IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE S/SHRI N.S SAINI, ACCOUNTANT MEMBER
AND PAVAN KUMAR GADALE, JUDICIAL MEMBER

ITA Nos.296,297 & 298/CTK/2017
Assessment Years : 2007-08, 2008-09 & 2009-2010

The Principal Officer, Sarda Mines Pvt Ltd., Block-B, Thakurani Iron, Barbil, Keonjhar.	Vs.	ACIT (TDS)-II, Bhubaneswar.
PAN/GIR No.AAHCS 2419 R		
(Appellant)	..	(**Respondent**)

Assessee by : Shri Bhagban Panda/D.K.Mohanty, AR
Revenue by : Shri Subhendu Datta, DR

Date of Hearing : 29/08/ 2018
Date of Pronouncement : 31/08/ 2018

O R D E R

Per N.S.Saini, AM

These are appeals filed by the assessee against the separate orders of the CIT(A)-3, Bhubaneswar dated 31.5.2017 for the assessment years 2007-08, 2008-09 and 2009-2010.

2. At the time of hearing, ld A.R. of the assessee submitted that he is arguing only Ground No.2 for the assessment year 2007-08 and common Ground No.4 of appeal for the assessment year 2007-08 and Ground No.3 of appeal for the assessment years 2008-09 & 2009-2010.

3. In Ground No.2 of appeal for the assessment year 2007-08, the grievance of the assessee is that the CIT(A) erred in holding that the assessee was liable to deduct tax at source from the payments made to M/s. Sunderlal Mohanlal Sarda and Others of Rs.2,08,52,219/- towards reimbursement of expenses and Rs.7,36,91,121/- for purchase of assets u/s.194-I of the Act.

4. The facts of the case are that an amount of Rs.2,08,52,219/- was paid to M/s. Sunderlal Mohanlal Sarda and Others as mining lease expenditure and Rs.7,36,91,121/- as capital expenditure for purchase of assets aggregating to Rs.9,45,43,340/- and no tax was deducted from the said payments. The assessee entered into an agreement on 22.6.2006 with M/s. Sunderlal Mohanlal Sarda and Others for getting the mining lease and made the above payments. The assessee submitted that no purchase agreement in respect of purchase of assets or mining lease expenditure was executed between the two entities. The Assessing Officer found that the amount paid to M/s. Sunderlal Mohanlal Sarda and Others was for the lease transfer of mines, that no sales tax was paid for the claim of sale of assets by M/s. Sunderlal Mohanlal Sarda and Others to the assessee and, therefore the payments made for capital expenditure was for transfer of mining lease. The Assessing officer was of the view

that as per provisions of section 194-I of the Act, the expenditure of Rs.9,45,43,340/- paid to M/s. Sunderlal Mohanlal Sarda and Others was actually for premium for transfer of mining lease whereas the law does not allow such payment for which no formal agreement has been entered that no TDS was made by the assessee and the amount was not offered by M/s. Sunderlal Mohanlal Sarda and Others and no formal agreement was arrived at only for the fact that doing so would have violated the existing law and that since the payment is in the nature of premium for transfer of mining lease, the tax is deductible u/s.194-I of the Act. Therefore, the Assessing Officer held that the assessee is in default u/s.201(1) and 201(1A) of the Act for TDS of Rs.2,13,66,795/- and interest of Rs.85,46,718/-.

5. On appeal, the CIT(A) held as under:

> " Regarding the reimbursement of expenditure of Rs.2,08, 52,219 paid by SLML Sarda &. Others to the Government towards afforestation expenditure and payment of Rs. 7,36,91,121/- to SLML Sarda & Others towards acquisition of fixed assets, a letter was written to the Directors of Mines, Odisha to clarify the nature of deal between SLML Sarda & Sarada Mines and also to clarify validity of the sub-lease in view of Rule-37 of Mineral Concession Rules, 1980.
>
> a) The reply received from the Directors of Mines vide M-XIII(d)44/2017 3008/DM., dated 13.04.2017 is reproduced hereunder for easy reference
> *"Sir,*

In inviting a reference to your letter No. CIT(A)-3/BBSR/Misc./2016-17/1761 dated 30.03.2017 on the subject mentioned above, this is inform you that there has been no subleasing of the mining lease over 947.06 hects of Thakurani (Block-B) iron ore, which was granted in favour of Sri Sundarlal Sarda and Sri Mohanlal Sarda vide Govt. Proceeding No. 1014/SM dt. 11.02.1999 and executed for a period of 20 years as per Govt, order No. 8721/SM Dt. 13.07.2001.

Subsequently, the lessees applied to the State Govt, under the provision of Rule- C Rules, 1960 for transfer of said mining lease in favour of M/s Sarda Mines Pvt. Ltd., submitting all required documents as per the said provisions of law. The State Govt. allowed the transfer of said lease of Sri Sundarlal Sarda and Sri Mohanlal Sarda in favour of M/s. Sarda Mines Pvt. Ltd as per the provisions of Rule-37 of MC Rules, 1960 for the un-expired period of said lease vide Govt. Proceeding No. 8762/SM dated 07.06.2006. The copy of the Transfer Proceeding is enclosed as Annexure-I. The transfer of said mining lease deed of Thakurani Iron Ore Mines, Block-B in favour of M/s Sarda Mines Pvt. Ltd was executed on 22.06.2006 in the prescribed model Form 'O'. *The period of the above mining lease is valid up to 12.08.2021."*

b) Thus, Mining Lease over 947.06 hects of Thakurani (Block-B) iron ore, which was granted in favour of Sri Sundarlal Sarda and Sri Mohanlal Sarda vide Govt. Proceeding No. 1014/SM dt. 11.02.1999 and Instrument of transfer of Mining Lease in Form '0' executed on 22.06.2006 and the transfer is valid uptp 12.08.2021. On perusal of the Instrument, it transpires that the appellant deductor had paid no other consideration for such transfer except stamp duty of Rs. 5,51,160/- and Rs. 1, 37,894/. But, it has claimed to have paid mining lease expenditure of Rs. 2,08,52,219/- as reimbursement of cost of aforestation and other expenses and Rs. 7,36,91,121/- towards purchase of assets to Sunderlal Sarda and Mohanlal Sarda, AOP. Assets claimed to have purchased consist of land & building, boundary wall, bore-well etc worth Rs. 2,69,05,000/- and plants & machineries worth Rs. 4,67,86,121/-.

Sunderlal Sarda and Mohanlal Sarda paid cost of aforestation and other expenses aggregating to Rs. 2, 08,52,219/- to the Govt prior to the transfer of lease on 22.06.2006. The appellant deductor did not adduce any agreement with SL & ML Sarda wherein SL & ML Sarda had undertaken to incur such expenditure on behalf of the appellant deductor. The appellant also did not produce any evidence that the said expenditure was not claimed by SL & ML Sarda as expenditure by way of debiting to the P & L A/c and the said amount in fact was shown in the Current Assets of the Balance Sheet of SL & ML Sarda as the amount recoverable from the appellant deductor. Merely filing the Income Tax return of SL & ML Sarda does not cut any ice as the return does not indicate whether the said amount was offered to tax as business income. In the absence of any such evidence the amount of Rs.2,08,52,219/- cannot be considered as reimbursement of expenditure. In fact, the payment of Rs. 2,08,52,219/- is related to acquisition of lease hold right over mines which is covered under Transfer of Property Act, 1882 being related to an immovable property. Therefore, such payment is required to be specified in the instrument of registration for acquiring such right.

v) The debit notes relating to payment made to SL & ML Sarda towards acquisition of capital assets shows not only transfer of machinery and equipment but also transfer of immovable assets like buildings, boundary wall bore well, etc which is covered under Transfer of Property Act, 1882. Transfer of such assets is required to be made by registered instrument. Therefore, transfer of such assets cannot take place by issue of debit notes. In the absence of a valid transfer deed, the payment made by the appellant to SL & ML Sarda aggregating to Rs. 2, 69, 05,000/-towards building, boundary wall etc is to be considered as the payment made for use of immovable property which attracts deduction of Tax u/s 1941 of the IT.Act. Likewise, for rest of the capital assets consisting of plant and machinery amounting to Rs. 4,67,86,121/-, there is no contract/agreement between SL & ML Sarda for transfer of such assets. Debit notes were issued in July, 2006, August 2006, January 2007 and March, 2007. The appellant has produced Form VAT-31 showing sales for the period from 01.10.2006 to 31.10.2006 which does not even match with

the period of debit notes. Merely submitting the Income Tax Return of SL & ML Sarda without adducing any evidence that SL & ML Sarda has offered the income from the sale of such capital assets to taxation does not cut any ice and therefore, ratio of the case in Hindustan Coca Cola Beverage (P), Ltd Vs. CIT 293 ITR 267 is not applicable to the case of the appellant. In that view of the matter, it is held that the appellant deductor is liable for TDS u/s 194-1 of the I.T.Act for use of assets of SL & ML Sarda.

As stated above, "there is no mention of any consideration paid by the appellant deductor to SL & ML Sarda for transfer of Mining Lease evident from the instrument dated 22.06.2006. The existing laws prohibit any type of monetary transaction in relation to Mining Lease transfer because of the very fact that mines are the properties of the Government. The appellant deductor contends that the alleged payments of Rs. 2,08,52,219/- and Rs. 7,36,91,121/- totaling to Rs. 9,45,43,340/-relate to the reimbursement of expenses on aforestation etc and transfer of assets of SL & ML Sarda, but the transfer of the assets are not supported by any registered instrument under Transfer of Property Act, 1882. The appellant has claimed the expenses of Rs.2,08,52,219/- as revenue expenses whereas the recipient SL&ML Sarda has shown it as balance sheet item of "Advance Recoverable in cash or in kind or for value". The receipts against sale of assets have also been cap-under the above head.

In the given facts and circumstances of the case, it is held t-there is no evidence of transfer of ownership of the assets of SI & ML Sarda in favour of the appellant deductor, but it paid alleged sum of Rs. 9,45,43,340/- for use of such assets of SI & ML Sarda including reimbursement of aforestation expenses and all these expenses are essential for running the mines transferred to its name through the instrument dated 22.06.2006 and therefore, the appellant deductor was liable to deduct tax at source u/s 1941 on payments made towards use of assets of SL & ML Sarda Ltd. Accordingly, it is held that the A.O is justified in raising demand of Rs.2,13,66,795/- u/s 201(1) and Rs. 8,546,718/- u/s 201(1A) for failure of the appellant deductor to deduct tax under the aforesaid section and hence, demand totaling into Rs. 2,99,135,13/- raised on this score is confirmed."

6. Before us, ld A.R. submitted that the payment of Rs.2,08,52,219/- paid/payable in course of transfer of mining lease are onetime payment. Therefore, if not considered as reimbursement to M/s. Sunderlal Mohanlal Sarda and others and are considered as payment towards acquisition of the transfer of right to enjoy the property, it is undisputed that such one time payment are nothing but a premium and hence, it is capital in nature. Therefore, they cannot be termed as a payment of rent and subject to *TDS u/s. 194-1. The Ld. A.R. placed reliance in the case of Raja Shiva Prasad Singh Vrs. King emperor AIR 1924 Patna 679, Board of Agricultural Income-tax Vrs. Sindhurani AIR 1957 SC 729, CIT Vrs. Panbari Tea Co. Ltd. 57 ITR 422 (SC), Bharat Steel Tubes Ltd. Vrs. CIT 252 ITR 622 (Del.). Further, Ld. A.R. submitted that onetime payment to acquire leasehold land is premium, but not rent by placing reliance in the case of A.R. Krishna Murthy & Ann Vrs. CIT, Madras on 10.02.1989 reported in 1989 AIR 2055, 1989 SCR(l) 596, ITO, Ward-50(1) , New Delhi Vrsr M/s. Indian Newspaper Society (ITA No.4660/del/2013), ITO(TDS) Vrs. M/s. Navi Mumbai SEZ Pvt. Ltd., R.K. Palshikar(HUF) Vrs. CIT on 05.05.1988 1988 AIR 1305, 1988 SCR (3) 989, ITO (TDS) 3(5) Mumbai Vs. M/s. Wadhwa & Associates*

Realtors Pvt. Ltd. on 19.06.2013 (ITA No.695/Mum/2012), Traders and Miners Ltd. Vrs. CIT (1995) 27 ITR 341 (Patna)"].

7. Ld A.R. further submitted that in the order dated 29.12.2017 passed by the CIT(A)-10, Kolkata in Appeal No.713/CIT(A)-10/07-08/Kol against the order of the Assessing officer dated 30.3.2015 passed u/s.147/143(3)/144 of the Act at page 12 of the order in para 9 P.No.3 has observed as under:

> "After giving due consideration to the facts submitted and examining the audited / financial accounts of the appellant for the FY 2006-07, I find merit in the *S* submissions made by the Id. ARs on behalf of the appellant. From perusal of the Balance Sheet, I find that in terms of the business purchase agreement with SLML Sarda AOP, the appellant had incurred cost of Rs.7,36,91,121/- for purchase of various fixed assets and such costs was appearing in the appellant's balance sheet on 'Asset' side. Similarly the appellant had also reimbursed to the said AOP the capital expenses which AOP incurred prior to the takeover. In the appellant's balance sheet for the year ended 31.03.2007, reimbursement of cost of Rs.2,08,52,219/-, was also capitalized. I therefore find that in respect of both the said two sums, the appellant had not debited its P&.L A/c nor any part of such cost was claimed as expenditure in arriving at total income of the appellant. In the circumstances the primary requirement for invocation of Section 40(a)(ia) was absent. In terms of Section 40(a)(ia), the AO can disallow only such expenditure for which deduction is claimed by an assessee in arriving at taxable income. However if no deduction is claimed for any expenditure, for the reason that the payment is capitalized in assessee's books, then Section 40(a)(ia) does not permit disallowance of capital expenditure for the reason of non-deduction of taxes. The disallowance of both the said sums was untenable u/s 40(a)(ia) of the Act."

8. Ld D.R. supported the orders of lower authorities and submitted that the mining lease cannot be transferred between

two private persons as the land belongs to the Government and the Government allots the mining to the persons.

9. In the rejoinder, ld A.R. submitted that it will be observed from the order of the CIT(A) at page 27 wherein, the CIT(A) has quoted from the submission of the Director of Mines vide XIII(d)44/2017 3008/DM dated 13.4.2017 as under:

> *" In inviting a reference to your letter No. CIT(A)-3/BBSR/Misc./2016-17/1761 dated 30.03.2017 on the subject mentioned above, this is inform you that there has been no subleasing of the mining lease over 947.06 hects of Thakurani (Block-B) iron ore, which was granted in favour of Sri Sundarlal Sarda and Sri Mohanlal Sarda vide Govt. Proceeding No. 1014/SM dt. 11.02.1999 end executed for a period of 20 years as per Govt, order No. 8721/SM Dt. 13.07.2001.*
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> *Subsequently, the lessees applied to the State Govt, under the provision of Rule- C Rules, 1960 for transfer of said mining lease in favour of M/s Sarda Mines Pvt. Ltd., submitting all required documents as per the said provisions of law. The State Govt. allowed the transfer of said lease of Sri Sundarlal Sarda and Sri Mohanlal Sarda in favourof M/s. Sarda Mines Pvt. Ltd as per the provisions of Rule-37 of MC Rules, 1960 for the un-expired period of said lease vide Govt. Proceeding No. 8762/SM dated 07.06.2006. The copy of the Transfer Proceeding is enclosed as Annexure-I. The transfer of said mining lease deed of Thakurani Iron Ore Mines, Block-B in favour of M/s Sarda Mines Pvt. Ltd was executed on 22.06.2006 in the prescribed model Form* 'O'. *The period of the above mining lease is valid up to 12.08.2021."*

10. Ld A.R. therefore, submitted that the submission of ld D.R. is not correct that the lands were not transferred by the Government to Sri Sunderlal Sarda and Mohanlal Sarda & Others.

11. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. In the instant case, the undisputed facts of the case are that the assessee has paid Rs.7,36,91,121/- and Rs.2,08,52,219/- aggregating to Rs.9,45,43,340/- to Sri Sunderlal Sarda and Mohanlal Sarda & others on which no TDS was deducted by the assessee. The assessee claimed that Rs.7,36,81,121/- was paid for acquisition of various capital assets and Rs.2,08,52,219/- was paid by way of reimbursement of afforestation expenses earlier incurred by the said M/s. Sunderlal Mohanlal Sarda and others. On the other hand, the contention of the department is that Rs.9,45,43,340/- was paid as mining lease premium and as the premium is not permissible as per applicable law, the said amount was treated as rent and, therefore, the assessee was liable to deduct tax at source u/s.194-I of the Act.

12. The related facts are that said M/s. Sunderlal Mohanlal Sarda and others had acquired mining lease from Government of Orissa in the year 2001 for 20 years for iron ore over 947.06

hectors of land. Further, it is not in dispute that mining lease for unexpired period was transferred by M/s. Sunderlal Mohanlal Sarda and others to the assessee company after obtaining necessary approval and permission from the appropriate authority. The assessee also acquired various machineries and other capital assets from the said M/s. Sunderlal Mohanlal Sarda and others for Rs.7,36,91,121/-. Further, said M/s. Sunderlal Mohanlal Sarda and others has incurred afforestation expenses of Rs.2,08,52,219/- and said expense was reimbursed by the assessee. We find that no material has been brought on record by the revenue to show that the amount of Rs.9,45,43,340/- was paid by the assessee to said M/s. Sunderlal Mohanlal Sarda and others for using any assets owned by the said M/s. Sunderlal Mohanlal Sarda and others. On the other hand, it is observed that Rs.7,36,91,121/- paid was shown by the assessee as its fixed assets in its balance sheet and depreciation was claimed thereon. The said depreciation was duly allowed by the Assessing Officer in the assessment u/s.143(3) of the Act. Thus, in the assessment, the payment was treated as payment for acquisition of capital assets. Further, Rs.2,08,52,219/- paid by the assessee for afforestation expenses was declared by the assessee as an asset under the head “miscellaneous expenses”. In the

assessment u/s.143(3) in the hands of the assessee, no part of aforesaid payment of Rs.9,45,43,340/- was treated as rent. Further, even if the contention of the revenue is accepted that payment of Rs.9,45,43,340/- claimed by the assessee paid to Sri Sunderlal Mohanlal Sarda and others was premium for mining lease then also the assessee was not obliged to deduct tax thereon u/s.194-I of the Act.

13. In this connection, it is observed that the Hon'ble Apex Court in the case of A.R. Krishnamurthy (176 ITR 417) has held that lease of land is transfer of interest in the land and creates a right in rem, and there is a transfer of title in favour of the lessee though the lessor has the right of reversion after the period of lease terminates. It was held that grant of mining lease at a premium is a capital asset. The Hon'ble Delhi High Court also brought out the difference between the amount payable for acquiring lease hold rights as premium and the amount which would be payable for use of assets as rent in Bharat Steel Tubes Ltd V/s CIT (2001) 252 ITR 622(Del). Their Lordships have held that when the premium is paid at the beginning of the mining lease for a long period, ordinarily represents the purchase of an out and out sale of the property and the sum received is capital and not income, but rent or royalty paid periodically is income. It

was held that the principle is the same, whether the premium is for a simple lease of land or for a lease of mineral rights. Therefore, when the interest of the lessee is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. That the former is capital and the later is revenue in nature. Their Lordships of the Hon'ble Delhi High Court stated that rent is allowable as deduction u/s 30 of the Act. It is stated that section 105 of the Transfer of Property Act, 1882 also make a distinction between the rent and premium payable under lease. When the interest of the lessor is charged with for a price, the price paid is premium or salami but the periodical payment made for the continuous enjoyment of the benefits under lease are in the nature of rent. Their Lordships held that former is capital and later is revenue in nature.

14. A similar issue also came up before the Hon'ble Bombay High Court in the case of CIT vs. Khimline Pumps Ltd, 258 ITR 459 (Bom). In the said case open plot of land was leased out to APVE Ltd, a company for a period of 95 years on payment of a premium of Rs.1,62,400/- and yearly rent of Rs.1. In the lease, the company had, at the end of 95 years to deliver a vacant possession of the land. The company was entitled to remove any

building, erections or structures put up by it on the land. The company had erected building, plant and machinery thereon. APVE Ltd. were to be wound up and its assets were sold under direction of Hon'ble High Court. The assessee company offered Rs. 75 lakhs of which the AO held that Rs.45 lakhs related to acquisition of lease hold land. But that amount could not be deducted as it was capital expenditure. The Tribunal held it was capital expenditure, but without giving reasons, held that since benefit of the expenditure would be exhausted in 71 years, a proportionate amount relatable to each year viz Rs.63,380/- might be allowed as deduction on account of payment of rent. On appeal to the Hon'ble High Court agreed with the AO that Rs.45 lakhs was a capital expenditure. Therefore, the Tribunal could not direct the department to apportion the amount over a period of 71 years. Their Lordships held that in order to ascertain true character and purport of the payment the court has to go by the substance of transaction and not by manner in which the assessee allocates the items for accounting purposes.

15. The Special Bench of Mumbai Tribunal in the case of JCIT v. Mukund Ltd. 106 ITD 231 wherein the issue was whether the premium paid for acquiring leasehold right in land is revenue or capital, has held that the same is capital expenditure.

16. Thus, in the absence of any material on record to show Rs.9,45,43,340/- was paid by the assessee as rent within the meaning of section 194-I of the Act, we hold that the assessee was not liable to deduct tax therefrom u/s.194-I of the Act. Consequently, the assessee cannot be treated as an assessee in default u/s.201(1) of the Act and no interest u/s.201(1A) can be levied. We, therefore, set aside the orders of lower authorities and allow the grounds of appeal of the assessee.

17. Ground No.4 of appeal for the assessment year 2007-08 and Ground No.3 of appeal for the assessment year 2008-09 & 2009-2010 are common. The grievance of the assessee is that the CIT(A) erred in restoring the issue of tax u/s.201(1) of the Act for Rs.23,57,034/- for the assessment year 2007-08, Rs.1,06,98,904/- for the assessment year 2008-09 & Rs.1,41,25,141/- for the assessment year 2009-10 back to the file of the Assessing Officer for verification of the fact that recipients of the amount have shown the amount received from the assessee as their income in their return of income filed and paid due tax thereon.

18. The brief facts of the case are that according to the Assessing Officer the assessee company hired heavy vehicles from Jindal Steel & Power Ltd., Minerals Management Services India Pvt

Ltd. and G.S.Atwal & Co. and has made payments and deducted tax at source u/s.194C as under:

Asst.Yr.	Company	Payment (Rs.)	Tax deducted at source u/s.194C
2007-08	MMSIPL G.S.Atwal	72,80,000 45,55,644	1,63,363 1,54,459
2008-09	MMSIPL G.S.Atwal	3,17,69,000 1,47,07,478	3599430 3,33,282
2009-10	GSPL G.S.Atwal	124965972 31219933	2831731 738991

According to the Assessing Officer, the assessee has deducted TDS u/s.194C on the ground that it has given a contract to the person raising handling and transportation of minerals. According to the Assessing Officer, the assessee has hired vehicles and, therefore, the payments made to these persons are rent and covered u/s.194-I of the Act for deduction of TDS. As the assessee has not deducted tax u/s.194-I, therefore, he held the assessee as the assessee in default for short deduction of TDS u/s.201(1) of Rs.23,57,034/- for the assessment year 2007-08, Rs.1,06,98,904/- for the assessment year 2008-09 & Rs.1,41,25,141/- for the assessment year 2009-10 and interest u/s.201(1A) of the Act for Rs.9,42,814/- for the assessment year 2007-08, Rs.106,98,904/- for the assessment year 2008-09 and Rs.1,41,25,141/- for the assessment year 2009-2010.

19. On appeal, the CIT(A) allowing the alternative plea of the assessee that the recipients of the amount have disclosed the amount as income in their return of income filed, therefore, the assessee cannot be held as the assessee in default for deduction of TDS u/s.201(1) of the Act and restored the matter back to the file of the Assessing Officer subject to verification of the income tax return of the recipients of the amount from the assessee. The CIT(A), however confirmed the addition on account of interest u/s.201(1A) of the Act of Rs.9,42,814/- for the assessment year 2007-08, Rs.29,95,693/- for the assessment year 2008-09 and Rs.22.60,023/- for the assessment year 2009-2010.

20. Hence, these appeals are before us.

21. Ld A.R. of the assessee pointed out from the copy of the agreement entered into with JSPL, Atwal & Co. And MMCIPL (copy of which is placed at paper book at pages 182 to 192) and submitted that as per the agreement entered into with G.S.Atwal & Co(Asansol), the scope of work was as under:

"a) Dozing,
b) Excavation
c Shifting & re-handling of iron ore (ROM/LUMP/FINES)
d) Road preparation & Drainage making
e) Other misc. work

and the assessee was to pay on hourly basis for utilisation and the rates were as under:

a) Dozer BD-355 @ Rs.3,000/- per hour
b) Excavator -Ex 600/PC600/demag @ Rs.2500/- per hour
c) Excavator -PC400 @ Rs.2000/- per hour
d) Dumper-35 Tonne @ Rs.1120/- per hour

This included monthly/labour charges payable to the operators, Assistant or labours required for completion of work, repairs and maintenance of vehicle, insurance, HSD, lubricants & also any other incidental expenses in running and maintenance of vehicles. Hence, it was his submission that it was a simplicitor contractor for hiring the vehicles for contract work. The contractor was to provide the operators and also paid fuel charges and repair of the vehicles and hence, TDS was deductible u/s.194C of the Act.

22. Similarly from the agreement with Jindal Steel & Power Limited, it was pointed out that the assessee hired following vehicles and was to pay rate per day as under:

D & Dozer	;	Rs.17,000/-
Rock L8 Drill machine:		Rs.40000/-
Motor Grader	:	Rs. 7000/-
Water Tanker	;	Rs. 1000/-

It was provided that the cost of diesel was to be borne by the contractor and that the operator of the equipments also be hired by the contractor and the contractor will maintain the equipment

for good working condition. Hence, it was a simplicitor contractor for hiring the vehicles for contract work.

23. Similarly, from the agreement of Minerals Management Services India Pvt. Ltd., it was pointed out that the company shall give on rent at rate mentioned below:

HM -1035	;	Rs.12,000/-
Excavator	:	Rs.22,000/-

The equipment given on rent by the company should be in good working condition. The cost of insurance and other registration expenses and taxes, if any will be borne by the company. The cost of the diesel will be borne by the contractor and the operator of the equipment will also be hired by the contractor. Thus, it was a simplicitor contractor for hiring the vehicles for contract work.

24. Ld D.R. supported the order of the CIT(A).

25. We have heard the rival submissions, perused the orders of lower authorities and materials available on record. The Assessing Officer observed that the assessee company hired heavy vehicles from Jindal Steel & Power Ltd., Minerals Management Services India Pvt Ltd. and G.S.Atwal & Co. and has made payments and deducted tax at source u/s.194C of the Act. According to the Assessing Officer, the assessee has hired vehicles and, therefore, the payments made to these persons are rent and covered u/s.194-I of the Act for deduction of TDS. As the assessee has

deducted tax at source u/s.194C of the Act and not deducted tax u/s.194-I, therefore, he held the assessee as the assessee in default u/s.201(1) of Rs.23,57,034/- for the assessment year 2007-08, Rs.1,06,98,904/- for the assessment year 2008-09 & Rs.1,41,25,141/- for the assessment year 2009-10 and interest u/s.201(1A) of Rs.9,42,814/- for the assessment year 2007-08, Rs.106,98,904/- for the assessment year 2008-09 and Rs.1,41,25,141/- for the assessment year 2009-2010.

26. On appeal, the CIT(A) allowed the alternative plea of the assessee that the recipients of the amount have disclosed the amount as income in their return of income filed and, therefore, the assessee cannot be held as the assessee in default for deduction of TDS u/s.201(1) of the Act and restored the matter back to the file of the Assessing Officer subject to verification of the income tax return of the recipients of the amount from the assessee. The CIT(A), however, the confirmed the addition on account of interest u/s.201(1A) of the Act of Rs.9,42,814/- for the assessment year 2007-08, Rs.29,95,693/- for the assessment year 2008-09 and Rs.22.60,023/- for the assessment year 2009-2010.

27. Before us, ld A.R. of the assessee referred to the agreement entered with the three contractors and submitted that the machines were provided by the contractor with operator. It was the responsibility of the contractor to provide diesel, repairs and ensure the upkeep and maintenance of the machines as envisaged in the agreements with the contractors. Therefore, the agreements with three contractors, namely; Jindal Steel & Power Ltd., Minerals Management Services India Pvt Ltd. and G.S.Atwal & Co., was a contract for work and not contract for hire and hence, the assessee was liable to deduct TDS from the payments to the contractors u/s.194-C of the Act and not u/s.194-I of the Act, hence the liability determined u/s.201(1A) should be deleted.

28. Ld D.R. supported the order of the CIT(A).

29. We find that the Pune Bench of the Tribunal in the case of DCIT vs. City Corporation ltd., ITA Nos. 593 & 594/PN/2014 Assessment Years : 2008-09 & 2009-10, order dated 12.8.2015 has held as under:

> "5. We have heard the submissions made by the representatives of rival sides and have perused orders of the authorities below. The only issue in the appeals is;
>
> Whether on the payments made by the assessee for hiring of JCB, Porkland etc. for excavation, TDS is to be deducted under the provisions of section 194C or 194I of the Act?

The provisions of section 194C deals with the deduction of tax at source on the payments made to contractors, whereas the provisions of section 194I relates to deduction of tax at source on the payments made in the nature of 'rent'.

6. In the present case, the assessee had hired JCB, Porkland, breaking and bucket machines for excavation of soil. On the payments made for use of said machines, the assessee deducted tax at source u/s. 194C, whereas the contention of the Revenue is that the payments made for the use of machines in the nature of 'rent', therefore, TDS should have been deducted under the provisions of section 194I(a). It has further been contended by the ld. DR that the payments are made for the use of machines on hourly basis. On the other hand the ld. AR of the assessee has asserted that the payments made for excavation of soil is a composite contract which includes payments made for manual work by unskilled labour, use of machinery and transportation of excavated material. The payments are made on the basis of excavation done in the units of per cubic meter. Before Commissioner of Income Tax (Appeals) the assessee has placed on record receipts/invoices raised by the contractor to support these contentions. The Revenue has not been able to refute the contention of the ld. AR. It is not a case of hiring machines simplicitor. The machines were provided by the contractor with operator. It was the responsibility of the contractor to provide for the diesel, repairs and ensure the upkeep and maintenance of the machines.

7. The ld. AR has drawn strength from the decision of Co-ordinate Bench in the case of Bharat Forge Ltd. Vs. Addl. CIT (supra) to support his submissions. In the said case the payments were made for hiring of cranes with driver/operator for loading and unloading of material in the factory. The assessee had deducted tax at source u/s. 194C. The Assessing Officer objected to the same and held that the tax should have been deducted under the provisions of section 194I. The Tribunal held that in such circumstances where the cranes are hired with driver/operator, petrol and maintenance expenses are on account of the contractor, the provisions of section 194C are applicable. The Tribunal while holding so, has placed reliance on the decisions of Hon'ble Gujarat High Court in the case of Shree Mahalaxmi Transport Co. reported as 339 ITR 484 (Guj.) and Swayam Shipping Services (P) Ltd. reported as 339 ITR 647 (Guj.).

We find that the facts in the present case are similar to the issue decided by the Co-ordinate Bench in the case of Bharat Forge Ltd. Vs. Addl. CIT (supra).

> 8. In the facts and circumstances of the present case, we are of the considered view that the assessee has rightly deducted tax at source on the payments made for hiring of JCB, Porkland etc. u/s. 194C. The payments made for hiring machines are in nature of works contract and not 'rent' as defined in Explanation to section 194I of the Act. We do not find any infirmity in the findings of the Commissioner of Income Tax (Appeals)."

30. Thus, from a reading of the above decision of Pune Bench of the Tribunal, we find that it has been held where machineries were provided by the contractor with operator and the contractor was to provide for diesel, repairs and ensure the upkeep and maintenance of the machines, then the contract was for work and the assessee is liable to deduct TDS from the payments to the contractors u/s.194C of the Act and not u/s.194-I of the Act. Consequently, the assessee cannot be treated as an assessee in default u/s.201(1) of the Act and no interest u/s.201(1A) can be levied. We, therefore, set aside the orders of lower authorities and allow the ground No.4 of appeal of the assessee for the assessment year 2007-08, Ground No.3 of appeal for the assessment years 2008-09 and 2009-2010.

31. In the result, appeals filed by the assessee are allowed.

Order pronounced on 31 /08/2018.

Sd/- sd/-

(**Pavan Kumar Gadale)** **(N.S Saini)**
JUDICIALMEMBER **ACCOUNTANT MEMBER**

Cuttack; Dated 31 /08/2018

B.K.Parida, SPS

Copy of the Order forwarded to :

1. The Appellant : The Principal Officer, Sarda Mines Pvt Ltd., Block-B, Thakurani Iron, Barbil, Keonjhar
2. The Respondent. ACIT (TDS)-II, Bhubaneswar,
3. The CIT(A)-3, Bhubaneswar
4. Pr.CIT-3, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr. Pvt. Secretary,
ITAT, Cuttack