

IN THE INCOME TAX APPELLATE TRIBUNAL GAUHATI BENCH
VIRTUAL HEARING AT KOLKATA

BEFORE SHRI RAJPAL YADAV, VICE PRESIDENT
AND SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA Nos.159 & 160/GTY/2020
Assessment Years: 2018-19 & 2019-20

Ramky ECI JV, C/o, Mohd Afzal, Advocate #402, Sherson's Residency, 11-5- 465, Criminal Court Road, Red Hills, Hyderabad- 04. (PAN: AACAR6483R)	Vs.	Income Tax Officer, TDS-1, Guwahati.
(Appellant)		(Respondent)

Present for:

Appellant by : Md. Afjal, Advocate

Respondent by : I. Gyaneshori Devi, JCIT

Date of Hearing : 18.07.2023 Date of
Pronouncement : 31.08.2023

ORDER

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

Both these appeals filed by the assessee are against the separate orders of Ld. CIT(A), Guwahati-1, Guwahati dated 14.02.2020 against the order of ITO, TDS-1, Guwahati u/s. 201(1) r.w.s. 201(1A) of the Income-tax Act, 1961 (hereinafter referred to as the "Act"), dated 26.02.2019 and 27.02.2019 for AYs 2018-19 and 2019-20. Since facts are identical and grounds are common except variance in amount, we dispose of both these appeals by this consolidated order for the sake of convenience.

2. The issue involved in the present two appeals is that whether assessee who is a Joint Venture is required to deduct

tax u/s. 194C from the payments made to one of its constituents for execution of work awarded to it and further, whether payments made to another constituent as compensation, constitutes payment in the nature of commission to be covered u/s. 194H of the Act. Assessee has taken six grounds of appeal on the aforesaid issues in AY 2018-19 and five grounds in AY 2019-20 wherein a demand of Rs.20,08,126/- is raised for AY 2018-19 u/s. 201(1)/201(1A) and Rs.1,48,00,974/- for AY 2019-20. The grounds are not reproduced for the sake of brevity.

3. Brief facts of the case are that assessee Joint Venture (JV) was formed by RAMKY Infrastructure Ltd. (hereinafter referred to as 'RAMKY' and ECI Engineering & Construction Ltd. (hereinafter referred to as "ECI") in the name of RAMKY-ECI

(JV). National Highways & Infrastructure Development Corporation Ltd. (NHIDCL) awarded the work of execution of development of road project at Kohima, Nagaland, assessee being the successful bidder. Assessee JV entrusted the execution of the said work to ECI who had to execute and complete the work as per the provisions of the contract agreement entered into between the assessee JV and NHIDCL.

3.1. For this purpose an internal agreement was entered into between the two JV partners i.e. RAMKY and ECI, dated 19.01.2015. This internal agreement laid down the terms and conditions for the execution of work and the understanding between the two JV partners for the work awarded by NHIDCL. Clause (2) of this internal agreement dealt with nature of work and consideration. The same is extracted below:

"2. Nature of Work and Consideration

If RAMKY-ECI(JV) is successful bidder and awarded the Work by the Client, RAMKY - ECI (JV) shall entrust the execution of the said Works to ECI Engineering & Construction Co. Limited and ECI shall execute and complete the work in accordance with the provisions of the Contract Agreement to be entered into between RAMKY- ECI (JV) and Client, and also as per instructions issued by the Client from time to time in accordance with the said Contract Agreement. All the taxes levied on RAMKY – ECI (JV) and commission if any, and all other expenses involved or incidental to the Work should be paid, borne and/or reimbursed by ECI.

ECI shall execute all (100%) the items of work as detailed in the drawings, specifications and other information furnished in the Contract Agreement, including extra Items, deviations and

substitutions of the work i.e., at the same consideration and terms and conditions as applicable between RAMKY - ECI (JV) and the Client subject to the overhead Fee (as stated below) due to RAMKY:

Parties agree that subject to mutual agreement between parties, RAMKY will deploy Project Management Team (PMT) to handle official correspondence. Parties expressly agree that size of such team shall be mutually decided, keeping overall Interest of the Project. The cost of PMT which shall be the actual cost, incurred by RAMKY and the same shall be borne by the ECI till the completion and closure of the work and RAMKY - ECI (JV) is relieved of all obligations under the contract agreement by the CLIENT. Cost of PMT is recovered from the bills of ECI on monthly basis or on the earliest possible occasion.

All the Payment/advance received through client will be deposited in to a separate escrows account which is to be opened in Hyderabad in the name of RAMKY-ECI (JV) irrevocable Escrow instructions shall be given to the Banker concerned such that from every receipt into the escrow account, an amount equivalent to 2.25% of the corresponding gross bill amount received from the Client (excluding all taxes) shall be paid to RAMKY's account towards its commission and remaining payment shall be transferred to ECI account irrespective of profit/loss. In case JV is successful in tender process, operation modality and escrow mechanism shall be finalized between both the parties.

Roles and responsibilities of each Party in summarization shall be as follows:

Name of the Party	Responsibility
ECRAMKY 51% Equity	RAMKY will be the lead member or the Consortium and provide advisory & Management support
	including technical support to the consortium and shall be responsible for sharing its experience, related to the Project Management and provide recommendations to the Consortium.
ECI 49% Equity	ECI will be the member of the Consortium and have overall responsibility for implementing the project including liaising with the CLIENT and other regulatory bodies and shall be responsible for the supply of equipment, construction of road work, civil works, etc which from part of the Project.

3.2. According to this agreement, ECI shall execute 100% work as detailed in the drawing specification and other information furnished in the contract agreement. RAMKY will be compensated by an amount of equivalent to 2.25% of the corresponding gross bills received from NHIDCL.

Payments/advances received from NHIDCL will be deposited in a separate escrow account in the name of RAMKY-ECI (JV) with irrevocable escrow instruction given to the banker that from every receipt into the said bank account, an amount equivalent to 2.25% of the corresponding bill amount shall be paid to the RAMKY's account, towards compensation. Remaining payment shall be transferred to ECI's account irrespective of profit/loss. ECI agreed through this internal agreement to observe, perform and comply with the provisions of the contract agreement which shall employ the required technical and administrative personnel and labour force as well as all other adequate resources for completing the work according to the terms and conditions of the contract agreement with NHIDCL. ECI shall also provide security, performance guarantee, bank guaranty against machinery and mobilisation advance as required by NHIDCL and shall bear the expenses to be incurred in obtaining such guarantees. All the expenses incurred in obtaining such guarantees shall be borne by the ECI.

3.3. ECI shall get necessary registration done and shall secure approvals required by relevant authorities on behalf of RAMKY ECI (JV) and shall bear all associated costs. All statutory compliances are the responsibility of ECI such as submission of returns, assessments and any other compliances under both direct and indirect taxes including income tax, works contract tax, value added tax, service tax, PF deduction and payments, ESI, minimum wages and workmen compensation etc. The penalties and damages if any, imposed by NHIDCL on account of violations, ECI shall borne such payments. The agreement is to expire if the JV has not been awarded the contract and also in case, the contract is awarded, after work has been completed in entirety.

3.4. A survey was conducted on 09.10.2018, by the Income Tax Officer TDS-1, Guwahati. Considering the material gathered during the course of survey, the learned Assessing Officer assumed that assessee Joint Venture failed to deduct tax as per the provisions of section 194C in respect of payments made to ECI and u/s 194H in respect of payments made to Ramky, therefore, a show cause letter was issued on 22.01.2019, proposing to treat the JV as assessee - in- default u/s 201(1) for non-deduction of tax at source.

3.5. In respect of assessment year 2018-19, assessee submitted Form No.26A (Rule 31 ACB), along with a certificate of Accountant under first proviso to sub section(l) of section 201 of the Act, by providing the details of return of income filed and payment of tax by ECI, who has executed the work. In respect of assessment year 2019-20, such certificate could not be produced as the survey was conducted on 09.10.2018, and show cause letter was issued on 22.01.2019, before completion of financial year 2018-19 and the time limit for filing of the return of income u/s 139(1) was 31.10.2019, therefore, there was no scope for filing of Form No. 26A for the assessment year 2019-20.

3.6. Ld. AO passed an order u/s 201(1A) for assessment year 2018-19, determining total amount payable at Rs.20,08,126/- which includes tax deductible u/s 194H of Rs.4,55,663/- and interest u/s 201(1A) at Rs.15,52,463/-. In respect of assessment year 2019-20, tax liability u/s 201(1) was determined at Rs.1,36,51,425/- and interest u/s 201(1A) at Rs.11,49,549/-, aggregating to Rs.1,48,00,974/-. Aggrieved by this order, an appeal was filed before the Ld. CIT(A)-1, Guwahati.

4. Before the Ld. CIT(A), assessee contented that there is no contractor and subcontractor relationship between the Joint Venture and one of its constituents and further the payment is not in the nature of payable by a person on behalf of another person for services rendered or for any services in the course of buying or selling of goods or any transaction relating to any asset, valuable article or thing, not being securities. Therefore, it was pleaded not to treat the assessee as assessee in default in respect of provisions of section 201(1) and 201(1A) for both the assessment years. Ld. CIT(A) confirmed the orders

of the Assessing Officer. Aggrieved by the order of the Ld. CIT(A), assessee is in appeal before the Tribunal.

5. Before us, Ld. Counsel for the assessee reiterated the factual position as stated above. According to him, purpose of forming J V is to perform the work contract from NHDICL. The agreement of formation of J V will expire, if the JV is not awarded the work contract. It will also expire when the work awarded as completed as per the contract agreement. Ld. Counsel further stated that JV set up is not governed by the provisions of Indian Partnership Act, 1932. Relation between the constituents of the JV are decided as per the agreement entered into by its constituents. Such a JV cannot be treated as Association of Persons (AOP) for the purpose of income-tax.

5.1. To buttress his contention, he referred to the CBDT Circular No. 07 of 2016 dated 07.03.2016 which was issued considering the dispute in respect of consortium contracts which are formed to implement large infrastructure projects. Relevant portion of para 3 in this respect from the said circular is reproduced as under:

“The matter has been examined. With a view to avoid tax-disputes and to have consistency in approach while handling these cases, the Board has decided that a consortium arrangement for executing EPC/Turnkey contracts which has the following attributes may not be treated as an AOP:

- a. Each member is independently responsible for executing its part of work through its own resources and also bears the risk of its scope of work i.e. there is a clear demarcation in the work and costs between the consortium members and each member incurs expenditure only in its specified area of work;
- b. each member earns profit or incurs losses, based on performance of the contract falling strictly within its scope of work. However, consortium members may share contract price at gross level only to facilitate convenience in billing;
- c. the men and materials used for any area of work are under the risk and control of respective consortium members;
- d. the control and management of the consortium is not unified and common management is only for the inter-se coordination between the consortium -members for administrative convenience;”

5.2. Thus in reference to the above attributes laid down by the CBDT circular, Ld. Counsel submitted that under the internal agreement, entire work awarded by NHIDCL was executed by

ECI, who is one of the constituents of JV, on its own risk.

According to him, the said internal agreement itself states that ECI is responsible for all the statutory liability, penalty, if any and shall procure men and machinery and other resources for execution of the work. The execution of project and its risk and awards are clearly demarcated in the internal agreement which is in the knowledge of NHIDCL from whom the work has been awarded. Ld. Counsel thus, asserted that considering the guidelines issued by the CBDT, there is no scope to treat the assessee JV as an AOP. According to him, there is no contract and sub-contract relationship between the assessee JV and ECI. Since there is no agreement between the assessee and its constituent ECI in the nature of sub-contract agreement, provisions of section 194C(2) are not applicable and, therefore, assessee JV is not liable to deduct tax at source for the payment made to ECI. According to Ld. Counsel, assessee JV is not required to deduct tax in respect of payments made to its constituents for execution of work to ECI and for payment of compensation to ECI.

5.3. Ld. Counsel referred to several decisions of Co-ordinate Bench of ITAT to submit that similar issues have been dealt with in favour of the assessee by holding that provisions of section 194C and or 194H do not apply in case of such JV arrangements for execution of the work contract awarded to the JV and executed by its constituents. He placed reliance on the decision of Co-ordinate Bench of ITAT, Hyderabad in the case of ITO Vs. KCEL-MEIL (JV) & 13 Ors. in ITA No. 323 to 336/Hyd/2014 dated 13.01.2014. He also referred to the decision of Co-ordinate Bench of ITAT Cuttack in the case of HCIL Adhikarya-ARSS (JV) in ITA No. 496/CTK/2012 dated 21.05.2015 and several other decisions as listed below:

(i) KCL AMRCL JV, Hyderabad Vs. ITO in ITA No.1409/H/2016 and 793/H/2017 dated 29.11.2017, (ii) ITO Vs. UAN Raju Constructions (2011) 48 SOT 178. (iii) SMC Constructions Vs. ITO (2011) 48 SOT 178, (iv) ITO Vs. Hindustan Ratna (JV), Hyderabad in ITA No.

852/H/2015 dt. 29.11.2018 and

(v) ITO Vs. Shraddha and Prasad JV, in ITA No. 2665/Pun/2017.

6. Per contra, Ld. CIT, DR placed reliance on the order of authorities below. He referred to various judgments cited by Ld. CIT(A) in the said order.

7. We have heard the rival contentions and perused the material available on record. Admittedly, it is a fact on record that assessee is a JV, comprising of two constituents viz. RAMKY and ECI. A work contract is awarded to the assessee JV by NHIDCL. There exists an internal agreement between the constituent members of the JV by which responsibility of execution of the project by ECI and its risk and rewards are clearly demarcated in it. Further in the same agreement, RAMKY is to be compensated by a compensation of 2.25% of gross bills received from NHIDCL. In the impugned assessment order, Ld. AO has nowhere given any finding that the other constituent members i.e. RAMKY has any authority or control over the work executed by ECI who is responsible to execute the same on its own risk and is responsible also for all the statutory liabilities, penalties and procure men and machine and other resources for the execution of work.

7.1. We have also perused the attributes which has been listed by CBDT in its circular (supra) whereby the JVs are not to be treated as an AOP so as to avoid income tax disputes and to have consistent approach while handling such cases. We do note that the present facts and circumstances of the case fulfils the requirements of the attributes listed by the CBDT, not to treat a JV as an AOP.

7.2. The status and legal position of JV under the Act has been elaborately discussed by the Co-ordinate Bench of ITAT, Cuttack in the case of HCIL Adhikarya-ARSS (JV) (supra) by considering the decision of Hon'ble Supreme Court in the case of Fazir Chand Gulati Vs. UPPAL Agencies Pvt. Ltd. (2008) 10

SCC 345. The discussion made by the Co-ordinate Bench of ITAT, Cuttack in this respect is extracted below:

“7. In our country, the implementation of infrastructure projects is taking place in a massive scale. In this connection, global tenders are invited. Hence two or more business enterprises are joining hands by forming a consortium of Joint Venture in order to get qualified for participating in tender process. They regulate themselves, by entering into an agreement, the methodology to be adopted for executing the contract obtained. Before going into the main issues, we feel that it is imperative to discuss about the status and legal position of “Joint Venture” visa-vis Income tax Act. The Joint Ventures are not be governed by the provisions of the “Indian Partnership Act, 1932. It is also a known fact that there is no statute which governs a Joint Venture. Hence the issue regarding the relationship between the members and also between the members and the Joint venture has to be decided on the basis of the terms of agreement entered between the parties. Though the “Joint Venture Agreements” generally fall in the category of “Association of Persons” (AOP) under the Income tax Act, yet their assessability in the status of “AOP” was not free from doubt and we notice that the authorities have decided this issue on the basis of facts and circumstances of each case.

8. The Hon’ble Supreme Court has made a detailed discussion on the concept of “Joint Venture” in the case of *Fazir Chand Gulati Vs. Uppal Agencies Private Ltd.* (2008) 10 SCC 345. The relevant observations are extracted below:-

“17. This Court had occasion to consider the nature of ‘joint venture’ in *New Horizons Ltd vs. Union of India* [1995 (1) SCC 478]. This Court held : “The expression “joint venture” is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. [Black’s Law Dictionary; Sixth Edition, p.839]. According to *Words and Phrases*, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit [P.117, Vol. 23].”[Emphasis supplied] The following definition of ‘joint venture’ occurring in *American Jurisprudence* [2nd Edition, Vol.46 pages 19, 22 and 23] is relevant: “A joint venture is frequently defined as an association of two or more persons formed to carry out a single business enterprise for profit. More specifically, it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership, a corporation or other business entity, pursuant to an agreement that there shall be a community of interest among the parties as to the purpose of the undertaking, and that each joint venture must stand in the relation of principal, as well as agent, as to each of the other covertures within the general scope of the enterprise. Joint ventures are, in general, governed by the same rules as partnerships. The relations of the parties to a joint venture and the nature of their association are so similar and closely akin to a partnership that their rights, duties, and liabilities are generally tested by rules which are closely analogous to and substantially the same, if not exactly the same as those which govern partnerships. Since the legal consequences of a joint venture are equivalent to those of a partnership, the courts freely apply partnership law to joint ventures when appropriate. In fact, it has been said that the trend in the law has been to blur the distinctions between a partnership and a joint venture, very little law being found applicable to one that

does not apply to the other. Thus, the liability for torts of parties to a joint venture agreement is governed by the law applicable to partnerships." "A joint venture is to be distinguished from a relationship of independent contractor, the latter being one who, exercising an independent employment, contracts to do work according to his own methods and without being subject to the control of his employer except as to the result of the work, while a joint venture is a special combination of two or more persons where, in some specific venture, a profit is jointly sought without any actual partnership or corporate designation." (Emphasis supplied) To the same effect is the definition in Corpus Juris Secundum (Vol. 48A pages 314-315): "Joint venture," a term used interchangeably and synonymous with joint adventure', or coventure, has been defined as a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit or a special combination of persons undertaking jointly some specific adventure for profit, for which purpose they combine their property, money, effects, skill, and knowledge..... Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement." (emphasis supplied) Black's Law Dictionary (7th Edition, page 843) defines 'joint venture' thus "Joint Venture: A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project."

9. On a careful reading of the order of the Hon'ble Supreme Court, we notice the following essential ingredients for a "Joint Venture".

- a) It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit. (or)
- b) it is in association of persons with intent, by way of contract, express or implied, to engage in and carry out a single business venture for joint profit, for which purpose such persons combine their property, money, effects, skill, and knowledge, without creating a partnership. (or)
- c) a special combination of two or more persons wherein some specific venture for profit is jointly sought without any actual partnership or corporate designation, or as an association of two or more persons to carry out a single business enterprise for profit.
- d) that each joint venturer must stand in the relation of principal, as well as agent, as to each of the other coventures within the general scope of the enterprise.
- e) Among the acts or conduct which are indicative of a joint venture, no single one of which is controlling in determining whether a joint venture exists, are: (1) joint ownership and control of property; (2) sharing of expenses, profits and losses, and having and exercising some voice in determining division of net earnings; (3) community of control over, and active participation in, management and direction of business enterprise; (4) intention of parties, express or implied; and (5) fixing of salaries by joint agreement."

7.3. Based on the above detailed discussion, the Co-ordinate Bench arrived at a conclusion that consortium of JV has been formed only to procure the contract works. By way of the agreement, the parties have regulated the relationship entered with respect to their joint responsibility that existed in relation to the member. In reality, both the parties have divided the contract work between themselves and have executed their share of work on their own risk. It was thus concluded that there is no merit in the presumption made by the AO that the JV is the main contractor and the constituents are the subcontractors. Accordingly, it held that question of deduction of tax at source u/s. 194C(2) does not arise. It was thus concluded that assessee JV was not liable to deduct tax at source and, therefore, it cannot be held to be in default u/s.

201(1) and liable to be charged interest u/s. 201(1A) of the Act.

7.4. Further, in respect of AY 2018-19, considering Form No. 26A from the constituent ECI stating that receipts from JV have already been offered for taxation, Ld. AO restricted to levy of interest u/s. 201(1A) and did not hold assessee as assessee in default for that component.

8. Considering the facts and circumstances of the case fulfilment of the attributes of not treating a JV as an AOP prescribed under CBDT Circular supra and the judicial precedents referred above, we are of the considered view that assessee JV does not fall in the category of AOP under the Act. Further, there does not exist a relationship of a contractor and sub-contractor within the meaning of section 194C, therefore, question of deduction of tax at source does not arise. Once there is no liability to deduct tax at source, holding assessee JV as assessee in default is also not tenable.

8.1. Ld. AO has applied the provisions of section 194H for the compensation paid to RAMKY, out of the gross bills received from NHDICL, by treating it as commission. Definition of commission as contained in section 194H

does not befit the payment of 2.25% made to RAMKY to subject it to tax deduction at source. The definition of commission contained in Explanation to section 194H is as under:

“Commission or brokerage” includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered (not being professional services) or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities.”

8.2. From the above definition, in the present case, compensation paid by assessee JV is not for acting on behalf of JV for any service. Further, there are no services taken by the JV in the course of buying or selling of goods nor there is any transaction relating to any asset, valuable articles or thing. Accordingly, the payment is not in the nature of commission and section 194H does not get attracted. Hence, assessee JV is not to be treated as assessee in default.

8.3. In respect of the judicial pronouncement relied upon by

Ld. CIT(A), in all those decisions, the moot point of liability to deduct tax at source under the relevant provision was missing. In all these decisions, the issue was in respect of chargeability of interest u/s. 201(1A) which has been held to be mandatory and automatic. In the present case before us, question involved is that whether in the facts and circumstances of the case, assessee which is a JV is required to deduct tax u/s. 194C from the payments made to one of its constituents i.e. ECI for execution of work and further, whether the payment made to another constituent as compensation, constitutes payment in the nature of commission to attract provisions of section 194H. We have answered this question in favour of the assessee in terms of the observation and discussion made above. Accordingly, assessee cannot be held to be the assessee in default u/s. 201(1) and liable for interest charged u/s. 201(1A) of the Act. Accordingly, grounds taken by the assessee in this respect are allowed.

9. In the result, both the appeals of the assessee are allowed.

Order pronounced in the open Court on 31st August, 2023.

Sd/-

Sd/-

(Rajpal Yadav)
Vice President

(Girish Agrawal)
Accountant Member

Dated: 31st August, 2023

JD, Sr. P.S.

Copy to:

1. The Appellant:
2. The Respondent
3. CIT(A), Guwahati-1, Guwahati
4. CIT
5. DR, ITAT, Guwahati Bench, Guwahati
6. Guard file

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By Order

Assistant Registrar

ITAT, Kolkata Benches, Kolkata