The Law of TDS u/s 194C: Controversies & Solutions

By K. C. Singhal, Advocate

History

This section was introduced in the year 1972 and subsequently amended from time to time. The scope of the said provision has been explained by CBDT from time to time through various circulars bearing Nos. 86 dated May 29, 1972, 93 dated 26.9.1972, 558 dated 28.3.1990, 681 dated 8.3.1994, 714 dated 3.8.1995, 723 dated 19.9.1995, , 715 dated 8.8.1995 and 13 dated 13.12 2006. This section has also been substituted by Finance (No 2) Act 2009.

Salient features

This section provides that tax is to be deducted at source against payments made to contractors/subcontractors. The followings are the salient features of the section as it stands today:

- TDS is to be made at the prescribed rate where payment is made for carrying out any work (including supply of labour for carrying out any work) by a contractor;
- Such work must be in pursuance of a contract (including sub contract) between the contractor and a specified person as defined in the Explanation;
- The recipient of payment must be a resident of India;
- TDS is to be made at the time of credit to the account of contractor or at the time of payment in cash or by cheque or draft or by any other mode whichever is earlier;
- TDS is to be made @ 1% where payment is to be made to an individual or a HUF and @ 2% in other cases;
- Where TDS is required to be made for the work of manufacturing or supplying a product according to the requirement or specification of a customer by using material purchased from the customer, TDS shall be made on the invoice value excluding the value of material, if such value is mentioned separately in the invoice and where value of the material is not mentioned separately in the invoice then TDS shall be made on the whole of invoice value (sub section 3);
- No TDS is required to be made by an individual or a HUF where payment is required to be made to the contractor for the work carried out for the personal purpose of such individual/HUF(sub section 4);
- No TDS is to be made where sum credited or paid or likely to be credited or paid does not exceed Rs.30000/-. However, if aggregate of the amount of such sums credited or paid or likely to be credited or paid in the financial year exceeds Rs.75,000/-, TDS is required to be made (sub section 5);
- No TDS is to be made where such sum is credited to the account of or paid to the contractor in the course of business of plying, hiring or leasing of goods carriages if the PAN is furnished by the contractor. Goods carriage shall mean as defined under Motor Vehicle Act 1988.

- The word "work" in this section would include—
  (a) advertising;
  (b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
  (c) carriage of goods and passengers by any mode of transport other than railways;
  (d) catering;
  (e) Manufacturing or supplying a product according to the requirement or specification of a customer by using the 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 the material purchased from a person, other than such customer.

Interpretation of the expression "carrying out any work (including supply of labour for carrying out any work)"

The major controversy between the tax payers and the department throughout had centered round the interpretation of the expression "carrying out any work (including supply of labour for carrying out any work)". At this stage, it would be appropriate to refer the first circular No 86 dated 29.5.72 wherein it was clarified by the CBDT that section 194C would apply only in relation to 'works contracts" and "labour contracts" and would not cover contracts for sale of goods. In the said circular, it was made clear that the contracts for rendering of professional services by lawyers, physicians, surgeons, engineers, accountants, architects, consultants, etc., could not be regarded as contracts 'for carrying out any work" and, accordingly, no deduction of income-tax need to be made from payments relating to such contracts.

In another circular bearing No. 93, dated September 26, 1972, it was stated that service contracts not involving the "carrying out of any work" are outside the scope of section 194C. It further clarified that the provisions of section 194C will not be applicable to transport contracts. This circular, inter alia, states that a transport contract cannot ordinarily be regarded as a "contract for carrying out any work" and, as such, no deduction in respect of income tax is required to be made from payments made under such a contract. In the case of a composite contract involving transport as well as loading and unloading, the entire contract will be regarded as a "works contract" and income tax will have to be deducted from payments made thereunder. Where, however, the element of labour provided for loading and unloading is negligible, no income-tax will be deductible.

The expression "carrying out any work (including supply of labour for carrying out any work)" was also the subject matter of interpretation by the courts.

Associated Cement Co. Limited-vs-CIT 201 ITR 435 SC: in this case, the assessee entered into contract with a contractor for supply of labour for loading and unloading of goods. The question before the court was whether assessee was required to deduct tax at source from the payments made to the contractor. The apex court observed as under:

> "Any work" means any work and not a "works contract", which has a special connotation in the tax law. Indeed, in the sub-section, the " work " referred to therein expressly includes supply of labour to carry out a work. It is a clear indication of the Legislature that the "work" in the sub-section is not intended to be confined to or restricted to " works contract". Work envisaged in the sub-section, therefore, has a wide import and covers "any work" which one or the other of the organisations specified in the sub-section can get carried out through a contractor under a contract and further it includes obtaining by any of such organisations supply of labour under a contract with contractor, for carrying out its work which would have fallen outside the" work ", but for its specific inclusion in the sub-section."

However, the above decision was misunderstood by the revenue as well as some High Courts. The CBDT, considering the SC judgment, was of the view that such expression is of widest import and, therefore, would include all types of contract. Accordingly, it issued a circular No 681 dated 8.3.94 wherein it was stated that in view of SC judgment, section 194C would apply to all types of contracts including transport contracts, labour contracts, service contracts, advt. contracts, broadcasting contracts, telecasting contracts, material contracts and works contracts. This led to filing of various writ petitions before various high courts.

In the meantime, Finance Act 1995 also amended the section wef 1.7.95 by inserting Explanation III by which the expression 'work' included the followings:

(a) advertising;
(b) broadcasting and telecasting including production of programmes for such broadcasting or telecasting;
(c) carriage of goods and passengers by any mode of transport other than railways;
(d) catering.

The apex court, in the case of **Birla Cement Works-vs-CBDT 248 ITR 216** has clarified by holding that the contract for carriage of goods simpliciter would not fall u/s 194C. It was pointed out that the earlier decision in case of Associated Cement Co has been misunderstood by the CBDT. The ratio of that decision was explained as under:

> "It is evident that Associated Cement Co. Ltd.'s case [1993] 201 ITR 435 (SC), was not in respect of transport contracts. The controversy therein was deduction of tax at source from payments made for loading and unloading of goods. The question whether the expression "carrying out any work" would include therein carrying of the goods or not, was not in issue in Associated Cement Co. Ltd.'s case [1993] 201 ITR 435 (SC). That is precisely the question in the present case. The decision in Associated Cement Co. Ltd.'s case [1993] 201 ITR 435 (SC) has not been correctly understood by the Central Board of Direct Taxes. It would not be correct to come to the conclusion, as the Central Board of Direct Taxes did, that the question involved is covered by the decision in the case of Associated Cement Co. Ltd.'s case [1993] 201 ITR 435 (SC)."

Thus, the court held that the expression "Carrying out any work" would not include carriage of goods. Accordingly, the impugned circular to the extent it related to transport contracts was quashed. The carriage of goods would be covered only from 1.7.95 because of insertion of Explanation III which was held to be prospective.

At this stage, it would be appropriate to mention that various High Courts also declared that the circular No 681 dated 8.3.94 was illegal to the extent it included various service contracts within the scope of section 194C of the Act. It is not necessary to discuss those decisions in detail since most of the said services have been brought within the net of TDS provisions. However, some important decisions are being discussed where important observations have been made on the interpretation of the said expression.

S. R. F. Finance Limited-vs-CBDT 211 ITR 861 (Del):

The issue before the court was whether payments made to broker/commission agent would fall within the scope of section 194C. Considering the various circulars and the various amendments proposed and dropped, it was observed:-

> "One more factor makes the meaning of the section beyond the pale of any doubt. If the term "any work" in section 194C by itself covers any kind of service, the words found in the bracket, in sub-section (1) of section 194C will have to be treated as otiose or superfluous. Supply of labour to carry out any work, is a concept that falls within the concept of "service"; if so, why should Parliament include these words in the bracket, to give an expanded meaning to the term "any work". The Supreme Court in Associated Cement Co. Ltd.'s case [1993] 201 ITR 435 clearly pointed out that but for the specific inclusion of those words (i.e., "including supply of labour for carrying out any work"), in section 194C, obtaining of supply of labour for carrying out the work would have fallen outside the word "work". The concluding part of the Supreme Court observation quoted above brings out the true purport of the term "any work" in section 194C.
>
> "Any work", certainly is a term of wide import ; but it is not so wide as to comprise within its scope the obtaining of the supply of labour to carry out the work, because, the latter concept is essentially, a concept falling within the sphere of "services". However, the term "any work" is wide enough to cover any kind of work which one can get carried out through another. The essentiality is that, it should be a "work" which is to be "carried out".

In view of the above observations, it was held that act of broker/commission agent amounts to act of service and thus outside the purview of section 194C. This decision has been quoted just to emphasis the importance of expression in the section. Otherwise, such payments are now covered by section 194H.

East India Hotels-vs-CBDT 320 ITR 526 (Bom):

The issue before the court was whether services provided by a hotelier would fall within the scope of the said expression. The court answered in negative by observing as under:

> "The expression "carrying out any work" in section 194C is limited to any work which on being carried out culminates in to a product result. In other words, the word "work" in section 194C is limited to doing something with a view to achieve the task undertaken or to carry out an operation which produces some result."
>
> "The services rendered by a hotel to its customers by making available certain facilities/amenities like providing multilingual staff , 24 hour service for reception, telephones, select restaurants, bank counter, beauty saloon, barbar shop, car rental, shopping centre, laundry, health club, business centre services etc do not involve carrying out any work which results into production of the desired object and therefore, would be outside the purview of section 194C of the Act."

Kurukshetra Darpans (P.) Limited-vs-CIT 169 Taxman 344 PH

In this case, the assessee was a cable network operator who was in the business of distributing cable connections to the customers and charged subscription fee from them. The appellant-assessee entered into a contract with the licensor of various TV channels for local cable distribution system.(A Y 2006-07) It is relevant to mention here that these licensors are not the owners of the TV channels and they only have the exclusive right to market and distribute satellite based television service to various customers and users of the service. In the above-mentioned contract, the assessee was referred to as subscriber or affiliate as he was to pay the subscription to another party referred to as the licensor. These channels are telecasted from abroad and the assessee becomes an affiliate or subscriber of the licensor by entering into an agreement for payment of subscription. The question before the court was cable operator was required to deduct tax u/s 194C. the court held as under:

> "15. From the recital of the agreement itself, it is clear that the service that the assessee-subscriber is availing is the receipt of 'telecasting signals' from the licensor or the company. The expression 'service' has also been referred to mean the TV channel which is dealt with by the licensor or the company. Therefore, what the assessee has transacted for with the licensor or company certainly includes within its ambit broadcasting and telecasting facility. The essence of the contract is to obtain broadcasting and telecasting of TV channels and thereafter its distribution amongst ultimate customers through the cable network of the assessee."
>
> 16. Another plea of the assessee/subscriber was that the licensor or the person to whom the assessee is making payment by itself does not do the work of broadcasting and telecasting and is therefore outside the purview of section 194C of the Act. This argument deserves to be negated at the threshold. As we have pointed out earlier what the assessee-subscriber is looking for is to obtain the telecast signals from the licensor, which is enough to deduce that the impugned contract involves broadcasting and telecasting of TV signals. Moreover, the licensor or the company, as is evident from the specimen agreement on record, in the

> business of distribution of satellite based TV channels and has exclusive rights to market and distribute said services in India, the service that is referred to in the agreement is the broadcasting and telecasting of TV signals.

Comment: in the case of cable network, no broadcasting is involved as mentioned in the judgment. However, the judgment would apply since telecasting is involved. It is, however learnt that a SLP has been admitted on this issue by the Supreme Court.

Entertainment One India Ltd-vs-ITO(tds) 126 ITD 491(Mum)

The assessee made advances to the producers who approached the assessee with the film projects. AO was of the view that assessee should have deducted tax u/s 194C. The tribunal was of the view that agreement was merely a finance agreement and there was no relationship as that of principal and contractor. Hence, section 194C was not applicable.

Works contract/job work

There is no dispute that works contract (including job work) are covered within the scope of section 194C of the Act. But there has always been disputes between the tax payers and the department whether a particular contract is a works contract or contract of sale. The hon'ble Supreme Court has decided such issue in many cases. It would be appropriate to refer the decision in the case of **State of Himachal Pradesh –vs- Associated Hotels, AIR 1972 SC 1131; [1972] 29 STC 474 (SC)** wherein the court observed in para 9 as under:-

> "The difficulty which the courts have often to meet with in construing a contract of work and labour, on the one hand, and a contract for sale, on the other, arises because the distinction between the two is very often a fine one. This is particularly so when the contract is a composite one involving both a contract of work and labour and a contract of sale. Nevertheless, the distinction between the two rests on a clear principle. A contract of sale is one whose main object is the transfer of property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the principal object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one of work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale; neither the ownership of materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."
>
> "From the decisions earlier cited it clearly, emerges that such determination depends in each case upon its facts and circumstances. Mere passing of property in an article or commodity during the course of the performance of the transaction in question does not render it a transaction of sale. For, even in a contract purely of work or service, it is possible that articles may have to be used by the person executing the work and property in such articles or

> materials may pass to the other party. That would not necessarily convert the contract into one of sale of those materials. In every case the court would have to find out what was the **primary object** of the transaction and the intention of the parties while entering into it. It may in some cases be that even while entering into a contract of work or even service, parties might enter into separate agreements, one of work and service and the other of sale and purchase of materials to be used in the course of executing the work or performing the service. But, then in such cases the transaction would not be one and indivisible, but "would fall into two separate agreements, one of work or service and the other of sale."

So, it is the dominant object which would determine the nature of the contract. If the dominant object is to transfer the chattel as chattel then it would be a contract of sale even though goods might have been manufactured as per the requirement and specification of the client. Hence, section 194C would not be applicable. On the other hand, if the dominant object is to carry out a work, it would be a works contract even though some material might have been used in the execution of the contract. In such cases, section 194C would be attracted. This test has been applied by the courts/tribunal in various cases mentioned below.

This can be explained by giving two examples. A wants his office to be renovated. He enters into a contract with B under which B agrees to execute the work of painting and polishing with his own material. In such a case, the dominant object is the execution of work irrespective of the fact that property in goods passes in the course of executing the work. Hence, it will be a case of works contract and the provisions of section 194C would apply.

Take another example where A wants to purchase uniforms for its employees. So, he enters into a contract with B under which B is required to supply the uniform as per the specification provided by A. B purchases the material from the market and prepares the uniforms as per the specification and delivers the same to A against payment. In such a case, the dominant object is purchase of chattel as chattel irrespective of the fact that supply is to be made as per the specification of the customer. Hence, section 194C would not apply.

The judicial view on this issue may be noted from the following decisions:

CIT-vs-Glenmark Pharmaceuticals Ltd 324 ITR 199(Bom): In this case, assessee entered in to a contract with other party under which the other was required to supply the goods as per its requirements and specification. The other party purchased the material from the market and then manufactured the desired item. No TDS was made while making the payments. AO was of the view that assessee should have deducted the tax u/s 194C. The court held:-

> "The expression "carrying out any work" in section 194C would not include a case where (i) where the property in the article or thing passes to the customer upon delivery, and (ii) the material that was required was not purchased/sourced from the purchaser/customer, but was purchased or independently obtained by the manufacturer from a person other than the customer.

> The rationale behind this was that where a customer provides the material, what the manufacturer does is to convert the material in to a product desired by the customer, the contract essentially involves work of labour and not a sale."(page 218)

It is also held that even the revenue had this view consistently which is apparent from the CBDT circular no 86 dated 29.5.72, circular No 108 dated 20.5.73 as well as the clarification regarding the word 'work' in section 194C in the Memorandum explaining the provisions of the Finance Bill 2009. (page 216-17of 324 ITR). The memorandum explains as under:

> "----To bring clarity on this issue, it is proposed to provide that work shall not include mfg or supplying a product according to the requirement or specification of a customer by using raw material purchased from a person other than such a customer as such a contract is a contract for sale. This will, however, not apply to a contract which does not entail manufacture or supply of an article or thing (e.g. a construction contract). It is also proposed to include mfg or supplying a product according to the requirement or specification of a customer by using raw material purchased from such customer within the definition of such work."

Accordingly it was also held that assessee was not required to deduct the tax at source u/s 194C. It was also held that the amendment made in Explanation III to section 194C was clarificatory and would apply retrospectively.

This view has also been taken by the courts and the tribunal in the following cases:

BDA Ltd 281 ITR 99 (Bom)

CIT-vs- Dabur India Ltd 283 ITR 197 (Del)- (supply of corrugated boxes were to be made with some labels printed on the same)

CIT-vs-Seagram Mfg. Pvt. Ltd. 221 CTR 509 (Del)-(a contract of sale packing material on principal principal basis)

CIT-vs-Reebok India Co 306 ITR 124 (Del)- (agreements with various manufacturers who manufacture the said items according to the specifications, drawings and designs provided by the assessee.)

CIT-vs- Girnar Food & Beverages P Ltd. 306 ITR 23 (Guj)

CIT-vs-Markfed 304 ITR 17 PH—(purchase of printed material)

Tuareg Marketing (P) Limited—vs—ACIT 122 TTJ 343 Del (supply of kitchenware as per specification and brand name of assessee)

Whirlpool Of India Limited-vs-JCIT 109 TTJ 994(Del)

ITO(TDS)-vs-Milan Dairy Foods (P) Ltd 7 SOT 901 (Del) & Bangalore Distt Co-op Milk producers Societies union 11SOT 539(Bang)—(Purchase of packing material as per specification of customer-not a work contract)

Power Grid Corp of India-vs ACIT 13 SOT 347 (Hyd)

ITO-vs- Varun Beverages Ltd 35 SOT 443 (Agra)(supply of glass bottles, plastic crates etc)

Section 194C—vs—section 194 I (Hiring of ships, vehicles etc)

Before and after the insertion of section 194I, disputes have arisen on the issue whether mere hiring of vehicle would fall within the ambit of section 194C. The judicial view is that mere hiring of vehicle would not fall within the ambit of section 194C.

CIT-vs-Poompuhar Shipping Corporation Ltd 282 ITR 3(Mad): In this case**,** assessee was engaged in shipping business. It took on hire a ship which was used by it in its business. It paid the hiring charges without deducting the tax at source. The case of the revenue was that section 194C was applicable since Explanation III was clarificatory and had retrospective effect. The court noted that it was not the case of the Revenue that the assessee entered into the said contract with the shipping company for transport of coal from one place to another. Hence, the court was of the view that mere hiring of ships for the purpose of using the same in the assessee's business would not amount to a contract for carrying out any work as contemplated in section 194C. It was also held that the said Explanation was not retrospective.

The above decision has been followed by the Tribunal in DCIT-vs-**Satish Aggarwal And Company 124 TTJ 542(Amr)**. It has been held that payments made against mere hiring of trucks would not fall within the scope of section 194C. The following observations are noteworthy:

> "12. For carrying out any work, manpower is the sine qua non and without manpower, it cannot be said that work has been carried out**.** Under s. 194C of the Act "carrying out any work" is the substance for making a payment relating to such work, liable for deduction tax at source. The provisions of S.194C are attracted only where any sum is paid for carrying out any work including supply of labour for carrying out any work."

Mythri Transport Corporation-vs-ACIT 124 TTJ 970(Vishakha)

In this case, the assessee was engaged in the business of transporting goods. It took on hire trucks from different parties and used them in its business for carrying goods of its clients. The hiring charges were paid without deduction of tax at source. AO was of the view that the assessee should have deducted tax at source u/s 194C. The tribunal held that it was a case of mere hiring of trucks and therefore, section 194C was not applicable. The tribunal held as under:

> "8.5 It is not established by the Revenue that other lorry owners, from whom the vehicles were hired, have also been fastened with any of the abovesaid liabilities. In a sub-contract, a

> prudent contractor would include all the liability clauses in the agreement entered into by him with the sub-contractor. The assessee has also claimed before the tax authorities that the responsibility in the whole process lies with it only. Though the passing of liability is not the only criteria to decide about the existence of sub-contract, yet this contention of the assessee read with the liability clauses of the work order, cited above, supports its submission that the individual vehicle owners are simple hirers of the vehicles.
>
> the instant case, there is no material to suggest that the other lorry owners involved themselves in carrying out any part of the work undertaken by the assessee by spending their time, energy and by taking the risks associated with the main contract work. In the absence of the abovesaid characteristics attached to a sub-contract in the instant case, the payment made to the lorry owners stands at par with the payments made towards salaries, rent, etc. Hence the reasoning of the tax authorities, which is stated in para 8.3 supra, to hold that the payment made for hired vehicles is a sub-contract payment, in our opinion, is not correct and not based on relevant considerations."

ACIT-vs-Accenture Services (P) ltd 44 SOT 290 (Mum)

In this case, the assessee deducted tax at source u/s 194C against payments made for hiring of vehicles for transportation of its employees. Under the contract, it was the responsibility of the transporter to provide the staff for running the vehicles as well as for ensuring all legal and operational obligations. The AO treated such payment for hiring of equipment falling u/s 194I and therefore passed an order u/s 201(1) for short deduction of tax. The CIT(A) as well as the Tribunal have held that it was a transport contract falling u/s 194C. Section 194I was held to be not applicable since no hiring was involved.

Similar view has been taken by the tribunal in the case of Tata AIG General Insurance Co 43 SOT 215(Mum) by observing that no particular car was provided but it was merely an arrangement for transportation of its employees and therefore section 194C would apply and not section 194I.

DCIT-vs-Japan Airlines 93 ITD 163 (Del) & Singapore Airlines 7 SOT 84 (Chennai)

Payment to AAI for landing and parking— in the case of Japan Airlines, the tribunal observed as under:

> "The Airport Authorities of India simply granted permission to landing and parking. It did not grant any exclusive right or interest to J.A.L. in any specific portion of land or building. It granted a license and also provided certain other facilities not necessarily for use of land but for safe landing and parking in pursuance of the guidelines referred to above. Hence, the payments made by the assessee cannot be termed as payment of rent so as to be covered within the purview of section 194-I of the Act"

The above view has been followed by the Chennai bench of the tribunal. However, it is to be noted that the tribunal in the case of Japan Airlines further held that landing & parking charges fall u/s 194C.

With due respect, it is submitted that AAI did not carry out any work for the airline. It was a case of mere use of a facility which does not fall within the scope of section 194C as held by the hon'ble Delhi HC in the case of **East India Hotels(supra).**

Sub section(2)-old provision (Sub contract)—(privity of contract)

Shree Choudhary Transport Company-vs- ITO 225 CTR 125(Raj):-

"In our view, on the language of s. 194C(2), and the fact that the goods received were sent through truck owners by the appellant, and there was **no privity of direct contract' between the truck owners and the cement factory.** According to the contract between the appellant and the cement factory, it was the appellant's responsibility to transport the cement, and for that the appellant hired the services of the truck owners, obviously as sub-contractors. In that view of the matter, we do not find any error in the impugned order of the Tribunal."

Solan District Truck Operators Transport Co-operative Society 227 CTR 299(HP)

Facts: The assessees were registered societies/AOP constituted by the truck operators. These societies entered into contracts with the companies such as cement manufacturers for transport of the goods of the companies. The company which had entered into contract with the assessee deducted 2 per cent of the amount paid on account of TDS in terms of s. 194C(1) of the IT Act, 1961. Thereafter, the assessee society paid the amount received by it to the members of the society who had actually carried the goods. However, out of the amount paid a nominal amount of Rs. 10 or Rs. 20 was deducted for administrative expenses of running the society and is known as "Parchi charges". The assessee did not retain any other amount except for the "Parchi charges" and the entire amount received by it from the company was paid to the members.

> **Held:** "the entire language of s. 194C(2) which clearly indicates that the payment should be made to the resident who is a sub-contractor. The concept of sub-contract is intrinsically linked with s. 194C(2). If there is no sub-contract then the person is not liable to deduct tax at source even if payment is being made to a resident.
>
> 13. To understand the nature of the contract, it would be relevant to mention that in the present cases the assessee societies were created by the transporters themselves. The transporters formed the societies or unions with a view to enter into a contract with the companies. The companies enter into contract for transportation of goods and material with the society. However, the society is nothing more than a conglomeration of the truck operators themselves. The assessee societies have been created only with a view to make it easy to enter into a contract with the companies as also to ensure that the work to the individual truck operators is given strictly in turn so that every truck operator has an equal opportunity to carry the goods and earn income. The society itself does not do the work of transportation. The members of the society are virtually the owners of the society. It may be true that they both have separate juristic entities but the fact remains that the reason for creation of the society was only to ensure that work is provided to all the truck operators on

> an equitable basis. A finding of fact has been rendered by the authorities that the societies were formed with a view to obtain the work of carriage from the company since the companies were not ready to enter into a contract with the individual truck operators but had asked them to form a society.
>
> 14. Admittedly, the society does not retain any profits. It only retain as nominal amount as "parchi charges" which is used for meeting the administrative expenses of the society. There is no dispute with the submission that the society has an independent legal status and is also contractor within the meaning of s. 194C. It is also not disputed that the members have a separate status but there is no sub-contract between the society and the members. In fact if the entire working of the society is seen it is apparent that the societies have entered into a contract on behalf of the members. The society is nothing but a collective name for all the members and the contract entered by the society is for the benefit of the constituent members and there is no contract between the society and the members."

In view of the above observations, it was held that there was no sub contract as such and consequently, the union was not required to deduct the tax at source. However, it is pointed out that SLP has been admitted by the SC and the matter is still pending.

EMC-vs-ITO 37 SOT 31

Assessee an **event manager assigned the job of art work** and photography to others but did not deduct tax at source against payment made to them. AO was of the view that TDS should have been made u/s 194C (1) since clients of assessee had deducted tax u/s 194J. The assessee contended that it was a case u/s 194C (2) since part of work was assigned to others. However, copies of agreements with the clients not produced by assessee. Hence, the tribunal was of the view that nature of contract was to be seen in the light of treatment given by the clients. Accordingly, the tribunal has confirmed the view of AO since assessee was rendering only professional services u/s 194J.

Comment: With due respect, in my view, the nature of contract should have been determined by the nature of work assigned by the assessee to the other party and not by the treatment given by the client for TDS purposes.

Kavita Chug-vs-ITO 44 SOT 95 (Kol)

Assessee engaged in transport business did not own any trucks. Requisition was made on daily basis from the market for transportation of goods to various destinations. The 'A' contented that she never passed her responsibility to truck owners who only delivered goods at necessary destinations at the instance of assessee. The AO found that 83 truck owners were paid more than Rs.50,000/- each. Since no TDS was made, he disallowed the deduction u/s 40(a)(ia). The tribunal held that it was a case of hiring vehicles and therefore, outside the purview of section 194C. Hence, disallowance u/s 40(a)(ia) was not justified.

Comment: With due respect, in my view, it was a case of sub contract for transportation of goods. The admitted fact was that truck owners transported the goods and delivered the goods at necessary destination at the instance of the assessee. How it could be said that assessee did not pass on the responsibility under the contract. Therefore, it could not be considered as contract for hiring of vehicles.

City Transport Corporation-vs- ITO 13 SOT 479 (Mum)—

Assessee engaged in business of transporting goods entered into contract with two companies for transporting goods from their factory to any place in India. It did not own any truck but hired the same from different transporters for executing the contract. The freight in respect of each truck was decided at the time of actual dispatch of goods and payment in each case did not exceed Rs.20,000/-. Relying on the circular no 715 dated 8.8.95, it was held that **each trip was under a separate contract** and there was nothing to show that more than one trip was under the same contract. Hence, no TDS was to be made u/s 194C.

ACIT-vs-Manish Dutt 46 SOT 130(Mum)(URO)

In this case, the assessee was engaged in the business of dubbing work in his own studio comprising of various dubbing equipments. Whenever, assessee's studio could not be used, he used to give the work of dubbing to other studios as a sub contractor. The assessee deducted tax u/s 194C @ 2% but AO was of the view that he should have deducted tax @ 20% u/s 194I. The CIT(A) as well as the Tribunal have held that it was a contract for work falling u/s 194C since the assessee had utilized the dubbing services which was in the nature of getting work done through a sub contractor.

Comment: full judgment is not reported and therefore, complete facts are not available. If the studio as such is handed over to the assessee for use by the assessee as per his wishes, in my view, it will be a case u/s 194I **but** if the possession of the studio continues with the owner and only the work is assigned to be performed by the other party then the case would fall under section 194C.

Sands Advertising Communications-vs-DCIT 37 SOT 179 (Bang)—

Assessee was an advertising agency involved in activity of advertising in print media. Its sister concern 'T' was in similar business but was an accredited agency. The assessee entered in to an agreement with 'T' under which all ads created/developed by the assessee for its clients were to be released to print media through 'T' for which certain consideration was to be made to T. The AO was of the view that section 194C was applicable while the stand of assessee was that T was only a routing agency and not a sub contractor. It was held by the tribunal that section 194C is applicable only when payment is to be made to an advertising agency and not when payment is made by ad agency to print media as clarified in the Circular no 715 of 95. Hence, no TDS was required to be made.

Glaxo Smithkline Consumer Healthcare Ltd –vs- ITO 12 SOT 221 (Del)- held that payments made to **clearing & forwarding agent** fell under 194C & not u/s 194J.

Other aspects:

Contractual payment-vs-payment to daily wage workers**:** the hon'ble Delhi high court in the case of CIT-vs-Dewan Chand 178 Taxman 173 confirmed the view of the Tribunal that payments made to daily wage workers could not be considered as contractual payments u/s 194C.

CIT-vs-United Rice Land Ltd 322 ITR 594 PH: Carriage of goods or passengers on various occasions must be under a contract which is a requisite condition for applying the provisions of section 194C. Where different trucks were hired on different times independently and the payment of freight did not exceed Rs.20,000/- in respect of each truck, it was held that section 194C was inapplicable.

Following the aforesaid decision, the PHC held in the case of Bhagwati Steels 326 ITR 108 that where the payment was made for purchase of goods (inclusive of freight charged separately) for which there was no separate contract for carriage of goods, the provisions of section 194C could not be applied.

Any person responsible for paying any sum: In the case of Cargo linkers 179 Taxman 151/218 CTR 695, the hon'ble DHC held as under:-

"We are in agreement with the order passed by the Tribunal which has mainly decided an issue of fact, namely, the nature of the contract between the parties concerned. It has also been found as a matter of fact that the contract is actually between the exporter and the airline and the assessee is only an intermediary. Therefore, it is not a "person responsible" for deduction of tax at source in terms of s. 194C of the Act."

ITO-vs-Rama Nand And Co. And Others 163 ITR 702 HP: in this case, the trial court found that payment was made for purchase of timber and therefore the assessee could not be said as contractor. For the similar reason, the persons to whom payments were made could not be considered as sub contractor. Hence, there was no force in the complaint of the ITO.

It would also be useful to refer the Board Circular 715 of 1995 wherein following clarifications have been given:

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 an 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, artistes,

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 artistes, 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 at 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 subjected to TDS at the rate of 2 per cent.

Question 4 : Whether tax is required to be deducted at source on payments made directly to the print media/Doordarshan for release of advertisements ?

Answer : The payments made directly to print and electronic media would be covered under section 194C as these are in the nature of payments for purposes of advertising. Deduction will have to be made at the rate of 1 per cent. It may, however, be clarified that the payments made directly to Doordarshan may not be subjected to TDS as Doordarshan, being a Government agency, is not liable to income-tax.

Question 5: Whether a contract for putting up a hoarding would be covered under section 194C or 194-I of the Act ?

Answer : The contract for putting up a hoarding is in the nature of advertising contract and provisions of section 194C would be applicable. It may, however, be clarified that if a person has taken a particular space on rent and thereafter sublets the same fully or in part for putting up a hoarding, he would be liable to TDS under section 194-I and not under section 194C of the Act.

Question 6: Whether payment under a contract for carriage of goods or passengers by any mode of transport would include payment made to a travel agent for purchase of a ticket or payment made to a clearing and forwarding agent for carriage of goods ?

Answer : The payments made to a travel agent or an airline for purchase of a ticket for travel would not be subjected to tax deduction at source as the privity of the contract is between the individual passenger and the airline/travel agent, notwithstanding the fact that the payment is made by an entity mentioned in section 194C(1). The provisions of section 194C shall, however, apply when a

plane or a bus or any other mode of transport is chartered by one of the entities mentioned in section 194C of the Act. As regards payments made to clearing and forwarding agents for carriage of goods, the same shall be subjected to tax deduction at source under section 194C of the Act.

Question 7: Whether a travel agent/clearing and forwarding agent would be required to deduct tax at source from the sum payable by the agent to an airline or other carrier of goods or passengers ?

Answer: The travel agent, issuing tickets on behalf of the airlines for travel of individual passengers, would not be required to deduct tax at source as he acts on behalf of the airlines. The position of clearing and forwarding agents is different. They act as independent contractors. Any payment made to them would, hence, be liable for deduction of tax at source. They would also be liable to deduct tax at source while making payments to a carrier of goods.

Question 8: Whether section 194C would be attracted in respect of payments made to couriers for carrying documents, letters etc. ?

Answer: The carriage of documents, letters etc., is in the nature of carriage of goods and, therefore, provisions of section 194C would be attracted in respect of payments made to the couriers.

Question9: In the case of payments to transporters, can each GR be said to be a separate contract, even though payments for several GRs are made under one bill ?

Answer : Normally, each GR can be said to be a separate contract, if the goods are transported at one time. But if the goods are transported continuously in pursuance of a contract for a specific period or quantity, each GR will not be a separate contract and all GRs relating to that period or quantity will be aggregated for the purpose of the TDS.

Question 10 : Whether there is any obligation to deduct tax at source out of payment of freight when the goods are received on "freight to pay" basis ?

Answer : Yes. The provisions of tax deduction at source are applicable irrespective of the actual payment.

Question 11 : Whether a contract for catering would include serving food in a restaurant/sale of eatables ?

Answer: TDS is not required to be made when payment is made for serving food in a restaurant in the normal course of running of the restaurant/cafe.

Question 12 : Whether payment to a recruitment agency can be covered by section 194C ?

Answer : Provisions of section 194C apply to a contract for carrying out any work including supply of labour for carrying out any work. Payment to recruitment agencies are in the nature of payments for

services rendered. Accordingly, provisions of section 194C shall not apply. The payment will, however, be subject to TDS under section 194J of the Act.

Question 13: Whether section 194C would cover payments made by a company to a share registrar ?

Answer : In view of the answer to the earlier question, such payments will not be liable for tax deduction at source under section 194C. But these will be liable to tax deduction at source under section 194J.

Question 14: Whether FD commission and brokerage can be covered under section 194C ?

Answer : No.

Question 15: Whether section 194C would apply in respect of supply of printed material as per prescribed specifications ?

Answer : Yes.

Question 16: Whether tax is required to be deducted at source under section 194C or 194J on payment of commission to external parties for procuring orders for the company's product ?

Answer : Rendering of services for procurement of orders is not covered under the provisions of section 194C. However, rendering of such services may involve payment of fees for professional or technical services, in which case tax may be deductible under the provisions of section 194J.

Question 17 : Whether advertisement contracts are covered under section 194C only to the extent of payment of commission to the person who arranges release of advertisement, etc., or whether deduction is to be made on the gross amount including bill of media ?

Answer : Tax is to be deducted at the rate of 1 per cent. of the gross amount of the bill.

Question 18: Whether deduction of tax is required to be made under section 194C for sponsorship of debates, seminars and other functions held in colleges, schools and associations with a view to earn publicity through display of banners, etc., put up by the organisers ?

Answer : The agreement of sponsorship is, in essence, an agreement for carrying out a work of advertisement. Therefore, provisions of section 194C shall apply.

Question 19 : Whether deduction of tax is required to be made on payments for cost of advertisements issued in the souvenirs brought out by various organisations ?

Answer : Yes.

Question 28 : Whether the services of a regular electrician on contract basis will fall in the ambit of technical services to attract the provisions of section 194J of the Act ? In case the services of the electrician are provided by a contractor, whether the provisions of section 194C or 194J would be applicable ?

Answer: The payments made to an electrician or to a contractor who provides the service of an electrician will be in the nature of payment made in pursuance of a contract for carrying out any work, accordingly, provisions of section 194C will apply in such cases.

Question 29 : Whether a maintenance contract including supply of spares would be covered under section 194C or 194J of the Act ?

Answer : Routine, normal maintenance contracts which include supply of spares will be covered under section 194C. However, where technical services are rendered, the provision of section 194J will apply in regard to tax deduction at source

Question 30 : Whether the deduction of tax at source under section 194C and 194J has to be made out of the gross amount of the bill including reimbursements or excluding reimbursement for actual expenses ?

Answer : Sections 194C and 194J refer to any sum paid. Obviously, reimbursements cannot be deducted out of the bill amount for the purpose of tax deduction at source.

Hope that readers would be benefited by the above write up.