IN THE INCOME TAX APPELLATE TRIBUNAL
"E" Bench, Mumbai

Before Shri B. Ramakotaiah, Accountant Member
and Shri Vijay Pal Rao, Judicial Member

ITA No. 3419 & 3420/Mum/2010
(Assessment Years: 2007-08 & 2008-09)

M/s. SKIL Infrastructure Ltd. 209, SKIL House, Bank Street Cross Lane, Fort, Mumbai 400023 PAN - AABCS 7689 F	Vs.	Income Tax Officer - TDS 3(3) K.G. Mittal Ayurvedic Hospital Charni Road, Mumbai
Appellant		**Respondent**

Appellant by: Shri S.K. Mutsaddi
Respondent by: Shri P.C. Maurya

Date of Hearing: 27.10.2011
Date of Pronouncement: 31.10.2011

O R D E R

Per B. Ramakotaiah, A.M.

These appeals by the assessee are against the order of the CIT(A) XIV, Mumbai dated 25.10.2010.

2. The short controversy in this case is regarding the applicability of provisions of section 194-C or 194 I for the payments made by assessee to the service providers while hiring helicopter/air craft services. The ground raised by assessee in both the years are common and is as under: -

> *"On facts & circumstances of the case and in law, the learned CIT(A) has erred in holding that the contract for transportation in respect of chartering a helicopter/aircrafts attracts TDS u/s. 194 I of the Income Tax Act, as against Section 194 C of the Income Tax Act."*

3. Briefly stated, assessee is a limited company engaged in the business of forming infrastructure ventures. A survey was conducted during which it was found that assessee paid hire charges amounting to ₹31,54,139/- to various parties under the head 'hire charges" on which TDS at 2% was made under section 194C in A.Y. 2007-08. In A.Y. 2008-09 assessee paid an amount of ₹40,13,818/-to various parties and deducted tax under section 194C as applicable. It was Assessing Officer's contention that hiring of

helicopters/air crafts would come under the definition of 'Rent' under section 194I and tax should have been deducted at 22.44% in A.Y. 2007-08 and 10.3% in A.Y. 2008-09 and accordingly he raised a demand under section 201(1) and 201(1A) in the respective assessment years. Assessee's submission that they have availed the services of various airlines for transportation from place to place and paid the charges as per the flying hours was not accepted as the A.O. held that the payment has been made for hire of aircraft/helicopter/ vehicle which attracts TDS under section 194I as per amendment Act No. 2 of 2006. Assessee relied on the CBDT Circular No.715 dated 08.08.1995 to clarify that the services for utilising transportation services falls under section 194C. Rejecting the above contentions of the assessee and relying on the Explanation to Section 194I the A.O. raised the demand.

4. Before the CIT(A) it was submitted that assessee has availed the services of helicopters/aircrafts for transportation from place to place and paid the amounts and furnished the details as under: -

AY 2007-08

Sr. No.	Particulars	Amount (₹)	TDS deducted u/s. 194C	TDS to be deducted as per the AO u/s. 194 I
1	Raymond Ltd. – Aviation Division charter of a helicopter – PAN: AAACR 4896 A	65,000/-	1,458/-	14,586/-
2	Executive Airways Pvt. Ltd. charter of twin engine aircraft The bill was of ₹10,000/- paid into two parts of ₹2,85,000/- & ₹25,000/- respectively, PAN AAACE 1302 Q	2,85,000/- 25,000/-	6,395/- 561/-	63,954/- 5,610/-
3	A.R. Airways, for charter of aircraft – PAN AAECA 9007 A	7,25,000/-	16,269/-	1,62,690/-
4	A.R. Airways, for charter of aircraft – PAN AAECA 9007 A	7,90,000/-	17,728/-	1,77,276/-
5	A.R. Airways, for charter of aircraft – PAN AAECA 9007 A	10,00,000/-	22,440/-	2,24,400/-
6	Others	2,64,139/-	5,927/-	59,272/-
	Total	31,54,139/-	70,778/-	7,07,788/-

AY 2008-09.

Sr. No.	Particulars	Amount (₹)	TDS deducted u/s. 194C	TDS to be deducted as per the AO u/s. 194 I
1	Raymond Ltd. – Aviation Division charter of a aircraft – PAN: AAACR 4896 A	23,60,000/-	52,958/-	2,43,080/-
2	Executive Airways Pvt. Ltd. charter of twin engine aircraft PAN AAACE 1302 Q	11,58,485/-	25,996/-	2,59,964/-
3	Others	4,95,333/-	11,115/-	1,11,152/-
	Total	40,13,818/-	90,069/-	6,14,196/-

5. It was further submitted that the charges paid are in the nature of transportation contracts and by following the CBDT circular No. 651 dated 08.08.1995 assessee has deducted tax applying the provisions of section 194C of the I.T. Act. Copies of the bills issued and contracts entered into with the parties as listed above were filed before the CIT(A) to submit that these are purely transportation contracts in which operating crew and fuel has been provided by the transport company. Without prejudice to the above it was also submitted that the parties to whom these payments have been effected are parties of repute and they are also assessed to tax and therefore, as per provisions of section 191 assessee cannot be held responsible for default for interest under section 201, relying on the principles established by the Hon'ble Supreme Court in the case of Hindustan Coco Cola Beverage Pvt. Ltd. vs. CIT 163 Taxman 365. The CIT(A), after considering the submissions have dismissed assessee's contentions as under, while directing the A.O. to examine whether the deductee has paid due tax. The order of the CIT(A) is as under: -

> *"6. I have gone through the above submissions very carefully and facts on record as well as order of the Assessing Officer. In this case, the appellant hired helicopter and aircraft and made payment of Rs.31,54,139/- on which the appellant had deducted TDS as per the provisions of section 194C whereas the Assessing Officer has held that the tax should have been deducted as per provisions of section*

194 I. I find that the appellant has hired helicopter/aircrafts/vehicle after the amendment brought in section 194 I of the I.T. Act. As per Amendment Act 2 of 2006 the said expenses are covered u/s. 194 I as the 'vehicle' is also covered under the payment of 'rent'. The vehicle is covered under plant and machinery. It is very clear from the facts of the case that the appellant has hired vehicle, the vehicle is at the disposal of the appellant. The appellant has not taken services of carrying passengers or goods which is covered u/s. 194C. After the above amendment, in my opinion, the case of the appellant is also not covered under the CBDT Circular No. 714 for deduction of tax u/s. 194C.

6.1 In view of the above facts, the action of the assessing officer appears to be justified. Hence, confirmed. However, the assessing officer is directed to verify whether the deductee has paid the due taxes on this payment in his return of income. If the deductee has paid the tax on the amount received, the recovery of tax cannot be enforced in view of the decision of the Hon'ble Supreme Court in the case of Hindustan Coco Cola Beverage Pvt. Ltd. vs. CIT 163 Taxman 355. However, this will not alter the liability to charge interest u/s 201(1A) of the Income-tax Act till the date of payment of taxes by the deductee assessee. Therefore, the Assessing Officer is directed to charge interest accordingly."

6. The learned counsel referred to the paper book, particularly the payment vouchers and bills issued in this regard to submit that assessee has availed services of aircrafts/helicopters for transporting it's Executives from one place to another and there is no hiring of the helicopter as such. It was utilization of transport services for which hire charges are paid on hourly basis for various service providers. He submitted that the CIT(A) wrongly considered the bills as hire of the vehicles whereas assessee has only hired the services of transportation. Further the learned counsel relied on the following orders of the ITAT where similar issue was considered: -

i. ACIT vs. Accenture Services (P.) Ltd. 44 SOT 290 (Mum)
ii. Tata AIG General Insurance Co. Ltd. vs. ITO 43 SOT 215 (Mum)
iii. Ahmedabad Urban Development Authority vs. ACIT ITA No. 1637/Ahd/2010 dated 10.03.2011

Relying of the above orders it was submitted that assessee has correctly deducted tax under section 194C.

7. The learned D.R., however, submitted that as per provisions of section 194 I as discussed by the A.O. and CIT(A) in the order, assessee's payment

of hire charges fall within the definition of 'Rent' as provided in section 194I and accordingly the orders of the CIT(A) are to be upheld. He further submitted that assessee hired helicopter/aircraft, therefore, hiring of machinery comes within the definition of rent under section 194 I.

8. We have considered the rival submissions and examined the invoices placed on record in the paper book. As far as the factual aspect of the matter is concerned the observation of the CIT(A) that assessee has hired helicopter/air craft/vehicle is not correct. Assessee has never hired helicopter/ aircraft as such either on a periodic basis or on day-to-day basis. What the assessee has hired is the transport services being provided by the reputed airlines for transportation of its Executives from place to place. For example, Executive Airlines P. Ltd. provided KING AIR C 90 TURBO PROPELLER air craft at the rate of ₹60,000/- per hour on 18.12.2006 for sector Mumbai-Rajkot-Mithapur-Mumbai at a charter cost of ₹2,85,000/-. The ultimate invoice was for ₹3,10,000/- including aviation services rendered and landing charges at Mithapur airport. This invoice indicates that the aircraft was used by Executive Airways to provide aviation services to transport Executive on a 5-seater aircraft for which charter cost was ₹60,000/- per hour for 4.45 hours and including landing charges at Mithapur airport. The total bill was for ₹3,10,000/-. Similar is the bill of charter of Cessna Citation II from M/s. AR. Airways (P) Ltd. All these invoices do indicate that assessee has only availed the transportation services of the respective aircraft service providers and the charges are paid on the basis of flying hours, cost of landing charges and refuelling charges, etc. This indicates that assessee has entered into a transportation contract for transportation of its Executives from place to place and not the aircraft/ helicopter which are not placed at the disposal of assessee. The crew, fuel, maintenance operation licences, etc. were all under the control of the said service providers but not under the control of the assessee. Assessee has only utilised the transport services being provided. Therefore the findings of the A.O. and the CIT(A) that assessee has hired machinery by way of helicopter/aircraft is not correct.

9. Be it as it may, even providing transport services was also considered by the Coordinate Benches on the issue whether TDS has to be made under section 194 C or 194 I. In the case of ACIT vs. Accenture Services (P) Ltd. 44 SOT 290 (Mum) (wherein one of us, the J.M. is a party) the issue was considered in detail as under: -

"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 Mahindra 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 assessee 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 assessee was utilizing the transport services provided by the service provider without making any arrangement of its own but all the arrangements were the responsibility and obligation of service provider. The CBDT has clarified in Circular No. 681, dated 8-3-1994 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 contracts, 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 as 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 (e.g, Driver, conductors, cleaner etc.) Reference in this regard is also invited to Board's Circular No. 558, dated 28-3-1990"

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 subparagraph (it) 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., along with the staff (e.g., Driver, conductors, cleaner etc.). The Board has also considered this issue in Circular No. 558, dated 28-3-1990 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 thereunder, 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 15th and the other for the remaining part of the month, accompanied by a certificate issued by the Traffic Supervisor of the Depot 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 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(l). 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 1 94C of the Act"

9. The main contention of the revenue is that as per Rule 5 of the Income-tax 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 1 94-I. It is to be noted that the classification of the assets for the purpose of depreciation under section 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'ble Jurisdictional High Court in the case of Indian National Ship Owners' Association (supra) has held that the definition of plant under Rule 5 of the Income-tax 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 paragraphs 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 sections 32A and 33 of the Act clearly differentiate ships, machinery and plant.

14. having examined clause(c) Explanation-Ill 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 freight 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 of tax in favour of one of the members of the first petitioner. Association, i.e., 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 12-3-2008 has explained that as amended by the Tax Laws, the Amendment Act, 2006 w.e.f. from 13-7-2006, the definition of rent on three new items plant, machinery and equipment has been inserted. Subsequently, as per the Finance Act, 2007 the rate of deduction of tax at source was reduced 15 per cent to 10 per cent 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. (supra) (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 (1) 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 C 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 section 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 Assessing Officer 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 under section 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 license, 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.

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 cannot be termed as contract for hiring of the vehicles. I do not agree with the observation of the Assessing Officer 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 cannot 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 l94C 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 194 I of the Act are not applicable in case of hire payments made for the hiring of transport vehicle.

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"

10. Similar view was also expressed by the Coordinate Benches in Tata AIG General Insurance Co. Ltd. vs. ITO 43 SOT 215 (Mum) and Ahmedabad Urban Development Authority vs. ACIT ITA No. 1637/Ahd/2010 dated 10.03.2011. Respectfully following the above, we hold that assessee has correctly deducted tax under section 194C and there is no liability to deduct tax under section 194 I as the said provisions are not applicable to the hire charges paid for utilisation of transport services from the respective service providers. In view of this, impugned orders of the A.O. levying tax under section 201(1) and interest under section 201(1A) are hereby set aside.

11. In the result, assessee's appeals are allowed.

Order pronounced in the open court on 31st October 2011.

Sd/-	Sd/-
(Vijay Pal Rao)	**(B. Ramakotaiah)**
Judicial Member	**Accountant Member**

Mumbai, Dated: 31st October 2011

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) – XIV, Mumbai*
4. *The CIT– (TDS), Mumbai City*
5. *The DR, "E" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.