IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'C' BENCH
BEFORE SHRI C.L. SETHI, JM & SHRI A.N. PAHUJA, AM

ITA nos.1829 to 1834/Del/2011 With CO nos.166 to 171/D/2011 AYs:2008-09 to 2010-11

Income Tax Officer, (TDS), Income Tax Office, D29/30, Industrial Area, Hardwar	**V/s**.	Indian Oil Corporation (Marketing Division), i)UASIDC, Landhaura, Roorkee Terminal, and ii) USAIDC,Indane Bottling Plant,Bahadrabad Industrial Area,Haridwar Uttarakhand
[PAN No.: AAACI 1681 G]		

Assessee by	S/Shri Murlidhar, AR
Revenue by	Shri Salil Mishra, DR

Date of hearing	9-11-2011
Date of pronouncement	16-11-2011

O R D E R

PER BENCH: These six appeals filed on 15.04.2011 by the Revenue and the corresponding Cross-Objections[CO] filed on 25.5.20011 by the assessee against six different orders dated 04.01.2011 of the ld.CIT(A)-I, Dehradun in the case of Indian Oil Corporation, (Marketing Division) for its UASIDC, Roorkee Terminal, and Indane Bottling Plant at Bahadrabad Industrial Area, Haridwar, for the Assessment Years 2008-09 to 2010-11, raise the following similar grounds:-

ITA nos.1829 to 1834/Del/2011[Revenue]

1.1 "The CIT(A) has erred on facts and in law in directing that the payment of hiring charges of tanker is liable for TDS u/s 194C and not 194I of the I.T. Act, 1961, as applied by the A.O.

1.2 In directing so, CIT(A) has failed to appreciate the following:

i) The payment was made essentially for hiring of tankers which were given in exclusive possession and use of the assessee for a fixed tenure and the tankers were also customized as per the requirement of the hirer.

ii) The assessee, being the hirer was not only in exclusive possession of the vehicle, but could also use them in the manner it wanted and no other person could use them in the manner it wanted and no other person could use them during the tenancy period.

iii) Ld. CIT(A) has erred in holding that the exclusive right to use the tankers was not vested with the assessee company whereas the very first clause of the contract deed provides for such exclusive rights to use by the assessee company and the company has the exclusive possession of the tankers to the complete exclusion of the owner of vehicles for the duration of tenancy.

iv) Section 194I(a) (introduced w.e.f. 01.06.2006) is applicable which provides TDS @10% on hiring of any machinery or plant or equipment and plant includes vehicles also. Therefore, the board circular No.558 (dated 28.03.1990) is not applicable as it was issued prior to the introduction of Section 194I. The case of the assessee is distinguishable inasmuch as in the instant case the vehicle had been given on hire for exclusive possession and use of the assessee for tenure period of two years whereas the circular No.558 speaks of case where part time possession of buses i.e. 14 hours/day were provided to the transport authorities.

v) The Hon'ble Apex Court, in the case of M/s Associated Hotels & India Ltd. Vs. R.N. Kapoor (AIR 1959 S.C. 262) have laid down certain tests for determination for tenancy. The third test therein states that if under the documents, a party gets exclusive possession of the property, prima facie, he will be considered as tenant. In the instant case, exclusive possession of the tankers were given to the

assessee and hence section 194I is applicable on the entire payments."

CO nos.166 to 170/D/2011[Assessees]

1. *"The learned CIT(A) erred in rejecting the contention of the appellant that the appellant was under bona fide belief that from the transportation charges tax was deductible u/s 194C and for that reason the appellant should not be held as an assessee in default u/s 201(1) of the Act.*

2. *The learned CIT(A) ought to have held that sufficient details regarding payment of taxes by the transport contractors were provided by the appellant and therefore ought to have specifically held that no further taxes can be collected from the appellant u/s 194C.*

3. *Each one of the above grounds of appeal is without prejudice to the other.*

4. *The appellant reserves the right to add, alter or amend any grounds of the appeal."*

Since similar issues were involved in these appeals and the corresponding COs, these were heard simultaneously for the sake of convenience and are being disposed of through this common order..

2.. Adverting first to the common grounds in appeals of the Revenue, facts, in brief, as per relevant orders are that a survey u/s 133A of the Income-tax Act, 1961 (hereinafter referred to as the Act) was conducted on 03.12.2009 in the aforesaid two premises of the assessee, engaged in transporting petroleum products from its plants to market at various destinations through hired trucks/tankers in terms of an agreement with the respective transporters termed as 'The Carrier' in the agreement. The tax on such payments has been deducted at source @2% in terms of the provisions of section 194C of the Act. However, the Assessing Officer (A.O. in short) was of the opinion that the assessee was required to deduct tax @10% per annum in terms of amended provisions of 194I of the Act until 30.9.2009 and @2% w.e.f 1.10.2009 onwards. In response to a

show cause notice by the A.O. as to why the assessee may not be treated in default for not deducting tax at the stipulated rates in terms of provisions of sec. 194I of the Act, the assessee while referring to CBDT circular no.681 dated 08.03.1994 and circular no. 558 dated 28.03.1990, contended that the agreement between the company and the carriers is similar to the contract discussed in the aforesaid circulars and, therefore, they deducted at source in terms of provisions of section 194C of the Act. However, the AO did not accept the contentions of the assessee and while analyzing various clauses of the sample agreement concluded that the assessee was required to deduct tax at source @10% until 30.9.2009 & @2% w.e.f. 1.10.2009 in terms of provisions of section 194I of the Act. Inter alia, the AO relied upon the decision in M/s Associated Hotels and India Ltd. Vs. R.N. Kapoor, AIR SC 262

3. On appeal, the ld. CIT(A) observed that the crucial thing to determine whether the arrangement is of hiring or for transportation is to see who is doing the transportation work. If the assessee takes the trucks and does the work of transportation himself, it would amount to hiring. Since the assessee. was in the business of refining crude oil and storing, distributing and selling the petroleum products, which involved transportation of its bulk petroleum products and for that purpose utilised the services of the carrier and the payment was for actual transportation work , the ld. CIT(A) was of the opinion that contract was for transportation of goods and not an arrangement for hiring of vehicles. Therefore, while relying upon decision dated 27.2.2009[pg.84 to 117 PB] of the Hon. Guwahati High Court in CR 3997/1998 in the case of the assessee company in the context of the provisions of the Assam Sales Tax Act , the ld. CIT(A) concluded that the arrangement under consideration is of the nature of transport contract and not one for hiring of vehicles and consequently, the assessee did not default the provisions of sec. 194I of the Act.

4. The Revenue is now in appeal before us against the aforesaid findings of learned CIT(A), holding that the tax was required to be deducted in terms of section 194C of the Act and not u/s 194I of the Act while the assessee in their COs raised a ground regarding their bona fide belief that tax was required to be deducted u/s 194C of the Act and the transport contractors having paid the taxes, no further tax could be collected from the assessee. The ld. DR while carrying us through the impugned order and the relevant sample agreement supported the orders of the AO while the ld. AR on behalf of the assessee supported the findings of ld. CIT(A) in the light of decision in ACIT (TDS) Vs. Acceture Services (P) Ltd. (2010) TIOL 618 (Mum.); Lotus Valley Education Society Vs. ACIT (2010) 10 Taxman,com 46 (Del.); Ahmedabad Urban Development Authority Vs. ACIT in ITA no.1637/Ahd./2010(Ahd.); CIT Vs. Shree Mahalaxmi Transport Co. in ITA no. 1038 of 2009(Gujarat); CIT Vs. Swayam Shipping Services Pvt. Ltd. in ITA no. 1037 of 2009 (Gujarat)

5. We have heard both the parties and gone through the facts of the case as also the aforesaid decisions. The issue before us is as to whether the assessee company was required to deduct tax at source in terms of provisions of sec. 194C or u/s sec. 194I of the Act while making payments to the carrier for transportation of petroleum products in accordance with agreement ,a sample copy of which is placed at pg. 59 to 72 of the paper book. The relevant provisions of sec. 194C , stipulating deduction of tax at source from payments to contractors fall under Part B of the chapter-XVII of the Act. In terms of these provisions, any person 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 shall, at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of cheque or draft or any other mode, whichever is earlier, deduct an amount equal to the percentage specified thereunder of such sum as income tax. The term 'work' defined in clause (iv) of the explanation to the sec. 194C of the Act includes in sub-clause (c) carriage of goods or passengers by any mode of

transport other than by railways. On the other provisions of sec. 194I of the Act falling under the same chapter bear the heading "Rent". The provisions of the said section stipulate that 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 on account of land, building, furniture or fittings, machinery, plant or equipment, 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 issue of cheque or draft or any other mode, whichever is earlier, deduct income tax thereon at the rate specified thereunder.

5.1 Examining the facts of the instant case in the light of the aforesaid statutory provisions and from the undisputed findings of facts recorded by the ld. CIT (Appeals) it is apparent that the arrangement in terms of the aforesaid agreement is of the nature of transport agreement and not one for hiring of vehicles, the agreement being for transportation of petroleum products including indane gas. The preamble to the agreement itself says that the assessee company for distribution of petroleum products required tank trucks for road transportation of bulk petroleum products from its various storage points to customers/other storage points. As per clause 1 of the agreement, the carrier engaged in the business of operating tank trucks , agreed to provide a stipulated number of tank trucks for the exclusive use of the company. Clause 2 stipulates that each tank truck would be attached to a particular loading/storage point for transportation of bulk petroleum products and the assessee company can assign a particular tank truck to different loading/storage point. In terms of clause 3 of the agreement, the carrier alone is required to provide crew(driver & cleaner) for efficient operations. In other words, in the instant case the tank truck owners not simply confined themselves to the extent of providing vehicles at the disposal of the assessee in lieu of rent but also engaged their drivers in driving such vehicles and thereby in transporting petroleum products from one place to the other..In effect, tank truck remains in possession of the staff of the carrier. In the event tank truck is not made available on any particular day, the assessee company is

free to use the services of any other tank truck and recover the difference in transportation charges from the carrier.. The assessee company, in terms clause 6 of the agreement, is required to pay for the transportation work in accordance with stipulated rates on per KL per KM basis. Inter alia, it is stipulated that no idle charges would be payable. In terms of clause 8, the carrier is responsible for loading and discharge and in the event of shortage, the carrier is made responsible. After considering various clauses of the sample agreement, we are of the opinion that the said agreement is essentially for transportation of bulk petroleum products and not for hiring of tank trucks. We find that the Hon'ble Gauhati High Court in their decision dated 27.2.2009 in CR3997/1998 in the context of deduction of tax u/s 27(a) of the Assam General Sales Tax Act,1993,, after analyzing the terms of a similar agreement in the case of the assessee observed that the said agreement obliged the contractor to operate the vehicles for the purpose of carrying petroleum and petroleum products, as per the directions of the assessee company, from one place to another. If the vehicle remained off the road and, consequent thereupon, the assessee company sustained any loss, the contractor was liable to make good the loss. If, in certain circumstances, the contractor was unable to carry the petroleum and/or petroleum products in a particular vehicle, wherein he had undertaken to carry, he could carry the products in 'drums' in 'stake-trucks'. Similarly, the contractor was also liable to make good the loss, which the assessee company might sustain due to short delivery of its products or due to confiscation thereof during the course of carriage. In the light of various terms and conditions of the agreement, the Hon'ble High Court, observed that

> *"54. Thus, when the contract agreement is read clause-by-clause, it becomes abundantly clear that there is no transfer of the right to use the vehicle involved in the contract agreement and that the contract agreement is merely for carriage of the petroleum and petroleum products and nothing more."*

5.2 Thereafter, Hon'ble High Court after considering the decisions in Ahuja

Goods Agencies V. State of U.P. reported in (1997) 106 STC 540 and Laxmi Audio Visual V. Asstt. Commissioner of Commercial Taxes, reported in (2001) 124 STC 426(Kar) concluded as under:

> "58. *In the case at hand too, the transactions do not amount to transfer of the right to use the goods in as much as the contractor, as a trustee of the petroleum and petroleum products, carries the same in the identified vehicles or in exceptional circumstances, in such a manner as have been agreed to by the parties concerned*…."

5.3 In nutshell, the Hon'ble Gauhati Court concluded that the contract was essentially for transportation of petroleum products and not for hiring of trucks/tankers. Following the view taken in this decision, the ld. CIT(A) concluded that provisions of sec. 194C were applicable in the instant case and not the provisions of sec. 194I of the Act. The ld. DR did not place any material before us in order to controvert the aforesaid finding of facts recorded by the ld. CIT(A) nor brought to our notice any contrary decision.

6. We further find that the Hon'ble Gujarat High Court while adjudicating a similar issue in respect of deduction of tax at source from payments for hiring dumpers for transporting building material concluded in their decision dated 11.1.2001 in the case of Shree Mahalaxmi Transport Co. in ITA no. 1038 of 2009 in the following terms:-

> *"5. The Commissioner (Appeals) upon appreciation of the evidence on record has found that the assessee had given sub-contracts of transportation of goods from one place to another. To prove the nature of contracts, the assessee had produced various bills issued by such; sub-contractors to show that, the contracts were mainly carried out for shifting of goods from one place to another. The Commissioner (Appeals) also found that the charges were collected by sub- contractors on the basis of the quantity of goods transported and the number of trips carried out; the assessee had not acquired dumpers on rent or lease; and that the possession and control of vehicles was with the sub-contractors, who only provided services of shifting of goods from one place to another place. It was noted that evidence in support of above was submitted to the Assessing Officer during assessment proceedings. In the*

background of the aforesaid findings of fact recorded by him, 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 contracts would be covered as works contracts and provisions of section 194C would be applicable, According to the Commissioner (Appeals), since the assessee had given sub-contracts for transportation of goods and not for the renting out of machineries or equipments, such payments could not be termed as rent paid for the use of machinery and the provisions of section 194I of the Act would not apply to such contracts. The Commissioner (Appeals) accordingly held that the assessee has rightly deducted TDS under section 194C of the Act; that there was no default no the part of the assessee under the TDS provisions and as such there was no short deduction of tax and set aside the levy of interest under section 201 (1A) of the Act.

……

9. Examining the facts of the present case in the light of the aforesaid statutory provisions, from the findings of fact recorded by the Commissioner (Appeals) it is apparent that the assessee has not taken the dumpers on hire rent from the parties in question. The assessee has given contracts to the said parties for the transportation of goods and has not taken machineries and equipment on rent. In the circumstances, the Commissioner (Appeals) was justified in holding that the transactions in question being in the nature of contracts for shifting of goods from one place to another would be covered as works contracts, thereby attracting the provisions of section 194C of the Act. That since the assessee had given sub-contracts for transportation of goods and not for the renting out of machineries or equipments, such payments could not be termed as rent paid for the use of machinery and the provisions of section 194I of the Act would not be applicable. The Tribunal was, therefore, justified in upholding the order passed by the Commissioner (Appeals).”

7. Likewise, in their another decision dated 11.1.2001 in the case of CIT Vs. Swayam Shipping Services Pvt. Ltd. in ITA no.1037 of 2009 , Hon’ble Gujrat High Court concluded as under:-

“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. 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 1941 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 section201of the Act and consequently, the Tribunal was justified in confirming the order passed by the Commissioner (Appeals)."

8. Apart from circular nos. 558 and 681 issued by the CBDT, clause 49.3 of the explanatory notes to Finance(No.2) Act ,2009 points out that tax is required to be deducted at source in terms of provisions of sec. 194C of the Act on payments to transport contractors engaged in the business of plying, hiring or leasing goods carriages and amended provisions would exempt payments to transport operators if operator furnishes its PAN to the deductor.

9. We also find that the Hon'ble Bombay High Court in their decision dated 29.6.2007 in Indian National Ship Owners' Association and Others Vs. CIT (TDS) in CWP no. 400 of 2007 concluded that the provisions of section 194I of the Act are applicable 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. Hon'ble High Court further held that explanation-III of section 194-C, clarifies that the expression "work" means carriage of goods and passengers by any mode of transport other than by railways and tax from freight

payments have to be deducted under this section and not under section 194-I. of the Act. Following the view taken in this decision, ITAT in the case of Accenture Services (P) Ltd.,2010-TIOL-618-ITAT-Mum held that expression plant and machinery used in explanation to sec. 194I of the Act refers only to the plant and machinery used by the assessee in their business by hiring them but not the hiring the transport services. The ITAT Delhi Bench in their decision in the case of Lotus Education Society (supra) held that provisions of section 194I of the Act could not be applied in the case of payments made to bus operators, providing pick up and drop facility to school students. In Ahemdabad Development Authority, ITAT Ahmedabad Bench in their decision dated 10.3.2011 in ITA no.1637/Ahd./2010 held in the context of deduction of tax at source from fixed rent payments for hiring cars that provisions of section 194C of the Act were applicable in respect of payment for vehicle hire charges and not the provisions of section 194I of the Act.

10. In the light of consistent view taken in the aforesaid decisions and considering the various clauses in the aforesaid Bulk Petroleum Products Road Transport agreement , we have no hesitation in upholding the findings of ld. CIT(A) in concluding that the arrangement for transportation of petroleum products was essentially a contract for transportation of goods and not an arrangement of hiring of vehicles. In view thereof, tax is required to be deducted at source from the payments to the carrier in terms of provisions of sec. 194C of the Act and not u/s 194I of the Act.Therefore, ground nos. 1.1 & 1.2 in these six appeals of the Revenue are dismissed. As a corollary, grounds raised in the six COs become academic and do not survive for our adjudication.

11. No other plea or argument was made before us by any of the party.

12. In result, these six appeals filed by the Revenue and the corresponding Cos filed by the assessee are dismissed.

Order pronounced in Open Court

Sd/-	Sd/-
(C.L. Sethi)	(A.N. Pahuja)
(Judicial Member)	(Accountant Member)

NS
Copy of the Order forwarded to:-

1. Income Tax Officer, (TDS), Hardwar.
2. Indian Oil Corporation (Marketing Division), UASIDC, Landhaura, Roorkee Terminal, and Indane Bottling Plant,Bahadrabad Industrial Area,Haridwar,Uttarakhand .
3. CIT(A)-I, Dehradun.
4. CIT concerned.
5. DR, ITAT,'C' Bench, New Delhi
6. Guard File.

BY ORDER,

Deputy/Asstt.Registrar
ITAT, Delhi