

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'एफ', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL "F", BENCH, MUMBAI
सर्वश्री राजेन्द्र, लेखा सदस्य, एवं , राम लाल नेगी न्यायिक सदस्य के समक्ष

BEFORE SHRI RAJENDRA, AM AND SHRI RAM LAL NEGI, JM

आयकर अपील सं./ITA No. 4482/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2012-13)

The DCIT (TDS)-1(2), Room No. 803, K.G. Mittal Hospital Bldg., Charni Road (W), Mumbai - 400002	Vs.	M/s Fino Fintech Foundation, Tarun Bharat, Plot No. 38/39, Sector No. 30, Near Sanpada Railway Station, Navi Mumbai - 400075
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AABCF1125D		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

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आयकर अपील सं./ITA No. 4483/Mum/2015

(निर्धारण वर्ष / Assessment Year: 2012-13)

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The DCIT (TDS)-1(2), Room No. 803, K.G. Mittal Hospital Bldg., Charni Road (W), Mumbai - 400002	Vs.	M/s Fino Paytech Ltd., Tarun Bharat, Plot No. 38/39, Sector No. 30, Near Sanpada Railway Station, Navi Mumbai - 400075
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACF9869M		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

राजस्व की ओर से / Revenue by : Shri T.A. Khan (DR)
निर्धारिती की ओर से /Assessee by : None

सुनवाई की तारीख / Date of Hearing : 14/09/2017
घोषणा की तारीख/Date of Pronouncement: 27/09/2017

आदेश / O R D E R

PER RAM LAL NEGI, JM

These appeals have been preferred by the revenue against two orders dated 20/05/2015 passed by the Ld. Commissioner of Income Tax (Appeals)-59, Mumbai pertaining to the Assessment Year 2012-13, whereby the Ld. CIT

(A) has allowed the appeals filed by the assessee M/s Fino Fintech Foundation and assessee M/s Fino Paytech Ltd. against orders passed by DCIT (TDS)-1(2), Mumbai (AO) u/s 201(1) 201(1A) of the Income Tax Act, 1961 (for short 'the Act'). Since, both the appellants are group concerns and the issues involved in both the appeals are common, these appeals were clubbed for hearing together and are being disposed of for the sake of convenience.

ITA No. 4482/Mum/2015 (Assessment Year: 2012-13)

Brief facts of the case are that the assessee company registered u/s 25 of the Companies Act, 1956 doing the activity of business correspondence (BC) to provide banking services in the extreme rural areas, where it is not viable for the commercial banks/schedule banks to carry on banking business. The company is providing services through its network of agents. The Agents carry transaction machines and by swiping and using their finger prints, the beneficiaries can have access to their accounts and do the banking transactions.

2. In connection with the assessment of tax (TDS) and to determine the tax payable on account of various defaults on non deduction or short deduction of TDS and interest payable u/s 201 (1A) for the financial year 2011-12, the case of the assessee was selected for scrutiny. On verification of P&L Account, it was found that the assessee company derived income of Rs. 95.24 crores from the aforesaid activities including enrollment expenses, AMC charges, POT usage charge, sourcing charges, switch charges etc. The company was accordingly asked to provide the details regarding the applicability of TDS provisions and compliance thereof the assessee furnished the details. It was seen from the details that the company initially treated the above expenses as contract payment and accordingly deducted tax at source @ 2%. However, after availing a lower deduction certificate the company changed its stand and treated all the

payments as professional/technical charges and deducted tax @ 0.01% as per lower deduction certificate. As regards, the sourcing charges expense no deduction was made stating that the contractual payment is below taxable limit. The assessee company further contended that the company is receiving composite services from M/s Financial Inclusion Network of Operations Ltd. and as such TDS under contract is applicable and accordingly the company has deducted the tax u/s 194C. It was further noticed that there were expenses in the head sourcing expenses. The assessee submitted that these payments are contractual payment below taxable limit and not TDS was required to be deducted. From the sourcing charges ledger, it was noticed that these payments were meant for agents for professional/technical fees but the assessee treating the same as contractual payments. It was further noticed that most of the entries were above Rs. 20,000/-. The AO treated these expenses as expenses related to outsourcing the technical work and held that these payments are covered u/s 194J of the Act and subject to deduction of tax at source @ 10%. Accordingly, the AO held the assessee company as company in default of short deduction/non deduction of TDS u/s 194J and computed the total default u/s 201 (1) and 201 (1A) under the Act.

3. In the first appeal, the Ld. CIT (A), after hearing the assessee, allowed the appeal of the assessee and deleted the demand raised by AO u/s 201 (1) and 201 (1A) of the Act to the extent of difference of tax between section 194C and 194J,. The revenue is in appeal before the Income Tax Appellate Tribunal against the findings of the Ld. CIT(A).

4. These cases were fixed for hearing on 14.09.2017. On the said date the case was called for hearing, however, none appeared on behalf of the assessee. No application for adjournment was received on behalf of the assessee. We noticed that the case was fixed for hearing for the first time on 17.04.14. On

the said date none appeared on behalf of the assessee. Notice was accordingly issued. Thereafter the assessee did not appeal on two successive dates. Thereafter on 16.08.2017 the authorized representative of the assessee appeared, however the case was adjourned to 14.09.2017 as per the request of the counsel for the assessee. From the conduct of the assessee we are convinced that the assessee is not interested in pursuing the present appeal. We, therefore, decided to dispose of the appeal on the basis of material on record after hearing the departmental representative.

The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

1. *i) "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the demand raised u/s 201 (1)/201 (1A) of the Act, holding that no specific skill is required by the agents to render the enrollment activities of a banking institution."*
- ii) "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in failing to appreciate that preparing biometric and demographic particulars of banking customers and putting these particulars in the bank's network require sound technical know-how and not basic computer knowledge, therefore, TDS ought to have been deducted u/s 194J of the Act as against section 194C of the Act."*
- iii) "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in not considering the service provider agreement which shows that the services are highly technical, and expertise in that field is a must, and any attempt of getting these services by a non-technical/non-qualified person will void the service contract."*
- iv) "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the demand of Rs. 4,64,36,118/- without properly appreciating the factual and technical issues of the case, as clearly brought out by the Assessing Officer in his order u/s 201(1)/201(1A) of the I.T. Act."*

2. *The order of the CIT (A) being erroneous be set aside and Ld. A.O.s order be restored.”*

5. Before us, the Ld. Departmental Representative (DR) relying on the assessment order passed by the AO submitted that the Ld. CIT (A) has erred in deleting the demand raised u/s 201 (1)/201 (1A) of the Act holding that no specific skill is required by the agent to render the enrollment activities that the Ld. CIT (A) has further deleted the addition made by the AO ignoring the fact that preparing biometric and demographic particulars of banking customers and putting these particulars in the bank network required technical know-how, therefore, the assessee was required to deduct tax at source u/s 194J of the Act and not u/s 194C of the Act. Since, the impugned order is erroneous, the same is liable to be set aside.

6. We have heard the Ld. DR and also perused the material on record including the cases relied upon by the authorities below. The only issue to be decided in this appeal is that whether the payments made by the assessee company to its agents for the work assigned to them are “fees for professional services or fees for technical services” within the meaning of section 194J for deducting tax at source as alleged by the AO or the same is payment made to the contractors within the meaning of section 194C. The Ld. CIT (A) has decided this issue in favour of the assessee. The relevant portion of the order reads as under:-

“4.15 Adverting to the fact in the instant case it is noticed that there is no acquisition of technical know-how or expertise by the assessee. Therefore, the payment to contractors by the appellant cannot be termed as fees for technical services. Further, on going through the A.Os order, it is observed that even A.O. is not sure about the fact that whether the parties have rendered professional or technical services. This is apparent from the order of the AO which is reproduced as under:-

Since the nature of activities of the assessee company seems to be very technical, hence for the same the service provider must have provided technical/professional service which is mostly in the form of Enrollment Expenses.” Hence the subject expenses should be covered under the head professional/technical expenses and TDS deducted on such expenses should be u/s 194J @ 10% not a contract expenses u/s 194C.

4.16 In view of the aforesaid discussion, the factual and the legal matrix of the case, I am of the considered opinion that the payment made by the appellant to the parties cannot be termed as fees for professional or technical services. The parties are contractor executing contracts for project undertaken and provisions of S. 194C are applicable to the payments received by the parties. The demand raised by the AO for the difference of tax between 194C and 194J u/s 201(1) and 201 (1A) is deleted.

Ground is Allowed.”

7. We notice that the assessee has relied on the law laid down by the Hon’ble Supreme Court in *CIT vs. Manmohan Das* 59 ITR 699 (SC), *Indian Medication Association vs. P Shantha* AIR 1996 SC 550, Hon’ble Madras High Court in *CIT vs. International cleaning and Shipping Agency* 241 ITR 172 (Mad) and the decision rendered by the ITAT Bench, Pune in *Glaxosmithklin Pharmaceuticals Ltd. vs. ITO* 48 SOT 643 taxmann.com 163 (Pune Tribl), during the appellate proceedings before the Ld. CIT(A). We further notice that the Ld. CIT (A) has based his findings on the judgments/decisions aforesaid relied upon by the assessee. The Hon’ble Supreme Court has held that the expression profession involves the idea of an occupation requiring either purely intellectual skill or if any manual skill, as in painting and sculpture or surgery skill controlled by intellectual skill of the operators as distinguished from an occupation, which is substantially the production or sale were arrangements for the production of sale of commodities. In *CIT vs. International Clearing and Shipping Agency* (supra), the Hon’ble Madras High Court has held that the

distinguishing feature of a profession is a possession by the practitioner of specialized knowledge involving intellectual skill and higher education in learning. On the other hand, a contractor is generally understood as a person who undertakes a contract provides material or labour for a job. In *Glaxosmithklin Pharmaceuticals* (supra) the Pune Bench of the Tribunal has held that for covering any payment as technical services u/s 194J it should be a consideration for acquiring or using technical know-how. The Ld. CIT(A) has rightly pointed out that there is no acquisition of technical know-how or expertise by the assessee. Hence, in our considered opinion, the findings of the Ld. CIT (A) are based on the principles of law laid down in the cases discussed above and there is no infirmity in the order of the Ld. CIT (A) to interfere with. We therefore, uphold the finding of the Ld. CIT (A) and dismiss all the grounds raised by the revenue in its appeal and direct the AO to delete the demand raised u/s 201(1) & 201(IA), in terms of the CIT (A) order.

ITA No. 4483/Mum/2015 (Assessment Year: 2012-13)

The revenue has raised the following effective grounds of appeal against the impugned order passed by the Ld. CIT (A):-

i) "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the demand raised u/s 201 (1)/201 (1A) of the Act, holding that no specific skill is required by the agents to render the enrollment activities of a banking institution."

ii) "On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in failing to appreciate that preparing biometric and demographic particulars of banking customers and putting these particulars in the bank's network require sound technical know-how and not basic computer knowledge, therefore, TDS ought to have been deducted u/s 194J of the Act as against section 194C of the Act."

iii) *“On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in not considering the service provider agreement which shows that the services are highly technical, and expertise in that field is a must, and any attempt of getting these services by a non-technical/non-qualified person will void the service contract.”*

iv) *“On the facts and circumstances of the case and in law, the Ld. CIT (A) erred in deleting the demand of Rs. 2,83,13,262/- without properly appreciating the factual and technical issues of the case, as clearly brought out by the Assessing Officer in his order u/s 201(1)/201(1A) of the I.T. Act.”*

3. *The order of the CIT (A) being erroneous be set aside and Ld. A.O.s order be restored.”*

2. The facts and the issues involved in the present appeal are identical to the facts of the case and issues involved in the case of the group concern in ITA No. 4482/Mum/2015 for the assessment year 2012-13 discussed above, except the amount of total default computed by the AO. Since, we have decided the identical issue in favour of the assessee in the aforesaid appeal, we decide the sole issue involved in this appeal in favour of the assessee and dismiss all the grounds of appeal of the revenue for the same reasons.

In the result, both the appeals filed by the revenue for assessment year 2012-13 are dismissed.

Order pronounced in the open court on 27th.Sept., 2017.

Sd/-
(RAJENDRA)
ACCOUNTANT MEMBER

Sd/-
(RAM LAL NEGI)
JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 27/9/2017

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

**उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai**