

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER**

ITA Nos.370 to 372/COCH/2013
Assessment Years:2006-07 to 08-09

Income Tax Officer (TDS), Alappuzha,	Vs	M/s Southern Mineral Industries Thycattussery P.O., Cherthala, Alappuzha. PAN:ABAFS2196L
(Appellant)		(Respondent)

ITA No.471/COCH/2013
Assessment Years:2006-07

Income Tax Officer, Ward-4, Alappuzha,	Vs	M/s Southern Mineral Industries Thycattussery P.O., Cherthala, Alappuzha. PAN:ABAFS2196L
(Appellant)		(Respondent)

Appellant by	Shri A.Dhanraj, Sr. D.R.
Respondent by	Shri R. Krishnan, C.A.
Date of hearing	03/10/2017
Date of pronouncement	04/10/2017

ORDER

PER P. K. BANSAL, V.P.

All these appeals have been filed by the Revenue against the consolidated order of CIT(A) dated 28th March, 2013 and 25th April, 2013.

2. In I.T.A.Nos. 370 to 372 although the Revenue has taken six grounds in each of the assessment years but the only issue involved in all these appeals relates to the issue whether the assessee is liable to deduct

the TDS at source under section 194I of the Act. Both the parties agreed that all these appeals be decided on the basis of the facts involved in assessment year 2006-07 and whatever view this Tribunal may take in assessment year 2006-07, the same view may be taken in all the other assessment years.

3. The facts of the case for the assessment year 2006-07, in brief, are that the assessee is a partnership firm engaged in the business of silica sand mining. During the course of inspection, the Assessing Officer was of the view that the assessee has committed the default by not deducting the TDS and paying it to the Central Government. According to the Assessing Officer the assessee made the following payments without paying the TDS:

Sl.No.	Nature of payments	Section applicable	Amount paid without TDS. Financial year 05-06 (Rs.)
1.	Sieving charges	194C	14,99,377
2.	Drying charges	194C	14,97,696
3.	Loading charges	914C	10,13,896
4.	Transportation charges	194C	1,21,000
5.	Freight charges	194C	78,800
6.	Commission of sale	194H	1,26,900
7.	Brokerage	194H	1,02,425
8.	Lease Hire	194I	67,90,900

3.1 The Assessing Officer therefore, issued the notice to the assessee requiring him to furnish the details of the tax deducted at source and deposited to the Government, details of filing of quarterly statements and to clarify/explain the position in this regard. The assessee in reply thereto denied the default being made. The Assessing Officer therefore, treated the assessee to be in default in respect of not deducting the TDS under section 194C, 194H and 194I of the Act and also created the demand and levied interest under section 201(1A) vide order dated 25/03/2011. The assessee went in appeal before the CIT(A). The CIT(A) treated the

assessee in default under section 194C and 194H in respect of transport charges, freight charges, commission and brokerage but in respect of lease hire charges, the CIT(A) took the view that the lease hire charges, as mentioned by the assessee in the profit & loss account, in substance does not represent the lease rent of the land but it represents consideration paid for extraction of the sand i.e. for the purchase of the sand but allowed the assessee consequential relief in respect of interest under section 201(1A) of the Act.

4. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. The moot question before us is whether the payment made by the assessee represents the rent of the land or represents the cost of the sand. If it is a payment towards the lease of the land, the provision of section 194I will apply and the assessee will be liable to deduct the tax at source. In this regard learned A.R. drawn our attention towards the copy of the agreement entered into between the assessee as well as the land owner from whom the assessee has taken the land for extraction of the sand. We noted that the copy of one of the said agreements is available at page 33 and 34 of the paper book. The terms and conditions entered into between the assessee and the owner of the land are stipulated as under:

- "1. *That the party no. II can mine maximum sand from the above said property.*
2. *The party no. II shall pay Rs.140/- (One Hundred and Forty only) per ton to the party no. I for the sand is to be taken from the property belongs to party No. I.*
3. *That the party no. II shall be responsible for arranging necessary licence from the Mining Department and the party no. II shall mine the silica sand from the abovesaid landed property within two years from the date of licence.*

4. *That party no.II shall settle with the party no.I every week the amount of the sand taken from the said property.*
5. *If necessary, the party no. I shall be responsible for shifting the trees from the said property.*
6. *The party no.II today paid Rs.50,000/- (Rupees Fifty Thousand Only) to the Party No.1 as advance vide cheque No.393131 drawn on State Bank of Travancore Cherthala.*
7. *The party No.II shall have the right to deduct the amount paid by him to the party No.I from the totaql sand value mined by the party no.II.*
8. *The party No.II shall not create any damages to the party No.I is connected to the law related to the sand business, and any party of this agreement violates any condition stipulated in this agreement, the party who violates the condition shall be responsible for the damages and loss caused to the other party."*

From the said agreement it is apparent that the assessee has been committed to mine the sand from the said land and for which the assessee is bound to pay Rs.140/- per ton to the land owner for the sand which he has extracted from the said land. The assessee shall also be responsible for arranging the necessary licence in this regard from the Mining Geology Department for extracting the sand from the said land. The assessee is bound to settle every week the payment to be made to the land owner. The land owner shall be responsible to shift the trees from the said land. The assessee has also given advance of Rs.50,000/- to the land owner for which he has right to deduct at source from the amount due towards the land owner in respect of the sand value mined by the assessee. Now the question arises whether the consideration paid by the assessee was towards the purchase of the sand extracted from the land or was it a rent for the land. In case it is a rent for the land, the assessee shall be liable to deduct tax at source but in case it is a consideration towards extraction of sand i.e. purchases of the commodity, which has to be taken out by the

assessee himself, the assessee has not to deduct tax. The rent for the purpose of section 194I has been defined as under:

"(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)

(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." ;

According to this section, rent means any payment, whatever may be the nomenclature given by the party under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any of the assets mentioned under clause (a) to (h). Land is also one of the assets mentioned therein. Now the question arises if the assessee has paid the consideration for the use of the land under the agreement entered into by the assessee by these parties, it will tantamount to be a rent but in case the land is not used by the assessee then it will not come within the four corners of the rent making the assessee liable for deduction of tax at source. We noted that Bombay Bench of Tribunal in the case of Chattisgarh State Electricity Board vs. ITO 2011(11) TMI 125 considered the word "use" for the purpose of section 194I when it had an occasion to consider whether the transmission charges paid by the assessee to power grid was "rent for use of plant". This Tribunal held as under:

(i) S. 194-1 defines "rent" to include any payment, by whatever name called, under any lease, agreement or

*arrangement "for the use of" any machinery or plant. **For a payment to be construed as "rent", it is a condition precedent that the payer should have some control over the asset. There is a distinction between 'the use of an asset' and the 'benefit derived from an asset'.** In a transaction of hire/leasing, the possession of the goods and its effective control is given to the customer and the customer has the freedom and choice of how to use the asset. On the other hand, if the customer entrusts to the assessee the work of achieving a certain desired result and that involves the use of goods belonging to the owner, the control of the asset remains with the owner and there is no "use" by the customer (Asia Satellite 332 ITR 340 (Del) followed.*

- (ii) *On facts, the transmission lines were under the possession & control of Power Grid. The assessee was merely enabled to use the services of transmission of electricity and not the use of transmission wires per se. The assessee was not **involved in the actual operations of the transmission lines.** The transmission wires were also used by other customers of Power Grid. Consequently, the payments were not "rent" u/s 194-I."*

On the basis of the proposition of law laid down in that case, it is essential for construing the consideration to be rent that the payer should have some control over the asset. In a transaction of hire/leasing, the possession of the goods and its effective control is given to the customer and the customer has the freedom and choice of how to use the asset. But in the impugned case we noted that the land was given by the assessee only for extracting the sand therein. The land remains with the owner. While extracting the sand, the assessee does not have any control over the land. Instead of sand being extracted by the assessee, the land owner could have himself extracted the sand and sold it to the assessee if they would have not included in the agreement. Extraction of the sand to be carried out by the assessee. Thus, in our opinion, it is simply selling of the sand by the owner of the land which has to be extracted and carried by

the assessee at own cost. Learned D. R. even though made the written submissions and relied on the provisions of section 194I but could not bring to our knowledge any decision which has taken the view distinguishing the word "use of land and benefits derived from the land". It is also not denied that the sand so extracted by the assessee is treated as commodity and the VAT is being levied thereon by the State Government on subsequent sale by the assessee. In view of this fact, we do not find any illegality or infirmity in the order of CIT(A) not upholding the order of the Assessing Officer treating the assessee in default in each of the assessment years under section 194I in respect of consideration paid by the assessee under the agreement entered into for extraction of the sand with the land owners. We, therefore, confirm the order of the CIT(A) and dismiss the appeal of the Revenue in each of the assessment years.

5. Now coming to I.T.A.No.471/COCH/2013. This appeal has also been filed by the Revenue against the order of CIT(A) dated 25/04/2013. The only issue involved in this appeal relates to the deletion of disallowance made by the Assessing Officer under section 40(a)(ia) in respect of lease hire charges paid by the assessee during the assessment year 2006-07 amounting to Rs.67,90,900/-, which was disallowed by the Assessing Officer by holding that the assessee was liable to deduct TDS under section 194I of the Act. While disposing of I.T.A.No.370/COCH/2013 for the assessment year 2006-07, we have confirmed the order of CIT(A) in earlier paragraph holding that the assessee was not liable to deduct the TDS under section 194I and assessee cannot be treated to be an assessee in default in this regard. Since the provision of section 194I, in our opinion, were not applicable in the case of the assessee in respect of the said payment therefore, this issue is consequential in nature and the disallowance under section 40(a)(ia) could have been upheld only if the

assessee would have committed the default under section 194I. We have also held that the provisions of section 194I are not applicable in the case of the assessee therefore, in our view, it is not a fit case which warrants our interference. We accordingly confirm the order of CIT(A).

6. In the result, all the appeals filed by the Revenue stand dismissed.

(Order pronounced in the open court on 04/10/2017)

Sd/.
(GEORGE GEORGE K.)
Judicial Member

Sd/.
(P. K. BANSAL)
Vice President

Dated:04/10/2017
***Singh**

Copy of the order forwarded to :

- 1.The Appellant
- 2.The Respondent.
- 3.Concerned CIT
- 4.The CIT(A)
5. D.R., I.T.A.T., Cochin

Asstt. Registrar