the answer to question No. 1 above.

Question 3 : At what rate is tax to be deducted if the advertising agencies give a consolidated bill including charges for art work and other related jobs as well as payments made by them to media ?

Answer : The deduction will have to be made under section 194C at the rate of 1 per cent. The advertising agencies shall have to deduct tax at source at the rate of 5 per cent under section 194J while making payments to artists, actors, models, etc. If payments are made for production of programmes for the purpose of broadcasting and telecasting, these payments will be subjected to TDS @ 2 per cent. Even if the production of such programmes is for the purpose of preparing advertisement material, not for immediate advertising, the payment will be subject to TDS at the rate of 2 per cent.

(emphasis supplied by us)

3.5. Further we find the case of the assessee is also covered by the Co-ordinate Bench decision of Delhi Tribunal in the case of Perfect Probuild P. Ltd., vs. DCIT in ITA No.1034/Del/2018 for A.Y.2011-12 dated 05/08/2021. The facts before the Delhi Tribunal which are relevant for the dispute before us are as under:-

“6. Similarly, in respect of advertisement expense, learned Assessing Officer was of the opinion that the TDS was to be deducted at 10% u/s. 194J, but not at 2% u/s. 194C, inasmuch as there was no contract for providing advertisement services. On that account, he raised a demand of Rs.9,47,429/- u/s. 201(1) and interest at Rs. 5,08,213/- u/s. 201(1A) of [the Act](#), put together at Rs.14,55,642/- for short deduction of TDS on payment of advertisement expenses.”

3.6. The finding given by the Delhi Tribunal are as under:-

“11. Now coming to the advertisement expenses, a reading of [section 194C](#) with Explanation (iv) thereof makes it clear that any person responsible for paying any sum to any resident for carrying out the work of advertising, broadcasting and telecasting shall deduct an amount equivalent to 1% where the payment is being made to an individual and at 2% in other cases. Learned Assessing Officer was of the view that the provisions of [section 194J](#) are applicable because there is no contract between the assessee and the advertising agency in this case and therefore, such payments have to be treated as payments by way of fee for professional services.

12. It could be seen that the word "advertising" has been clarified by CBDT in Circular No. 714 dated 03/08/1995 while stating that according to the amended provisions, tax has to be deducted @ 1% in case of advertising and at 2% in other cases. It is further stated in Circular No. 714 that fee for professional or technical services to be formed u/s. 194J would mean the services rendered by a person in the course of carrying on legal, medical, engineering or the profession of accountancy or technical consultancy or interior decoration or advertising or such activity as is notified by the Board for the purpose of [section 44AA](#) or [section 194J](#). This circular makes it clear that the tax will be deducted at source u/s. 194J from the payments made for professional services, when advertising agency makes payment for professional services to a film artist such as an actor, a cameraman, a director etc., in which case the tax will be deducted at 5%.

13. Further Circular No. 4 clarifies the distinction between the payments by a person to the advertising agency and the payments made by advertising agency to the television channel or newspaper company etc. A reading of Circular No. 714 and 4 makes it amply clear that when a person makes a payment to advertising agency, such payments are covered by [section 194C](#) whereas if the advertising agency makes any payment to a film artist such as an actor, a cameraman, a director etc., it would be covered by [section 194J](#). This distinction is based on the fact that when the advertising agency makes such payments to a film artist, the intellectual property in the contents will be acquired by the advertising agency and the services secured are only broadcast and telecast and nothing more.

14. Further, a contract need not always be in writing and could be implied also. In the circumstances, we find that the payment made by the assessee for advertisement in connection with their business falls within the ambit of [section 194C](#) and not [section 194J](#). Ground Nos. 2 & 4 are, accordingly, allowed. Learned Assessing Officer is directed to delete the addition.”

3.7. In view of the aforesaid observations and respectfully following the CBDT Circulars and judicial precedents relied upon hereinabove, we hold that the entire payments made by the assessee to Social Kinnect would fall only within the ambit of provisions of Section 194C of the Act and not u/s.194J of the Act. Accordingly, the ground raised by the assessee is allowed.

4. In the result, appeal of the assessee is allowed.

Order pronounced on 22/07/2022 by way of proper mentioning in the notice board.

Sd/-
(ABY T VARKEY)
JUDICIAL MEMBER

Sd/-
(M.BALAGANESH)
ACCOUNTANT MEMBER

Mumbai; Dated 22/07/2022
KARUNA, sr.ps

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Sr. Private Secretary / Asstt. Registrar)
ITAT, Mumbai