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Tax Deduction at Source – Sections 194C,194-I, 194-IA & 194J

Bombay Chartered Accountants' Society

Workshop on TDS

10th April, 2015

General - TDS on service tax

CBDT Circular No 1 dated 13 Jan 2014

- Whether tax is required to be deducted at source on service tax component in case of payments made to residents
- CIT v Rajasthan Urban Infrastructure Development Project 261 CTR 628 (Raj) – if consideration agreed upon and agreed that service recipient to pay the service provider applicable service tax as per extant law, no TDS deductible on service tax component u/s 194J
- CBDT view – wherever, in terms of the agreement/contract, service tax component in amount payable is indicated separately, TDS to be deducted on amount paid/payable without including such service tax component
- Applicable to all types of payments to residents
- Applicability to past transactions

S.194C/194J - Reimbursement of Expenses

Reimbursement of Expenses

- Whether subject to TDS
- Payment made to agent, where agent made payment to advertising agency after deducting TDS – no deduction required on payment to agent where no profit element – *CIT v Harbanslal Malhotra & Sons (P) Ltd 217 Taxman 112 (Cal)*
- Reimbursement of clearing house agent charges to clearing & forwarding agent, where agent had deducted and deposited TDS – no profit element in payment to agent – *CIT v Gujarat Narmada Valley Fertilizers Co Ltd 217 Taxman 114 (Guj)*
- Ship management company paid salaries to employees of shipping company – reimbursement by shipping company to ship management company at actuals – no TDS required – *CIT v Vector Shipping Services (P) Ltd 357 ITR 642(All)*
- Reimbursement of clearing house charges to clearing house agent (another bank) where TDS deducted by CHA – *Karnavati Co-op Bank Ltd v DCIT 134 ITD 486 (Ahd)*

Recent Amendments

Finance Bill, 2015 – w.e.f. 1.6.2015

- Payments to Transport Contractors – non-deduction
 - Limitation of 10 goods carriages
 - Declaration in addition to PAN

s.194C – Supply of Goods

- Supply of processed goods – whether “contract for work” or contract for sale?
- Clause (iv) of explanation inserted w.e.f. 1.10.2009
 - “work” shall include manufacturing or supplying a product according to requirement or specification of a customer by using material purchased from such customer, but does not include manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from a person, other than such customer
- If material supplied by customer, but not purchased, definitely work
- What if part material purchased from other person, apart from customer?
- TDS on whole invoice value if value of material not disclosed separately
- ✗ Supply of printed packing materials, stationery, books, etc.
- ✗ Loan licence manufacture – CIT v. Glenmark Pharmaceuticals 324 ITR 199 (Bom), CIT v. Reebok India Co 306 ITR 124 (Del)
- ✗ Supply of seeds and repurchase of agricultural produce – *ACIT v. Kalindi Agro Biotech Ltd.* 7 ITR (Trib) 249 (Del)

S. 194C

Works Contracts – TDS on Gross Payment or only on Labour Charges?

- Contract for repairing of transformers
- Contract divided into various components – supply of coil, transformer oil, other items and labour charges
- TDS attracted only to labour charges and not to supply of materials
- *CIT v Executive Engineer (Electricity Stores), Distribution Division 94 DTR 167 (All)*

S. 194C

Payments for Publicity

- Real estate co making payments to airline co for printing logo of assessee on boarding card, ticket, baggage tag etc. was for publicity of its activities in order to promote business and area of operation
- Whenever publicity of a brand or logo brings commercial benefit either apparent or hidden, it will assume character of advertisement
- S.194C applicable
- *DCIT v Sahara India Commercial Corporation Ltd 67 SOT 318 (Luck)*

S.194C vs 194-I

Payments to Clearing & Forwarding Agents – s 194C or 194-I?

- Godowns taken on rent & C & F agents engaged to manage godowns
- Warehousing charges paid to C & F agents
- Since rent paid separately to landlords on which tax deducted u/s 194-I, tax deductible u/s 194C on warehousing charges
- *CIT v Hindustan Lever Ltd 216 Taxman 280 (Del)*

S.194C vs 194-I

Hire of Vehicles for Transportation – s 194C or 194-I?

- Buses hired for transportation of staff or Trucks hired for transportation of goods
- Manned by contractor's employees
- All expenses to be borne by transporter
- Payment on per trip basis
- Transportation – s.194C ?
- Hire of Movable Property – s.194-I ?
- Royalty – s.194J ?

S.194C vs 194-I

Hire of Vehicles for Transportation – s 194C or 194-I?

- *CIT vs. Poompuhar Shipping Corporation Ltd. 282 ITR 3 (Mad).* – Ships hired for transport is not contract of transport
- *Poompuhar Shipping v ITO 360 ITR 527 (Mad)* – Time charter amounts to royalty, being hire of ships
- *CBDT Circular No.558 dated 28.3.1990, 183 ITR (St.) 158*
- *Great Eastern Shipping Co. Ltd. v. State of Karnataka 136 STC 519 (Kar)* – tug with crew given for use by port trust – maintenance by owner – transfer of right to use
- *State of AP v. Rashtriya Ispat Nigam Ltd. 126 STC 114 (SC), Rashtriya Ispat Nigam Ltd. v. CTO 77 STC 182 (AP)* - delivery of possession to be distinguished from custody – not uncommon to find transferee in possession while transferor has custody
- Domain over & Control of Vehicle – with whom?

S.194C vs 194-I

Hire of Vehicles for Transportation – s 194C or 194-I?

- *CIT v Apeejay School 275 CTR (All) 92* – Payment to bus operator on monthly basis per student for carrying students from residence to school & back – provision of service, not hiring of bus – s.194C, not s.194I
- *Lotus Valley Education Society v. ACIT 13 ITR (Trib) 61 (Del)* – Payment to Bus Operators providing pick up and drop facility to students and staff – s.194C, not s.194-I
- *Tata AIG General Insurance Co Ltd v. ITO 43 SOT 215 (Mum)* – arrangement for providing cars of particular category for transportation of employees and guests from one place to another – no specific cars earmarked and identified - hire of buses for transport of employees from station to office - s.194C, not s.194-I
- *ACIT v. Accenture Services (P) Ltd. 44 SOT 290 (Mum)* – agreement with transport service providers for transport of employees – for provision of transport services, and not hire of vehicles – s.194C, not s.194-I
- *ACIT v Delhi Public School 24 ITR (Trib) 531* – contract for students transport – per trip on specified routes – transport arrangement & not vehicle hire

S.194C vs 194-I

Hire of Vehicles for Transportation – s 194C or 194-I?

- *ITO v. Indianoil Corpn. 15 taxmann.com 210 (Del)* – transport trucks under contract for transport of petroleum products – s.194C, not s.194-I
- *Bharat Electronics Ltd. v. DCIT 20 taxmann.com 3 (Del)* – employee transport buses – s.194C, not s.194-I
- *CIT v. Reliance Engg. Associates (P) Ltd. 21 taxmann.com 539 (Guj)* – contractors for transportation services for goods and passengers by buses, cars, Sumos, utility vans – s.194C, not s.194-I
- *Three Star Granites (P) Ltd. v. ACIT 41 taxmann.com 91 (Ker)* – vehicles for loading & unloading & transportation of products - payment on hourly use basis – no work other than making available machinery with operator – contract of hire of vehicles, not transportation contract

S.194-I – Lease Premium

Lease premium

- Whether covered by s.194-I
- Definition of rent – any payment by whatever name called under any lease, sub-lease, tenancy or other agreement or arrangement for the use of any land or building.....
- Premium paid for lease of land – whether rent?
- *Krishak Bharati Co-op. Ltd v ACIT 210 Taxman 123 (Del) - CIT v Panbari Tea Co Ltd 57 ITR 422 (SC)* referred to
- S.105 of TP Act draws distinction between price paid for transfer of a right to enjoy property (premium) and rent to be paid periodically to lessor
- May be circumstances where parties may camouflage real nature of transaction by using clever phraseology – in some cases, so-called premium is in fact advance rent and in others rent is deferred price
- Not the form but the substance of the transaction that matters

S.194-I – Lease Premium

Lease premium

- Nomenclature used may not be decisive or conclusive but helps the court to ascertain the intention of the parties
- If the premium represents the whole or part of the price of the land it cannot be rent
- Decision is fact dependant – to be discerned from conduct of parties or surrounding circumstances
- Advantage in form of highly depressed or nominal rent would indicate that premium is in nature of advance rent
- *Navi Mumbai SEZ (P.) Ltd 147 ITD 261 (Mum)*
- *Wadhwa & Associates Realtors (P) Ltd 146 ITD 694 (Mum)*
- *ITO v Indian Newspaper Society 144 ITD 668 (Del)*
- *ACIT v Oil & Natural Gas Corporation Ltd ITA No 5808/Mum/2012 dtd 3.12.14*
- Contrary view in *Foxconn India Developer (P) Ltd v ITO 53 SOT 213 (Chen)*

Section 194-IA – TDS on Payment for Transfer of Immovable Property

- Applicable wef 1.6.2013
- TDS at 1% from payments for transfer of immovable property (other than agricultural land)
- No deduction where consideration for transfer of immovable property less than Rs.50 lakh
- Deduction by any person, being a transferee
- Applicable only to payments to resident transferors – payments to non-resident transferors governed by s. 195
- Immovable property defined – land (other than agricultural land) or any building or part of a building
- No requirement of obtaining TAN
- No certificate for lower deduction of TDS
- Both resident & non-resident transferees required to deduct TDS

Section 194-IA – TDS on Payment for Transfer of Immovable Property

- In absence of PAN of seller, 20% rate applicable u/s.206AA
- In case of joint purchasers, each purchaser to deduct on his portion of payment
- Limit of Rs.50 lakh – property wise, each joint purchaser wise, each joint seller wise?
- Also applicable to immovable property acquired or sold as stock-in-trade, or to sale of depreciable assets
- Applicability to transfer of leasehold rights/tenancy rights
 - *Kishori Sharad Gaitonde ITA No 1561/Mum/09 dated 27.11.2009*
 - *Atul G Puranik v ITO 132 ITD 499 (Bom)* – s.54D draws distinction between land or building and right in land or building
 - *DyCIT v Tejinder Singh 16 ITR (Trib) 45 (Kol)* – payment for tenancy rights is not same as for ownership rights

Section 194-IA – TDS on Payment for Transfer of Immovable Property

- Applicability to development agreements where consideration in kind
- Applicability in case of introduction of property by partner into partnership firm
- Payment by bank of loan directly to seller

Section 194J – Notified Professions

- Notification No 1619 dated 12.1.1977 – notified professions for s.44AA – film artist engaged in his professional capacity in the production of a cinematographic film as actor, cameraman,
- Services specific and not person specific – payment to actress for modelling – not fees for professional services – s.194J not applicable - *Kodak India (P) Ltd v DCIT 58 SOT 251 (Mum)*
- Notification 88/2008 dated 21.8.2008 – in relation to sports activities – anchors, event managers,.....

Section 194J – TDS on Stock Exchange Charges

- Payments to Stock Exchange by Brokers – whether covered by s.194J?
- Payments made for transacting using stock exchange platform, for clearing of settlements
- Whether fees for technical services – services of a technical or managerial nature?
- Managerial Services - *CIT v Kotak Securities Ltd 340 ITR 333 (Bom)*
- Depository Charges paid to depository – *Karvy Computer-Share Pvt Ltd v ACIT 150 ITD 413 (Hyd)*, *ACIT v Karvy Computershare (P) Ltd 23 ITR (T) 599 (Hyd)*
- Clearing Charges paid to MICR Centre managed by SBI – identifying, reading & clearing cheques through machines – managerial charges – *Canara Bank v ITO 117 ITD 207 (Ahd)*
- Where no human intervention, not fees for technical services - Interconnect, port access charges - *CIT v Bharti Cellular Ltd 330 ITR 239 (SC)*, *CIT v Bharti Cellular Ltd 319 ITR 139 (Del)*, MICR Clearing charges - *CIT v Chief Manager, State Bank of India 245 CTR 107 (P&H)*

Section 194J – FTS/Royalty

- Purchase of software – amounts to royalty under expln 4 to s.9(1)(vi)
- No TDS deductible from payments made for purchase of software, where seller gives confirmation that TDS deducted from earlier purchase u/s 194J/195 – *Notification 21 of 2012 dated 13.6.2012*
- Subscription to database – imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill – expln 5 - consideration in respect of right, property or information, whether or not possession/control with payer or used directly by payer
- Internet Leased Line charges
- Web hosting charges
- E mail hosting charges
- Seminar fees – not professional services – not covered by s.194J – *Bharat Forge Ltd v Addl CIT 144 ITD 455 (Pune)*

Section 192 vs 194J – Consultant Doctors

- Consultant Doctors drawing fixed plus variable pay
- No PF, Retirement benefits
- Required to spend fixed time at hospital, treat fixed no of patients at hospital as in-patients and out-patients
- Free to carry on own private practice at own clinic or outside hospitals, but beyond the hospital timings – treated own private patients at hospital premises
- Fixed no of hours so as not to inconvenience patients visiting and seeking treatment
- Fixed timings & required no of hours insisted upon to ensure proper utilisation of infrastructure
- If handsome remuneration prescribed in return for readymade facilities, such insistence is not necessarily to treat highly qualified professionals as servants
- Relationship of mutual trust and confidence in larger interest of serving patient efficiently

Section 192 vs 194J – Consultant Doctors

- No express bar from working at other hospitals
- Merely because income from hospital is substantial does not make a difference
- In some cases, no stipulations regarding working hours, academic leave or attachments
- Only agreement that certain private patients or fixed or specified number seen by consultant could be admitted to hospital – does not indicate binding or master-servant relationship
- Contract to be read as a whole
- *CIT v Grant Medical Foundation 275 CTR (Bom) 253*

Section 194C vs 194J – Production of Film

- Whether payments made to film producer for shooting of film is fees for technical services (s.194J) or payments to contractor (s.194C)?
- Expln (iv) to s.194C – work includes broadcasting or telecasting including production of programmes for such broadcasting or telecasting
- Production of motion film or cinematographic film is work, not FTS or fees for professional services – *Nitin M Panchamiya v Addl CIT 50 SOT 468 (Mum)*
- Sub-contracting production of portions of animation films – not FTS – *ADIT v DQ Entertainment International (P) Ltd 64 SOT 152 (Hyd)*
- Providing line producer, local crew for stunt services, transport necessary for stunts for production of show – not fees for technical services – *Endemol India (P) Ltd, in re 361 ITR 658 (AAR)*
- Services availed in connection with shooting of different films which mainly included arranging for extras, arranging for security, arranging for locations, arranging for accommodation of cast and crew, arranging for necessary permissions from local authorities, arranging for makeup of stars, arranging for insurance cover, etc. – not FTS – *Yash Raj Films Pvt Ltd 140 ITD 625 (Mum)*

Thank you