IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH – AHMEDABAD

(BEFORE S/SHRI G. D. AGARWAL, VP AND BHAVNESH SAINI, JM)

ITA No.1637/Ahd/2010
A. Y.: 2009-10

Ahmedabad Urban Development Authority, Sardar Vallabhbhai Patel Sankul Usmanpura, Ashram Road, Ahmedabad	Vs	The A. C. I. T., TDS Circle, Amrut Jayanti Bhavan, Navjivan Trust Building, Off Ashram Road, Ahmedabad
PA No. AAALA 0233 B		
(Appellant)		(Respondent)

Appellant by	Smt. Urvashi Shodhan, AR
Respondent by	Shri R.K. Dhanista, DR

O R D E R

PER BHAVNESH SAINI: This appeal by the assessee is directed against order of the learned CIT(A)-VI, Ahmedabad dated 23-02-2010 for assessment year 2009-2010, challenging the order of the learned CIT(A) in confirming the demand for short deduction of tax u/s 201 (1) of the IT Act and confirming the demand of interest charged u/s 201 (1A) of the IT Act.

2. Briefly, the facts of the case are that the assessee is a local authority and is engaged in development of areas in and around Ahmedabad outside municipal limits. It was seen that the assessee had hired cars on fixed rent payments but TDS was deducted @ 2% treating the same as contract. Since the cars are one type of machinery, and rent is paid at fixed monthly rate, according to the AO, TDS is applicable at the rate prescribed u/s 194 -I of the IT Act.

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Explanation of the assessee was called for. It was explained that for hiring of cars the provisions of section 194-I of the IT Act are not applicable. The payment is made towards the work contract executed and not towards hiring of vehicles. As per the explanation to section 194-I of the IT Act, the rent does not include motor cars. Moreover, as per section 194C of the IT Act, the work includes carriage of passengers. Accordingly, tax has been correctly collected u/s 194 C of the IT Act. The AO on consideration of the reply of the assessee noted that the assessee had made payment for vehicle hire charges in connection with plying of employees from one place to another. The vehicles are owned and maintained by the contractor. The assessee is making fixed payment of an amount. All other expenses of diesel, repair and insurance etc. are paid by the contractor. After considering the provisions of section 194-I of the IT Act which provides for rent, the AO noted that it included payment of use of machinery, land and rent for hire of any vehicle which is forming part of machinery for the period in use. The AO noted that in the present case vehicles are owned and operated by contractor which are used for carrying employees from one place to another or such services would fall within the scope of section 194-I of the IT Act and not u/s 194C of the IT Act. The AO relied upon Board Circular No.715 dated 8-8-1995 which clarify deduction of the tax and section 194C of the IT Act is applicable when a plane or bus or any other mode of transport is chartered by one of the entities mentioned in section 194C of the IT Act and work in section 194C of the IT Act continuously remain in the statute book and such interpretation of the provision would not controvert or the general provisions contained in the section. The AO,

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therefore, noted that if the assessee paid the rent for hiring out any machinery then he has to deduct tax at sources u/s 194-I of the Act. In the case of the assessee it paid rent and vehicles had to ply for transporting employees from one place to another, therefore, the assessee was required to deduct tax @ 10%, however, the assessee had deducted TDS @ 2% u/s 194C of the IT Act. Therefore, the difference was calculated @ 8% and the assessee was held to be in default of payment of TDS in a sum of Rs.1,75,506/- and interest u/s 201 (1A) in a sum of Rs.26,537/-. Order was accordingly passed, raising the demand against the assessee. Same submissions were reiterated before the learned CIT(A). The learned CIT(A) however, dismissed the appeal of the assessee holding that the assessee had hired cars on fixed rent payment and deducted tax @ 2% of the contract but in fact cars are one type of machinery and rent for the same is paid. Therefore, provisions of section 194-I of the IT Act have been rightly invoked. The appeal of the assessee was accordingly dismissed.

3. The learned Counsel for the assessee reiterated the submissions made before the authorities below and submitted the assessee correctly deducted TDS as per provision of section 194C of the IT Act. The AO wrongly applied the provisions of section 194-I of the IT Act in which vehicle hire charges have not been mentioned. The learned Counsel for the assessee relied upon the order of ITAT Ahmedabad "B" Bench in the case of M/s. Mukesh Travels Co. Vs ITO in ITA No.2594/Ahd/2010 dated 25-2-2011 in which the Tribunal considering Explanation (iii) to Section 194C of the IT Act on the

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identical facts held that the payment of the same nature clearly falls within the scope of section 194C of the IT Act. The learned Counsel for the assessee also raised additional ground of appeal stating therein that the entire amount of tax has been paid by the payee; therefore, there is no loss to the revenue. Copy of the return of the payee is filed on record.

4. On the other hand, the learned DR relied upon the orders of the authorities below.

5. We have considered the rival submissions and the material available on record. The facts noted by the AO are not in dispute that the assessee had hired cars on fixed rent payment and TDS was deducted @ 2% treating the same as contract as per section 194C of the IT Act. The AO also noted that the assessee had made vehicle hire charges payment in connection with plying of employees from one place to another. It was also noted by the AO that vehicles are owned and maintained by contractors. The assessee paid fixed payment for use of the hired cars and all the expenses are borne by the contractors. It is also admitted fact that the assessee is a local authority. The provisions of section 194C of the IT Act is applicable to the assessment year under appeal provided (a) any person responsible for paying any sum to any resident ((b) any local authority (as the assessee is) referred to as a contractor for carrying out any work in pursuance of the contract between the contractor and the local authorities etc., shall at the time of credit of such sum to the account of the contractor or at any time of payment thereof in cash or

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issue of a cheque or draft or by any other mode whichever is earlier, deduct an amount equal to, (i) 1% in case of "advertising", (ii) or in any other case 2%, of such sum as income tax or income comprised therein. The definition of "work" has been provided in Explanation (iii) to Section 194C of the IT Act which provides for the purpose of this section, expression "work" shall also 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.

The AO admitted that the assessee had hired the cars on fixed rent payment owned and maintained by contractor. The assessee paid vehicle hire charges and all the expenditure are borne by the contractor. It is also admitted fact that vehicle charges were paid in connection with plying of employees from one place to another. Thus, it implies that the passengers were transported by the drivers and vehicles of the vehicle owner/contractor and in consideration of that the vehicle owners/contractors were paid by the assessee the fixed amount. Therefore, sub-clause (c) to Explanation (iii) of the provisions of Section 194C of the IT Act would apply in the case of the assessee. In our opinion the above payment of vehicle hire charges clearly falls within the scope of section 194C of the IT Act. The assessee, therefore, correctly deducted tax thereof as per the provisions of section 194C (Explanation (iii) (c)) of the IT Act. Same

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view is taken by ITAT Ahmedabad "B" Bench in the case of M/s. Mukesh Travels Co. (supra) copy of which is placed on record. The AO however, noted that the provisions of section 194-I of the IT Act would apply in the matter being rent paid to the contractor which provides as under: (prior to amendment w. e. f. 1-10-2009)

> *"194-I Any person, not being an individual or a Hindu undivided family, who is responsible for paying to [a resident] any income by way of rent, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, [deduct income-tax thereon at the rate of—*
>
> ***[****(a) ten per cent for the use of any machinery or plant or equipment; and*
>
> *(b) fifteen per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings where the payee is an individual or a Hindu undivided family; and:****]****]*
>
> *(c) twenty percent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings where the payee is a person other than an individual or a Hindu undivided family."*
>
> ***Provided** that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed one hundred and twenty thousand rupees :*
>
> *[**Provided further** that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section.]*

Explanation.—For the purposes of this section,—

[(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—

(a) land; or

(b) building (including factory building); or

(c) land appurtenant to a building (including factory building); or

(d) machinery; or

(e) plant; or

(f) equipment; or

(g) furniture; or

(h) fittings,

whether or not any or all of the above are owned by the payee;]

(ii) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.]

The above definition of rent does not provide any item for vehicle hire charges. Therefore, provisions of section 194-I has been wrongly applied in the matter by the AO. Considering the above discussions we are of the view that the authorities below have wrongly applied the provisions of section 194-I of the IT Act in the matter. We accordingly, set aside the orders of the authorities below and delete the demand and the interest thereon for shortfall as noted by the AO on this issue.

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In view of the above finding, there is no need to admit the additional ground of appeal of the assessee.

6. In the result, the appeal of the assessee is allowed

Order pronounced in the open Court on 10-03-2011

Sd/- Sd/-

(G. D. AGARWAL) (BHAVNESH SAINI)
VICE PRESIDENT JUDICIAL MEMBER

Date : 10-03-2011

Lakshmikant/-

Copy of the order forwarded to:

1.	The Appellant
2.	The Respondent
3.	The CIT concerned
4.	The CIT(A) concerned
5.	The DR, ITAT, Ahmedabad
6.	Guard File

BY ORDER

Dy. Registrar, ITAT, Ahmedabad

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IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES, ‘D’, MUMBAI

BEFORE SHRI S V MEHROTRA, ACCOUNTANT MEMBER AND
SHRI VIJAY PAL RAO, JUDICIAL MEMBER

ITA No. 5920,5921 and 5922/Mum/2009
(Assessment years 2007-08, 2008-09 and 2009-2010)

ACIT (TDS) 1(1)
8th fl, Smt.KG Mital
Ayurvedic Hospital Bldg,
Mumbai-400002. ... Appellant

Vs

Accenture services P ltd
Godrej and Boyce Complex LBS marg,
Vikhroli(W),
MUMBAI
PAN: AACCA8997K
...Respondent

Appellant by : Shri Jitendra Yadav
Respondent by : Shri R R Vora

O R D E R

PER VIJAY PAL RAO,JM

These appeals by the revenue are directed against the three different orders of the CIT(A) dated 18.08.2009 arising from the orders passed under section 201(1) and 201(1A) of the Income Tax Act, 1961. These appeals pertain to the assessment years 2007-08, 2008-09 and 2009-10. In all these appeals issue involved is applicability of section 194-I or 194-C. Therefore, for the sake of convenience, these appeals were heard together and are being decided by this composite order.

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2. Solitary common ground raised by the revenue in these appeals is as under :

> *"On the facts and circumstances of the case an din law, the ld. CIT(A) has erred in law is not considering whether section 194-I of the IT Act, 1961 is attracted in the facts and circumstances of the case and specifically after amendment w.e. f 13th July, 2006 in section 194 –I of the IT Act, 1961"*

3. Brief facts of the case are that the assessee is a company engaged in the business of software development, information technology enabled services and consulting. On 13th and 14th January 2009, a survey u/s 133 was carried out at the assessee's company premises to verify the compliance of TDS provisions. In pursuance to the survey, the order dated 19.02.2009 u/s 201(1) and 201(1A) of the Act was passed whereby the respective demands were raised on the assessee. In the said order the AO has held that the assessee has deducted the TDS on payment made for hiring of vehicles for transportation of its employees under the provisions of section 194C of the Act. Whereas this arrangement falls within the provisions of section 194-I of the Act for rental of motor vehicles. Thus, the AO was of the view that the assessee has short deduction of tax and held to be in default regarding payment to transport service provider, as per the provisions of section 201)(1) for the assessment year 2008-09 and interest under section 201(1A) for the all the assessment years..

4. On appeal, the CIT(A) held that the contract entered by the assessee with the transport service provider for transportation of its employees should be covered by Explanation (3) to section 194C of the Act and therefore the payment made to the transport service provider falls within the ambit of provisions of section 194C of the Act.. Consequently, the assessee should not be treated the assessee is in default u/s 201(1) as well also not liable for any levy of interest under section 201(1A).

5. Before us, the learned DR has submitted that the payment made for hiring of the vehicle for transportation of the employees falls under the provisions of section 194-I of the Act which has been amended with effect from 13.07.2006 to include rental payment made for the use of the plant and machinery. Thus, the assessee was required to deduct the tax under section 194-I and not under section 194-C. The ld. DR has referred the provisions of section 194-I and submitted that this provisions cover the rental payment made for the use of the machinery, plant or equipment. Since as per the Rule 5 of the Income Tax Rules, 1962 the motor vehicle used in the business of running them on hire falls within the ambit of plant and machinery, therefore, the payment made towards rental of motor vehicles would attract the TDS under the provisions of section 194-I of the Act. The ld. DR has further

contended that after the amendment of section 194-I the circular no.N681 dated 8.03.1994 is not applicable. The learned DR has referred sub-para (3) of paragraph 7 of the said circular and submitted that even as per the said circular, the payment made for hiring or renting the equipment would not fall under the provisions of section 194-C.. The ld. DR submitted that the circular relied upon by the assessee as well as by the learned CIT(A) are not applicable when the vehicles is treated as plant and machinery for the purpose of depreciation under section 32. The same cannot be treated differently for the purpose of deduction under TDS. The ld. DR has referred the agreement and particularly the Annexure –A of the agreement for providing the transportation services by the service provider between the assessee and the service provider. Thus, the ld. DR has submitted that when all the vehicles provided to the assessee are dedicated vehicles and remained with the assessee during the duty and are at the disposal of the assessee then it is not a simple case of hiring of the vehicle for transportation but the vehicles were taken on lease by the aseseee at assessee's disposal for all time and not for any particular services or for a particular destination. The ld. DR has further contended that when the assessee was having full control over the vehicle then the provisions of section 194-I are applicable for making the payment of the arrangement made by the assessee. The ld. DR has also

attempted to distinguish the decision of the honourable jurisdictional High Court in the case of Indian National Ship Owners' Association and others V/s CIT(TDS) and ors in Writ Petition no. 400 of 2007, order dated 29.6.2007 which has relied upon by the CIT(A) and submitted that the decision was only in respect of ship and not in respect of motor vehicles. Therefore, the learned DR has emphasized that the said decision is not applicable on the facts of the present case. He has relied upon the order of the AO.

6. On the other hand, the learned AR has submitted that the assessee has been providing its services to its client at various places. For providing the said services, the aseseee has to sent its employees at various placed of its client and therefore for the transportation to its 14000 employees the assessee hired the transportation services from Janani Tours and Resorts Pvt ltd and Mahijndra and Mahindra limited and other service providers vide their respective agreements. It is a transport services provided by the transport provider for the movement of the employees of the assessee at various clients to their fixed destination. The service provider is providing the vehicles along with the staff of vehicles. Therefore it is not a case of hiring only the vehicle and using the same by the aseseee by employing its own staff but all the facilities are provided by the service provider. The assessee is making the

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payment on the basis of per kilometer of mileages with minimum billing. He has referred the annexure “C” to the agreement which contains the rates agreed between the parties for providing the transport service. Under these agreements the assessee availed transportation services for picking up and drop of employees. The vehicles operated by the service provider run on pre-determined routs as agreed by the assessee and the service provider. The service provider is responsible for maintenance and the up-keeping of the vehicles and transporting the assessee’s employees. The key expenses such as fuel cost, repair and maintenance charges, remuneration of the vehicle staff and other expenses of the employees of the service provider are born by the service provider. He has further pointed out that the service provider is also responsible for the attending the necessary problems, licence for running the vehicles and transport of the working employees of the assessee. The drivers and other staff of the vehicles of the vehicles were under the supervision and control of the service provider. The service provider is also responsible to supervise each movement of the vehicle transporting the assessee employees and self passage of the employees of the aseseee. The vehicles operated by the transport service provider were under the control of the service provider and cannot be said to be at the disposal or under the control of the assessee. Thus, the payment made to

the transport service provider are in the nature of Payments for availing the transporting service and not rent for hiring vehicles. He has submitted that as per the Explanation III to section 194C, the expression "work" which include the carriage of goods and passenger by any mode of transportation other than by railways. Thus, the ld. AR has submitted that the service availed by the assessee is even otherwise comes under the wet lease which include vehicle, driver, staff and other service to be provided by the service provider and not dry lease in which only vehicle is hired and used by using his own staff under his direct control. He has referred the circular no.681 dated 8.03.1994 and submitted that as per the said circular it is clarified that the provisions of section 194C shall apply to all types of contract for carrying out any work including the transport, contract service contract etc. He has also referred the circular no.558 dated 28.03.1990, circular no. 715 dated 08.08.1995 and circular no.713 dated 02.08.1995 and submitted that in circular no.558, the CBDT has examined the matter in consultation with the Ministry of Law, in the case of State Road Corporation regarding contract for hiring the buses under which the payment were made to the private bus operators from whom the buses were hired for plying on specific routs. After examining the terms and conditions of the agreement between State Road Transport Corporation and the owners of the private buses only, it has

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been clarified that in such cases the provisions of section 194C are applicable. As per the circular 715 in answer to question no.6 Board has clarified that the payment made to the travel agent or an airline for the purchases of tickets for travel would not be subjected to tax deduction at source. The provisions of section 194 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 per the circular no.713, the Board has clarified that the provisions of section 194C do not apply to the payments made to the airline or the travel agents for purchase of tickets for air travel of individual. The provisions shall , however, apply when the payments are made for chartering an aircraft for carriage of passengers or goods. Thus, the ld. AR has submitted that the Board has repeatedly clarified that the provisions of section 194C will be applicable when the transport services is availed and the buses, airline, or any other mode of transport is chartered. In the case of the assessee, the assessee has availed the services of the transporter vehicles and all the services provided which is similar to the nature of charting the vehicles. The learned AR has relied upon the decision of in the case of Indian Nation al Ship Owners Association and others V/s CIT (TDS) and others (writ petition number 400 of 2007). He has also relied upon the decision in the case of National Panasonic India (P) Ltd V/s DCIT reported in (2005)

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3SOT 16(Del). The Id. AR alternatively submitted that when the transport service provider has paid tax on income by way of advance tax and TDS in respect of the payment made by the assessee then the AO cannot again raised the demand under section 201(1) of the Act. He has relied upon the various decisions in support of his contentions :

Hindustan Coca Cola Beverage (P) Ltd V/s CIT	(2007) 293 ITR 226 (SC)
M/s Mahindra and Mahindra V/s The DCIT(TDS) range	1(1)(MUM) 2009-TIOL-255 ITAT-Mum-SB)
M/s Larsen and Tourbro John Deere Pvt Astt	2008-TIOL-449-ITAT-Pune
M S Chahal V/s ITO	(2004)(82 TTJ 841)Ars
ACIT V/s British Airways	(2005)(95 TTJ 980)(Del)
CIT V/s Deevan Chand	(2000)178 Taxman 173)Del HC
ITO V/s Manav Grays Exim (P) ltd	(2000)(75 TTJ 115)(Mumbai ITAT)
The Addl director of income Tax V/s Bobcards ltd	(2009 TIOL-31-ITAT-Mum)

7. We have considered the rival contentions and relevant record. The short controversy in this case is regarding the applicability of the provisions of section 194C or 194-I for the payment made by the assessee to the transport service provider. The assessee has entered into agreements with the various transport service providers. As per the agreement with Janani Tours and Resorts Pvt ltd and Mahijndra and Mahindra limited, it is to be noted that the terms and conditions of the agreement are identical. As per the clauses (A), (B) and (C) of the agreement, it has been agreed

between the parties that the service provider has provided the transport services at a particular locations for transportation of assessee's employees to different destination and at different locations as mentioned in Annexure "D". It is clear from the agreement that the transport service provider has to provide the vehicle along with the requisite staff and relevant facilities, full maintenance and repairs of the vehicles etc. Thus, the aseseee was not required to provide anything but was availing the services of the transport for picking up and dropping of its employees from its offices at different locations to the places of its clients. Though as per the agreement the vehicles provided for the requirements of the assessee were dedicated but it is not a case of hiring of vehicles only without other facilities. In the case in hand all the facilities alongwith the vehicles were to be provided by the transport service provider and he was under the obligation to replace the vehicles as well as the driver and other staff after running certain hours. We further note that each vehicle was provided appropriate number of drivers to comply with the working time directives and enable the vehicle to be operated 24 hours day and 7 days per week. The service provider was responsible for ensuring all legal and operational obligations. Thus, it was a kind of wet lease, wherein the aseseee was utilizing the transport services provided by the service provider without making any

arrangement of its own but all the arrangement were the responsibility and obligation of service provider . The CBDT has clarified in circular no.681 dated 8.03.1994 as under :

> *"7....*
> *(i) the provisions of section 194 shall apply to all types of contracts for carrying out any work including transport contract, service contracts, advertisement contracts, broadcasting contracts, telecasting contracts, labour contr4acts, materials contracts and works contract;*
> *(ii)....*
> *(iii)...*
> *(iv)....*
> *(v)....Service contracts would be covered by the provisions of this section since service means doing any work aas explained above"*

It was further clarified in sub-para (ii) of paragraph 8 of circular no.681

> *"(ii) the term "transport contracts" would, in addition to contracts for transportation and loading/unloading of goods, also cover contracts for plying of buses, ferries, etc, along with staff (eg. Driver, conductors, cleaner etc) Reference in this regard is also invited to Board's circular no. 558, dated 28.03.1990"*

8. Thus, it is made clear by the Board that the provisions of section 194-C shall apply to all types of contracts for carrying out any work including transport contract, service contract etc. Under sub-paragraph (ii) of paragraphs 8 of circular, it was further clarified that the transport contract would be in addition to contract for transportation of loading and unloading of goods also cover contracts for plying buses,

ferried etc alongwith the staff (eg. Driver, conductors, cleaner etc). The Board has also considered this issue in circular no. 558, dated 28.03.1990 in paragraph 3 as under :

> *"3. The matter has been examined in consultation with the Ministry of Law. The Board have been advised that the applicability of the provisions of section 194C will have to be examined with reference to the terms and conditions of each contract. In a case where the Board had occasion to examine this issue, the terms and conditions governing the contract between the owner of the buses and the State Road Transport Corporation were, inter alia as follows :*
>
> *(i) the owner of the bus shall give his bus on hire to the corporation for plying on notified routes;*
>
> *(ii) the owner shall provide a driver, with a valid licence and PS Badge for the vehicle supplied by him, who shall follow the instructions of the authorized officials of the corporation;*
>
> *(iiI) the owner shall make available the bus for 14 hours a day and complete the schedules given to him for the day;*
> *(iv) the owner shall keep the bus road worthy in terms of chapter V of the Motor Vehicles Act, 1939, and rules made there under, from time to time by carrying out necessary maintenance and repairs;*
>
> *(v) the corporation shall provide a conductor for the operation of services with necessary equipment for issuing tickets to the passengers as well as luggage;*
>
> *(vi) the owner shall submit his claim twice in a month, once for the period from 1st to 15 th and the other for the remaining part of the month, accompanied by a certificate issued by the Traffic Supervisor of the Deport with regard to the distance operated during the respective period;*
>
> *(vii) the corporation shall pay the owner at the rate of Rs...as fixed cost per day in addition to Rs. Per km operated as variable cost, etc.*
> *On the basis of the these terms and conditions, the Board have been advised that although the contract*

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may appear to be a simple hire contract, it is actually a service contract (for carrying out any work)_ entered into between the State Road Transport Corporation and the owner of the bus for plying certain buses on certain routes and subject to certain conditions. In such cases, the provisions of section 194C are applicable and tax will have to be deducted at source from the payment made to the private bus owner. It may, therefore, be kept in mind that the applicability of the provisions of section 194 in such cases may be considered on merits in the light of the aforesaid observations, and to this extent the clarification given in question no.5 in Board's circular no.98, dated Sept 26 1972 stands modified"

Further in circular no.715 dated 8.8.1982, the Board has again clarified in answer to in question no.6 as under :

"Q.No.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 tickets or payment made to a clearing and forwarding agent for carriage of goods?

A. The payments made to a travel agent or an airlines for purchase of a tickets for travel should not be subjected to tax deduction at source as the privity of the contract is between the individual passenger and the airlines/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"

9. The main contention of the revenue is that as per Rule 5 of the IT Rules, 1962, the vehicle on hire is included under plant and machinery and therefore, the same shall be treated as plant and machinery for the purpose of deduction of tax and falls under the provisions under section 194-I. It is to be

noted that the classification of the assets for the purpose of depreciation u/s 32, the Motor vehicles used for the business of running them on hire is included in the class of plant and machinery for applying the rate of depreciation as per Appendix-I. These classifications does not per se change the nature of the service provided by the service provider who is running the vehicle on hire. There is no dispute that the service provided by the person who is running the vehicles on hire would claim the depreciation on the vehicle at the rate which is provided under the Appendix for Plant and Machinery. But that classification cannot be stretched to determine the nature of services provided which is otherwise clear from the agreement between the parties. The Hon. Jurisdictional High Court in the case of . Indian National Ship Owners' Association and others V/s CIT(TDS) has held that the definition of plant under Rule 5 of the IT Rules appears to be only for the purpose of sections 28 to 41 of the Act. The observations of the Hon'ble High Court in paragraph 13, 14 and 15 are as under :

> *"13. Having heard rival parties, prima facie, it appears that section 194-I is attracted only in respect of rent for land or building (including factory building), furniture, fittings or any other machinery attached thereto and not for anything else like ships, transport vehicles (including railways) and freight/charter hire payments thereto. The definition of "plant" appears to be only for the purpose of sections 28 to 41 of the Act. Therefore, the fact that*

the said definition has been found necessary means that in normal parlance "plant" does not include "ship" even section 32A and 33 of the Act clearly differentiate ships, machinery and plant

14. having examined clause (c) explanation-III of section 194-C, it, prima facie, clarifies that the expression "work" means carriage of goods and passengers by any mode of transport other than by railways and fright payments have to be deducted under this section and not under section 194-I.

15. Apart from the above, respondents themselves in consonance with the above interpretation or view have issued certificate under section 197-I of the Act in relation to the deduction o9f tax in favour of one of the members of the first petitioner. Association, ie. M/s Varun Shipping Company Ltd accepting the contentions which the petitioner have advanced in this case, Needless to mention that the department cannot make discrimination between the similarly circumstances shipping companies""

10. The explanatory note on provisions relating to Finance Act, 2007 vide paragraphs 56.2 and 56.3 of Circular no.3 of 2008 dated 12.03.2008 has explained that as amended by the Tax Laws, the Amendment Act, 2006 w.e.from 13.07.2006, the definition of rent on three new items plant, machinery and equipment has been inserted Subsequently, as per the Financed Act 2007 the rate of deduction of tax at source was reduced 15% to 10% in respect of income payable by way of rent for use of any machinery or plant or equipment. Thus, it is clear that the provisions of section 194-I is confined to the payment for rent on hiring of land or building including factory building, furniture or fittings but not for the transport vehicle and other mode of transportation particularly when the

same is in the nature of providing and availing the transport services. In the case of National Panasonic India P Ltd V/s DCIT (Delhi) Bench of the Tribunal in paragraph 6 has held as under.:

> *"6. We have duly considered the rival contentions and the material on record. Section 194-I of the Act mandates person, other than an individual or an Hindu Undivided family (HUF), paying rent to a resident to deduct tax at source at the time of credit or payment, whichever is earlier clause (i) of the Explanation to Section 194-I gives the meaning of "rent" to be a payment under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or any building (including factory building), together with furniture, fittings and the land appurtenant thereto, whether or no such building is owned by the payee. Thus, "rent" for the purpose of s.194-I, is essentially a payment for the use of any land or building. In other words, the agreement or arrangement which given rise to the payment of rent, must necessarily be an agreement or arrangement predominantly for the use of land or building. However, where the agreement is not predominantly for the use of land or building, but for something else, then payment under that agreement will not constitute rent even if that "something else" involves the use of land or building as an integral part of or incidental to the predominant objective of the agreement . Let us consider the facts of the case before us in the light of the basic concept of rent"*

11. Even if the amendment in the provisions of section 194-I has included the plant and machinery the expression plant and machinery used in the explanation to section 194-I refers to only the plant and machinery used by the assessee in its business by hiring them but not the hiring of transport service. We also find force in the alternative contention of the ld. AR

that the AO cannot demand under section 201(1) when the entire tax has been paid by the recipient of the amount by way of advance tax and TDS to the revenue. In view of the various decisions as referred by the learned AR it is clear that once the revenue has collected the tax on the payment then no demand can be raised u/s 201(1) otherwise it will amount to double taxation. The CIT(A) has decided the issue in paragraph 6. to 6.7 as under :

> *"6. I have gone through the facts, of the case, material on record, submissions made by the appellant and also the order of the assessing officer. I have also analyzed the sample copies of the agreement entered by the appellant with its transport service providers. As per the terms of the agreement, the contract entered by the appellant with its transport service providers. As per the terms of the agreement, the contract entered by the appellant with the transport service provider is primarily in the nature of transport contract for the transportation of its employees. The terms of the transport contract clearly provide that as such vehicle is not at the disposal of the appellant and the appellant has to run the vehicles on predetermined routes only. The agreement also makes the transport service providers responsible for the provisions of derivers, running and maintenance of the vehicle (e.g. petrol) insurance licensce, permit) The drivers for vehicles work under the supervision and control of the transport service providers. The appellant is not responsible for the damage/accident of any of the vehicles and the entire responsibility of the vehicles is that of the transport service provider. The transport contract also provides that transport service provider charges are on "per kilometer" basics.*

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6.1 Based on the above, it is amply clear that the contract entered by the Appellant with the transport service provider is in the nature of service contract only. I agree with the contention of the appellant that since the appellant does not enjoy the control over the vehicles of the transport service providers and also the running and maintenance expenditure is borne by the transport service providers, the nature of contract entered can not be termed as contract for hiring of the vehicles. I do not agree with the observation of the AO that use of vehicles on a regular basis renders the arrangement as a contract for hiring of the vehicles . I am of the opinion that mere fact that vehicles are used regularly by the appellant can not take away the primary nature of agreement entered by the appellant as the agreement has to be considered in its entirely;

6.2 further, I have gone through the circulars and the judgments which have been brought to my notice by the appellant;

6.3 The nature of arrangement entered by the appellant for transportation of its employees between residence to office is similar to the arrangement mentioned in the circular no.558, dated 28th March 1990, issued by the CBDT regarding the applicability of the provisions of section 194C of the Act to the hire charges paid to bus owners. Apartment from this, other circulars (i.e. circular number 681 dated March, 8, 1994, circular no. 713 dated August 2, 1995 and circular number 715 dated August 8, 1995) have specifically provided that the provisions of section 194C of the Act shall apply in case where bus or any other mode of transport is chartered. Based on the reading of the circulars. I am of the opinion that payments made by the appellant are of similar nature and hence tax should be deductible under section 194C of the Act;

6.4 I have also gone through the judgment in case of Indian National Ship owners Association relied on by the appellant and I am of the view that the same is applicable to the appellant's case in which it has been held that the provisions of section 194I of the Act are not applicable in case of hire payments made for4 the hiring of transport vehicle.

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> *6.5 The carriage of goods and passengers by any mode of transport other than railway are specifically covered by the expression "work" as defined in the explanation III to section 194C of the Act. The contracts entered by the appellant with the transport service providers are for the transportation of its employees. Hence the same should be covered by the Explanation III to section 194C of the Act;*
>
> *6.6 Thus, in view of the above facts, I agree with the contention of the appellant and hold that the payments made to the transport service provider fall within the ambit of the provisions of section 194C of the Act;*
>
> *6.7 As held above, since the appellant has rightly deducted taxed as per the provisions of section 194C of the Act, the assessee shall not be treated as "assessee in default" under section 201(1) of the Act"*

12. In view of the above discussion, we do not find any error or illegality in the order of the learned CIT(A) who has discussed the issue in detailed and the findings are based on the decision of the Hon. Jurisdictional High Court as well as on the basis of Board circulars. Therefore, the appeals of the revenue are devoid of any merit and deserve to be dismissed. Accordingly we dismiss the appeals filed by the revenue

13. In the result, the appeal of the revenue are dismissed.

Pronounced in the Open Court on 20.10.2010

Sd	sd
(S V MEHROTRA) ACCOUNTANT MEMBER	(VIJAY PAL RAO) JUDICIAL MEMBER

Mumbai, Dated 20 th Oct 2010

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SRL:13910

copy to:
1. Appellant
2. Respondent
3. CIT Concerned
4. CIT(A) concerned
5. DR concerned Bench

BY ORDER

True copy

ASSTT. REGISTRAR, ITAT, MUMBAI

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL No. 1037 of 2009

COMMISSIONER OF INCOME TAX (TDS) - Appellant(s)

Versus

SWAYAM SHIPPING SERVICES PVT LTD - Opponent(s)

Appearance :
MR MR BHATT, SR. ADVOCATE with MRS MAUNA M BHATT for Appellant(s) : 1,
None for Opponent(s) : 1,

CORAM : HONOURABLE MS. JUSTICE HARSHA DEVANI
and
HONOURABLE MR. JUSTICE H.B.ANTANI

Date: 11/01/2011

ORAL ORDER (Per: HONOURABLE MS. JUSTICE HARSHA DEVANI)

1. The appellant-revenue in this appeal under section 260A of the Income Tax Act, 1961 (the Act) has challenged order dated 2nd December, 2008 made by the Income Tax Appellate Tribunal (the Tribunal) proposing the following question:-

> "*Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT(A) in deleting the order passed under section 201(1) r.w.s. 194C(1) of the I.T. Act of Rs.6,33,353/-?*"

2. The assessment year is 2007-08. The facts stated briefly are that during the course of TDS verification, it was found that the assessee had taken cranes/trailers on rent from various transport companies and handling agents. According to the Department, though the cranes and trailers were taken on hire, TDS under section 194C of the Act was made from such payment whereas the same was required to be made under section 194I. Accordingly, the Assessing Officer passed an order under section 201 read with section 194I of the Act and raised a demand of Rs.6,33,353/- which had been short deducted at source on amount of rental payment of Rs.31,36,030/-. Being aggrieved, the assessee preferred appeal before the Commissioner (Appeals) who vide order dated 29th November, 2007 deleted the demand raised under section 201 of the Act. Revenue carried the matter in appeal before the Tribunal but did not succeed.

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3. Assailing the impugned order of the Tribunal, Mr. M.R. Bhatt, learned senior advocate, appearing on behalf of the appellant invited attention to the order made under section 201 of the Act, and more particularly to the part where reference is made to the CBDT Circular No.715, to submit that the assessee had taken on hire vehicles which are covered under section 194I of the Act and that it was accordingly liable to deduct tax at source at the rate provided under the said provision. It is submitted that the Tribunal has erred in holding that the assessee had given sub-contracts for transportation of goods and not for renting out of machineries or equipment.

4. The facts are not in dispute. As can be seen from the order made by the Commissioner (Appeals), the Commissioner (Appeals) upon appreciation of the evidence on record has found that the assessee was engaged in the business of clearing and forwarding and had carried out freight and goods works contracts with three parties and these parties had transported goods belonging to the assessee and its clients to various places through their vehicles. To prove the nature of contracts, the assessee had produced various bills which showed that the contracts were mainly carried out for shifting of goods from one place to another. Charges were collected on the basis of the quantity of goods transported and number of trips carried out. It was also the case of the assessee that it had not acquired dumpers on rent or lease and that the possession and control of the vehicles was with the parties and not with the assessee. The parties had only provided services of shifting the goods from one place to another. In the aforesaid backdrop, after considering the facts of the case in the light of the provisions of section 194C of the Act, the Commissioner (Appeals) was of the view that when the transportation contract was in the nature of shifting of goods from one place to another, such contract would fall within the ambit of work contracts and as such the provisions of section 194C would be applicable. Since the assessee had given sub-contracts for transportation of goods and not for renting out of machineries and equipments, therefore, such payment could be termed as rent paid for use of machinery and the provisions of section 194I of the Act would not apply. The Commissioner (Appeals), accordingly was of the view that the assessee had rightly deduced TDS under section 194C of the Act and as such there was no short deduction of tax. He, accordingly, held that the assessee was not an assessee in default in respect of such tax under section 201 of the Act and therefore, levy of interest under section 201(1A) of the Act was not justified.

5. The Tribunal, in the impugned order has concurred with the findings recorded by the Commissioner (Appeals).

6. The facts are not in dispute. The assessee has carried out freight and transportation works contracts with three transporters who transported the goods belonging to the assessee and its clients to various places through their vehicles.

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The assessee had not taken the trailers/cranes on hire or rent from the said parties. The assessee has given sub-contracts to the said parties for the transportation of goods and not for renting out of machineries and equipments. Section 194I of the Act makes provision for deduction of tax at source where any person who is responsible for paying to a resident any income by way of rent where as section 194C of the Act makes provision for deduction of tax at source where any person is responsible for paying any sum to any resident for carrying out any work including supply of labour for carrying out any work in pursuance of a contract between the contractor and a specified person. In the facts of the present case, there is nothing to indicate that the assessee has taken trailers/cranes on rent so as to attract the provisions of section 194I of the Act. The assessee had given sub-contracts for transportation of goods. In the circumstances, the said transactions would fall within the purview of section 194C of the Act as the assessee was responsible for paying the amount in question for carrying out work in pursuance of contracts between the assessee and the transporters and as such was required to deduct tax at source at the rate prescribed under the said section. The Commissioner (Appeals) was, therefore, justified in holding that the assessee was not an assessee in default within the meaning of the said expression as contemplated under section 201 of the Act and consequently, the Tribunal was justified in confirming the order passed by the Commissioner (Appeals).

7. In view of the above discussion, there being no legal infirmity in the impugned order of the Tribunal the same does not give rise to any question of law, much less, a substantial question of law so as to warrant interference by this Court. The appeal is, accordingly, dismissed.

(Harsha Devani, J.)

(H.B. Antani, J.)

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