CASE STUDIES IN TDS

Commissioner of Income Tax V/s. Eli Lilly & Co. (I) P. Ltd. (2009) 312 ITR 225 (SC) : (2009) 223 CTR (SC) 20 – TDS provisions being machinery provisions cannot be independent of the charging provisions as held in the case of *B.C. Srinivasa Setty 128 ITR 294* , the 1961 Act is an integrated Code.

Hindustan Coca-Cola Beverages Pvt. Ltd. V/s. CIT 293 ITR 226 (SC)-

The liability of the deductor comes to an end once taxes have been paid by the deductee. However, this will not alter the liability to charge interest under section 201(1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C of the Income-tax Act".

Prasar Bharati 292 ITR 580 (Del)-

If, on the same date, two provisions are in the Act, one specific to the activity sought to be taxed and the other in more general terms, resort must be had to the specific provision which manifests the intention of the Legislature.

Section 194C

Associated Cement Co. Limited. V/s. CIT (1993) 201 ITR 435 -

The words "Any work" means any work and not a "works contract", which has a special connotation in the tax law. 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*.

Chamber of Tax Consultants V/s. CBDT (1994) 209 ITR 660 (Bom). –

The Supreme Court did not intend to give an extended meaning to the expression 'any work' so as to include professional services within its ambit. The Supreme Court interpreted the expression 'any work' to decide whether it was confined to works contract as argued by the appellant before it or it was applicable to labour contracts also. It is in this context that the Supreme Court observed that "any work" means any work and not only a "works contract". The above observation of the Supreme Court cannot be interpreted out of context to include payments made to professionals like advocates, solicitors, chartered accountants, tax practitioners, doctors, surgeons, engineers, etc., for the services rendered by them.

East India Hotels Limited.vs Central Board Of Direct Taxes. (2010) 320 ITR 256 : (2009) 179 Taxman 17 (Bom)-

The words 'carrying out any work' in section 194C are limited to any work which on being carried out culminates into a product or result. In other words, the word 'work' in section 194C is limited to doing something with a view to achieving the task undertaken or carry out an operation which produces some result.

S.R.F Finance Ltd. V/s. CBDT 211 ITR 861 (Del)-SLP dismissed 212 ITR (St.) 375.

The petitioner was engaged in the service of collecting deposits. The question was whether this act falls within the definition of ‘work’ within the meaning of section 194C.

HELD there are qualitative differences between the subject, referred to as "work" and the subject referred to as "service". The two words convey different ideas. In the former (i.e., "work"), the activity is predominantly physical ; it is tangible. In the activity referred to as "services", the dominant feature of the activity is intellectual, or at least, mental.

Glenmark Pharmaceuticals Ltd. ITXA/2256/2009 (Bombay High Court) {Decided on 12th March 2010}
- Where material is supplied by the purchaser, it would be a case of ‘works contract’. However where the manufacturer buys the material and manufactures the goods, it would amount to a ‘sale’; fact that the goods were produced as per the specifications provided by the customer would not change that position.

CIT V/s. Cargo Linkers (2009) 179 Taxman 151 (Del): **218 CTR (Del) 695 -** Assessee a C&F agent collected freight from such exporters intending to transport their goods for export and paying the same to airlines without deducting TDS. Held assessee not liable to deduct

TDS since the contract was between the exporters and the assessee was only and intermediary. Hence assessee cannot be held to be 'person responsible' within the meaning of section 194C.

Datta Digamber Sahakari Kamgar Sanstha Ltd. (2002) 83 ITD 148 (Pune)-
{A.Y.s- 1995-96}-
The basic requirement of section 194C(2) is that the sub-contractor has to carry out whole or any part of the work undertaken by the contractor. In other words, there should be not only a contract between a contractor or sub-contractor, but further the said contract has to be for carrying out whole or part of the work undertaken by the contractor. The requirement of section 194C(2) is that the sub-contractor should carry out the whole or any part of the work undertaken by the contractor.

Ambuja Darla Kashlog Mangu Transport Coop. Society (2010) 188 Taxman 134 (HP)-
Assessee, a cooperative society was formed by the truck owners and it entered into contracts with companies for transportation. The company deducted TDS @ 2%. Thereafter the assessee-society paid the amount to the truck owners on the basis of work done after deducting a nominal amount for administrative expenses. The issue was whether the assessee was liable to deduct TDS on amounts paid to the truck-owners in terms of sec.194C(2).
HELD that even though assessee had an identity distinct from its' members, still the language of sec. 194C(2) dictates that the deduction is required only in case of a sub-contract. The relationship between assessee and its members was NOT that of a contractor and a sub-contractor. The assessee was formed as a matter of convenience. The society was nothing more than a conglomeration of truck operators themselves. The truck owners were virtual owners of the society even though the society was a distinct legal entity. The society was formed only because the companies were not ready to deal with individual truck owners. The society did not even retain profits. There was no sub-contract.

City Transport Corporation V/s. ITO (2007) 13 SOT 479 (Mum) {A.Ys 1999-00 to 2002-03}-
The assessee was engaged in transporting goods for different companies. The assessee did not have vehicles of its' own and hence, used to hire from truck owners. The issue was whether the amounts the assessee paid to the truck owners fell within the scope of sec.194C. The assessee contended that each trip is negotiated at the time of dispatch and hence each

transaction is a fresh contract and since in each transaction's case the amount did not exceed Rs.20,000/-, the assessee was not liable to deduct TDS.
HELD there was no material to show that all trips for transporting goods were under a single contract and payment for each trip being less than Rs.20,000/-, provisions of section 194C were not applicable.

CIT V/s. Poompuhar Shipping Corporation (2006) 282 ITR 3 : {A.Y. 1994-95}-

Under section 194C, the tax is to be deducted when a contract was entered into for carrying out any work in pursuance of a contract between the contractor and the entities mentioned in sub-section (1) of section 194C. In the present case, there was no contract between the assessee and the shipping companies to carry out any work. On the other hand, the assessee-company hired the ships belonging to other shipping companies for a fixed period on payment of hire charges.

Mythri Transport Corporation (2010) 1 ITR (Trib) 290 (Vishakhapatnam)-
{A.Y.s- 2005-06}- The assessee entered into a contract to transfer bitumen which required specially designed vehicles. Assessee obtained few vehicles on hire since the assessee did not have too many vehicles. The question was whether the assessee was obliged to deduct TDS u/s. 194C while making payments to the truck owners from whom the vehicles were taken on hire.
HELD the assessee alone was responsible to perform the contract and was fastened with liabilities. The other truck owners were not saddled with any liabilities. Hence the assessee was not liable to deduct as section 194C was not applicable- it not being a case of a sub-contract.

Ess Kay Construction Co. V/s. ITO (1988) 41 Taxman 15 (Chd.) (Mag.) - {A.Y. 1981-82, 82-83}-
Under 194C(2) tax is to be deducted only where payment is made pursuance to a contract. There cannot be a contract without consideration hence sec.194C(2) did not come into play in this case. {*Decision affirmed in (2004) 267 ITR 618 (P & H)* }.

CIT V/s. Dewan Chand 178 Taxman 173 (Del)-

The liability to deduct tax under section 194C of the said Act, only arises in case of contractual payments. Payments made to the employees employed by the assessee on daily wages cannot be said to be contractual payments and hence no liability to deduct is called for.

Khaitan & Co. (2007) 12 SOT 120 (Del)-

For the purpose of sec.194C, 'carrying out work' necessarily has to be through manpower. Supply of manpower is sine qua non for attracting section 194C.

Section 194H

Delhi Milk Scheme 301 ITR 373 (Del): 173 Taxman 54-

Transaction between the assessee (milk supplier) and the concessionaires (selling agents) held to be a principal-to-agent transaction and not a principal to principal transaction. Hence sec.194H applicable.

CIT V/s. IDEA Cellular Ltd. (2010) 230 CTR (Del) 43- {A.Y.s 2003-04 & 2004-05} Commission retained by the PMA (Prepaid Market Associates) DOES NOT amount to a sale at a discount; it is as much a commission as a post-paid commission. This is because the agreement stipulates that unsold goods are to returned to the assessee-deductor- this an antithesis of sale. Further the nature of service remains the same, the contract remains between the assessee & the subscriber. Also a clause in the agreement between the assessee and the PMA states that on termination of the agreement, the PMA will not be entitled to any compensation for the costs incurred towards setting up the business or promotion- this again militates against the concept of sale.

CIT V/s. Prasar Bharati (2010) 230 CTR (Ker) 277- Transaction between DD (Doordarshan and Advertising Agents) where Ad agent collects amounts from customers for advertisement on DD and retains 15 % commission while remitting the balance amount to DD –Amounts to a transaction on Principal-Agent relationship and amount of 15% retained by the Ad agent is commission to which section 194H is attracted. Decisions of Gujarat High Court in **Ahmedabad Stamp Vendors' Association 92002) 257 ITR 202 (sale of stamp by Govt. to stamp vendors)** and Kerala High Court in **M.S. Hameed & Ors. V/s. Director of State Lotteries 249 ITR 186 (Ker**) (lotteries) distinguished.

CIT V/s. Singapore Airlines Ltd. (2009) 224 CTR (Del) 168- Assessee selling air travel tickets to agents at concessional rates-Amounts to a transaction on principal-to-agent basis-Assessee entitled to deduct TDS u/s. 194H.

Section 194J

Skycell Communications 251 ITR 53 (Mad) –

Installation and operation of sophisticated equipments with a view to earn income by allowing customers to avail of the benefit of the user of such equipment does not result in the provision of technical service to the customer for a fee.

When a person decides to subscribe to a cellular telephone service in order to have the facility of being able to communicate with others, he does not contract to receive a technical service. What he does agree to is to pay for the use of the airtime for which he pays a charge. The fact that the telephone service provider has installed sophisticated technical equipment in the exchange to ensure connectivity to its subscriber, does not on that score, make it provision of a technical service to the subscriber.

Kotak Securities Ltd. (2008) 25 SOT 440 (Mum): (2009) 124 TTJ 241 (Mum)-
Amount paid to stock exchange by assessee/broker for transaction charges/VSAT and leaseline connection does not amount to 'Fees for Technical Service' within the meaning of section 9 (1) (vii). Followed in **Angel Broking (2010) 35 SOT 457 (Mum).**

Jaipur Vidyut Vitaran Nigam (2009) 123 TTJ 888 (Jp)- Assessee making payment to BSNL for use of its' network for gaining access to the telecom network of other service providers. Held not amounting to 'Fees for Technical services' within the meaning of section 194J and assessee not liable to deduct TDS. And hence no disallowance is called for u/s. 40 (a)(ia). There is difference between service by using technical skill/knowledge and rendering technical service. The former does not amount to a 'Technicl service' within the meaning of section 9 (1) (vii) the letter. **Estel Communications 217 CTR (Del) 102**- Payment for bandwidth services & port charges by the assessee-deductor to other telecommunication concerns being standard facilities are not includible in technical services within the meaning of section 194J.

Parasrampuria Synthetics (2008) 20 SOT 248 (Del)-

Amount paid to technicians for maintaining machinery & conversion of yarn but that knowledge did not rest in the assessee so that the assessee itself could make use of it. Amount paid cannot be considered as FTS within the meaning of 194J.

Indraprastha Medical Corpn Ltd. (2009) 33 SOT 261 (Del)- Sec. 194J- Fees for Technical Services- Assessee a hospital engaging outside doctors in their OPD Dept. and paying them after collecting fees from the patients, without deducting TDS. Held assessee not liable to deduct TDS since the contract was between the patients and the doctors and there was no contract of service provider and service recipient between the assessee and the doctors (i.e. the payees). Hence no liability of sec.201.

Expeditors International (I) Ltd. (2010) 2 ITR (Trib) 153-

VSAT uplinking charges paid by the assessee-company to its' parent company are not in the nature of fees for technical services & hence were not liable for TDS.

Tecumseh Products (2007) 13 SOT 489 (Hyd.)- {A.Y. 96-97 & 97-98}- Assessee liable to deduct TDS on payments made to holding company for rendering advice or service in respect of human resources development, taxation, maintenance of accounts & finance- since the same amounted to managerial/technical service**.**

Section 195

Transmission Corporation Of A. P. Ltd. And Another .V/s CIT 239 ITR 587 (SC)

The issue was whether the assessee/deductor was liable to deduct TDS while making payments for purchase of certain machinery and towards assembly/erection?. The assessee/deductor contended that the words "any other sum chargeable under the provisions of this Act" occurring in section 195 of the Act do not contemplate inclusion of trade receipts in their ambit and that section 195 applies only to cases where the sums paid are "pure income profits".

Held-The scheme of sub-sections (1), (2) and (3) of section 195 and section 197 leaves no doubt that the expression "any other sum chargeable under the provisions of this Act" would mean "sum" on which income-tax is leviable. In other words, the said sum is chargeable to tax and could be assessed to tax under the Act. The consideration would be-whether payment of the sum to the non-resident is chargeable to tax under the provisions of the Act or not ? That sum may be income or income hidden or otherwise embedded therein. If so, tax is required to be deducted on the said sum, what would be the income is to be computed on the basis of various provisions of the Act including provisions for computation of the business income, if the payment is a trade receipt. However, what is to be deducted is income-tax payable thereon at the rates in force.

Mahindra & Mahindra 92009) 122 TTJ (Mum) 577 (SB) – The liability of the assessee to deduct TDS would depend upon the assessment on the non-resident deductee. The time-limit of taking action u/s. 201 will be the limitation provided for the purpose of action u/s. 147**.**

Van Oord ACZ India (P) Ltd. ITA No. 439 of 2008 (Delhi High Court){Decided on March 15, 2010}

Section 195deals with the deduction of tax at source by the payer i.e. assessee if the payments are to be made to a non-resident. The payer/assessee is required to deduct Income tax on such payments made to non-resident at the specified rates in force. The obligation to deduct the tax at source arises only when the payment is chargeable under the provisions of the Income Tax. If the parties feel that either the deduction of tax at source by the payer is required to be at a rate lower than the prescribed rate or no deduction is required to be made they are required to file an application before the ITO for obtaining such certificate. In case no such application is filed before Assessing Officer for obtaining such certificate or such application is rejected by Assessing Officer and direction is issued by the Assessing Officer to deduct such tax at a particular rate the payer is duty bound to deduct tax as per the directions of Assessing Officer and in case no such application for obtaining the certificate was filed before the Assessing Officer then the payer is duty bound to deduct tax as per the prescribed rates in force at the relevant time. The order of the Assessing Officer under Section 195(2) of the Act is tentative in nature.In the assessment proceedings relating to the assessee when it is found that the assessee was required to deduct the tax at source in the eventuality contemplated in (d) above, the assessee would not be permitted to argue that the amount paid to the recipient is not chargeable under the provisions of the Act. The assessee may be treated as in default and would suffer the consequences provided under the Income Tax Act. However, in case in the assessment proceedings relating to the recipient, it is ultimately held that the sum received by the recipient was not chargeable to tax, the effect of that would be that it was no obligation on the assessee to deduct tax at source on the sum paid to the said non-resident and in that eventuality, the assessee will not be treated as in default and would be absolved of any consequences for not deduction the tax at source.

Commissioner Of Income-Tax. vs Siemens Aktiongesellschaft. {2009}310 ITR 320 (Bom)-

Reimbursement of expenses does not amount to income in the hands of the assessee-payee. Same view in **Cairn Energy (I) Pvt. Ltd. {2010} 2 ITR (Trib) 38 (Chennai**). In **Cairn's case** the decision in Transmission Corp's case has been analyzed.

Information Architects 322 ITR 1 (Bom)- The issue was whether TDS was applicable to the overseas maintenance allowance paid to the employees by the assessee . HELD that these amounts were paid towards expenses at a particular rate per day, per person. These amounts constitute reimbursement of exps incurred by the assessee's employees and would not form part of salary in the hands of the receipments. Hence the question of applying sec.40(a) (iii) would not arise.

ACIT V/s. IIC Systems P. Ltd. (2010) 127 TTJ (Hyd.) 435{A.Y.s 2005-06 & 2006-07}

Assessee, an Indian company, entered into a contract with a US company for procurement of software personnel. The US company procured the personnel and deployed them on the projects as required by the assessee and per the directions of assessee. The assessee made payments to the US company. The question was whether the payment is in the nature of 'Fees for Technical Services'?. Held that the fact that the personnel may give technical input while rendering services does not mean that technical skill/knowledge is made available to the person purchasing the service. The work to be developed by the personnel did not belong to the assessee or the US company which supplied the personnel. Hence the US company was not chargeable to tax in India and consequently no tax need be deducted u/s. 195.

Jindal Thermal Power Co. **[2009] 182 Taxman 252 (Kar) : 225 CTR (Kar) 220-** The deductor of TDS i.e. the payer is entitled to question the imposition of tax liability on the payee. No tax deducted and further no application u/s. 195(2) made for A.Y 1997-98.

Tecumseh Products (2007) 13 SOT 489 (Hyd.)- {A.Y. 96-97 & 97-98}-

Payment made by assessee's bank to foreign. Assessee had opened a LC in favour of foreign supplier for an import transaction. On assessee's failure to make timely payment, supplier approached foreign bank and demanded interest as per terms of LC which the bank paid. The Dept. contended that since bank has paid on behalf of the assessee, the assessee is responsible for making payment and consequently for deducting TDS u/s. 195. Held that the immediate responsibility of paying interest was that of the bank in terms of LC. And hence, assessee could not be made responsible for deducting tax at source u/s. 195.

Section 201.

Nishit Desai V/s. ITO 9 SOT 42 (Mum)-

Bonafide impression that TDS not deductible on reimbursement of expenses to employees cannot be treated as default u/s 201 and hence no interest u/s. 201(1A) can be charged.