IN THE INCOME TAX APPELLATE TRIBUNAL : COCHIN BENCH: KOCHI.

[BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER AND SHRI GEORGE GEORGE. K., JUDICIAL MEMBER]

आयकर अपील सं./I.T.A. No. 320/Coch/2013.
निर्धारण वर्ष /Assessment year : 2007-2008.

M/s. AC Cargo Management Pvt. Ltd, 1st floor, Chacko Chambers, Civil Lines Road, Palarivattom, Kochi 682 025.	**Vs.**	The Income Tax Officer, Ward 1(1) Kochi

[**PAN AACECA 2206K**]

(अपीलार्थी/Appellant) **(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by	:	Shri. R. Krishnan, C.A.
प्रत्यर्थी की ओर से /Respondent by	:	Shri. A. Dhanaraj, Sr. D.R

सुनवाई की तारीख/Date of Hearing	:	20-03-2017
घोषणा की तारीख /Date of Pronouncement	:	23-03-2017

आदेश / O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER

In this appeal filed by the assessee, it has taken altogether seven grounds of which ground No.1 is general in nature needing no specific adjudication.

2. Vide its grounds 2 to 5, assessee assails disallowance of Rs.45,78,000/- made u/s.40(a)(ia) of the Income Tax Act, 1961 (in short ''the Act'').

3. Facts apropos are that assessee a cargo mover, had filed its return of income for the impugned assessment year declaring Nil income. During the course of assessment proceedings, it was noted by the ld. Assessing Officer that assessee had not deducted TDS on truck leasing charges of Rs.60,96,000/- paid by it. When this was pointed out to the assessee, its reply was that Sec. 194C of the Act was not applicable to it, by virtue of the judgment of Hon'ble Madras High Court in the case of *CIT vs. Poompuhar Shipping Corporation Ltd 282 ITR 3.* Thereupon ld. Assessing Officer put the assessee on notice that such payment fell within the definition of rent given in the Explanation to Section 194 I of the Act. As per ld. Assessing Officer containarized trucks leased by the assessee fell within plant and machinery and hence for charges paid on leasing such trucks, it was obliged to deduct TDS as mandated under section 194 I of the Act. Argument of the assessee on this aspect was as under:-

> *'With reference the above notice we submit that we are not liable to deduct tax at source in respect qt the "Truck lease charges. We hire the Trucks for our business and there is no agreement for carrying out any goods or any work from one place to another. The truck owners do not supply*

their man power or conductors and therefore there is no carrying out any work as contemplated by section 194(c) of the act. It has been held by the Income Tax Appellate Tribunal (Amrithsar bench) reported in 317 ITR (AT) page 196 that the explanation 3 to clause 194(c)namely carriage of goods and passenqers by any mode transport other than railways new provisions of the trucks without any manpower could not be termed as carrying out any work by the truck owners and hence TDS/disallowance under 40(a)(ia) is not applicable to the hire charges .

Without prejudice the above submission we state that the new amendment 10 section 194(i) is not applicable. It may be stated the' rent has been already defined in the section and the inclusion of Plant therein will not take in motor cars or lorries etc. This is because that there is already special provision in section 194(c) explanation 3 to the effect (carriage of goods or passengers by any other mode of transport other than railways).

In this case the Lorries though hired by the company is used only for the purpose of its own business and this would not amount to a contract for carrying out any work as contemplated in section 194(c) of the Act. We again submit that 194(i) will not also apply since it refers only to plant. In the circumstances we request you drop your proposal to invoke the provisions of section 40(a)(ia) and disallow the expenditure of the truck lease payments".

However, ld. Assessing Officer was of the opinion that all types of vehicles were included under category III with the heading ''plant and machinery" appearing in New Appendix I to IT Rules 1962, which gave the depreciation rates. As per ld. Assessing Officer Memorandum of understanding (MOU) between assessee and the lessors were in

the nature of agreement or arrangement for use of the containarized trucks by the assessee. Further, as per ld. Assessing Officer definition of 'rent' was expanded by substituting of the explanation to Sec. 194I of the Act through Taxation Laws (Amendment) Act, 2006, with effect from 13.07.2006. According to him, assessee had failed to deduct TDS on truck charges of Rs.45,18,000/-. Disallowance was made u/s.40(a)(ia) of the Act.

4. Assessee's appeal before ld. Commissioner of Income Tax (Appeals) was not successful.

5. Now before us, ld. Authorised Representative strongly assailing the order of the ld. Commissioner of Income Tax (Appeals) submitted that by virtue of decision of Mumbai Bench in the case of M/s. *Skil Infrastructure Ltd vs. ITO (in ITA Nos.3419 & 3420/Mum/2010 dated 31.10.2011)* Section 194I of the Act could not be applied for hire charges paid for utilization of transport service from transport providers. According to him, ld. Assessing Officer himself had accepted Sec. 194C of the Act was not applicable to the assessee. As per ld. Authorised Representative decision of Mumbai Bench in the case of Skil Infrastructure Ltd (supra) was rendered after considering amendment to Sec.194I of the Act, through Taxation

Laws (Amendment) Act, 2006 w.e.f. 13.07.2006. Contention of the ld. Authorised Representative was that plant and machinery which could be considered under Section 194I of the Act were only those types which were affixed to a factory building or land and not a moving article like truck. Reliance was also placed on the decision of Mumbai Bench in the case of *ACIT vs. Accenture Services P. Ltd (2011) 44 SOT 0290.*

6. Per contra, ld. Departmental Representative submitted that all decisions relied on by the ld. Authorised Representative were on liability to deduct tax u/s. 194C of the Act. As per ld. DR the issue in all such case were whether such deduction was to be done u/sec. 194C or 194 I of the Act. Further, according to ld. DR, by virtue of judgments of Hon'ble Jurisdictional High Court in the case of CIT vs. PVS Memorial Hospital Ltd 380 ITR 284, CBDT vs. Cochin Goods Transport Association 236 ITR 993 and that of Hon'ble Apex Court in the case of Associated Cement Co. Ltd vs. CIT 201 ITR 435, payments made by the assessee to contractors were liable for TDS and the assessee had failed to effect such deductions. According to him, lower authorities were justified in applying Section 40(a)(ia) of the Act.

7. We have considered the rival contentions and perused the orders of the authorities below. It would be apposite to have look at the MOU entered by the assessee for leasing the Containarized trucks. Terms of on such MOU, taken as a representative read as under:-

> ''(1) M/s. A.C. Cargo Management Pvt. Ltd. (hereinafter referred to as the 1st part) having goods. transporting business and (2) A.C. Gadgets & Appliances Pvt. Ltd. (Hereinafter referred to as the 2nd' party) in respect of leasing of Containerized Trucks/Trailers/HCVs owned by second party.
>
> *(1) This MOU signed on the 26the day of March'2004 and will be in force from 1st day of April'2004 to 31st day of March'2005 for a period of One year.*
>
> *(2) The 2nd party will provide Containerized Trucks/ Trailers/HCVs to the 1st party in statutory fitness condition fitted with new tyres including spare. They will provide a list of tools and spares while handing over the Containerized Trucks/Trailers/HCVs along with certificate of Registration, Tax Insurance, National Permit, Road Tax, Pollution Clearance etc. Fuel tanks of the vehicle may be kept empty at the time of providing the vehicles.*
>
> *(3) The 1st party will utilized the Containerized Trucks/Trailers / HCVs supplied by the 2nd party for legitimate business purpose only abiding the prevailing Govt. laws.*
>
> *(4) The 1st party reserves the right to run the Containerized Trucks/Trailers/ HCVs to any destination within the Country as demanded by their business. But they will obtain the required documents I permits at their own cost.*
>
> *(5) The 1st party will meet all operational expenses while the Containerized Trucks/Trailers/HCVs is in their custody. This will include all Repairs and Maintenance, periodic servicing like changing Engine & Gear oils, Greasing as per manufacturer's manual. The 1st party will ensure the safe custody of*

the Containerized Trucks/Trailers/HCVs with frequent check ups at their garages by expert mechanics. .

(6) Renewal of Insurance, National Permits, Road Tax, Pollution Clearance Certificate will be the responsibility of the 1st party with all expenses' borne by them.

(7) The 1st party will deploy experienced drivers with valid Heavy Duty license to run the Containerized Trucks/Trailers/HCVs. They will be educated and instructed to run the Containerized Trucks/ Trailers/HCVs safely and smoothly .

(8) Though the Containerized Trucks/Trailers/HCVs are being managed by expert hands, accident may occur due to various reasons. In such cases all expense incurred for repair of the Containerized Trucks/Trailers/HCVs, towing charges or crane charges incurred if any as well as treatment of the injured if any met by the 1st party.

(9) Claims for such expenses from the Insurance agency will be forwarded to the 2nd party. However the amount received against such claims irrespective of the actual expenses incurred by the borne by the 15t party will be passed over to the latter after deducting the no claim bonus.

(10) The 1st party will pay a remuneration of Rs. 6000/-, Rs.12,OOO/- and Rs. 4000/- per month per Containerized Trucks/Trailers/HCVs respectively. Payment will be released by the 10the day of the subsequent month towards the remuneration for the previous month. .

(11) The 1st party is not allowed to pledge or mortgage the Containerized Trucks/ Trailers /HCVs to anyone for whatsoever may be the purpose.

(12) It is the responsibility of the 2nd party to see that monthly repayments to financial institutions for hypothecated vehicles are paid in time. Any loss incurred to the 1st party due to seizure of Containerized Trucks/ trailers/HCVs for default of such payments will be to the account of the 2nd party.

> *(13) The 1st party will release the Containerized Trucks/ Trailers/HCVs immediately after completion of this MOU in statutory fitness conditions with new tyres including spare. All documents including registrations, insurance, National Permit, Road Tax, Pollution clearance Certificate etc. will be returned to the 2nd party along with the Containerized Trucks/Trailers/HCVs. Fuel tanks will emptied before handing over the Containerized Trucks/ Trailers/HCVs.*
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> *(14) The 1st party solely reserves the right to terminate this MOU in case any business contingency occurs with 1st party giving one month notice in writing. If the MOU is terminated by the 1st party without prior intimation then they shall compensate the second party with one month extra remuneration and return the said Containerized Trucks/ Trailers/HCVs immediately to the 2nd party with all dues paid.*
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> *(15) All disputes subject to Ernakulam Jurisdiction only.*

First question posed to the assessee by ld. Assessing Officer was why taxes were not deducted u/s. 194C of the Act on the lease charges paid by the assessee. Assessee thereupon relied on the judgment of Hon'ble Madras High Court in the case of Poompuhar Shipping Corporation Ltd (supra) and this obviously was accepted by the ld. Assessing Officer. However, he then endeavored to apply Sec. 194I of the Act on such payments.

A reading of the MOU reproduced above would clearly show that charges were for hiring the containerized, trucks dry, without drivers. Assessee was to use it for its business, deploying its own personnel for

meeting its business needs. In the case of Skil Infrastructure Ltd (supra) decided by the Mumbai Bench of this Tribunal the contract was for chartering of helicopter /Air craft, where the crew was provided by the lessor. Since it was a service contract whereby assessee was using the helicopter alongwith crew provided by the lessor, it had deducted tax u/s.194C of the Act at the rate 2%. As against this ld.Assessing Officer had held that assessee ought have deducted 10% u/s.194I of the Act. Argument of the Revenue was that payment of lease charges for chartering helicopters /aircraft fell within the definition of rent under section 194I of the Act. What was held by the Co-ordinate Bench in paragraphs 8 to 10 of its order dated 31.10.2011 is reproduced hereunder:-

> 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 Rs.60,000/- per hour on 18.12.2006 for sector Mumbai-Rajkot-Mithapur-Mumbai at a charter cost of Rs.2,85,000/- The ultimate invoice was for Rs.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 Rs.60,000/- per hour for 4.45 hours and

including landing charges at Mithapur airport. The total bill was for Rs.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 wasconsidered 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 194C 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-III of section 194-C, it, prima facie, clarifies that the expression "work" means carriage of goods and passengers by any mode of transport other than by railways and freight payments have to be deducted under this section and not under section 194I.

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.

In the case before us, what was hired by the assessee was containarized trucks stripped of services. Lessors namely Shri. K.P. Nelson and M/s. AC Gadgets & Appliances Pvt Ltd were only providing the trucks. Arranging drivers, maintaining the trucks were all the responsibility of the assessee and all related expenditure had to be borne by the assessee. Hence, assessee rightly considered itself as not liable to deduct tax under section 194C of the Act. As for application Section 194I co-ordinate Bench of the Tribunal in *Skil Infrastructure Ltd (supra*) has clearly held that application of the said section was confined to the payment of rent on hiring of land or building including factory building, furniture or fitting, and plant and machinery attached to land or building and not on hiring charges of transport vehicle and other mode of transportation. Similar view was taken by Mumbai Bench in the case of Accenture Services P. Ltd (supra) where vehicles were hired for transportation of employees. In both these decisions amendment to Sec. 194I of the Act by Taxation Law (Amendment Act), 2006 w.e.f. 13.07.2006 through which definition of rent was considerably expanded, were considered

8. As for the judgment of Hon'ble Jurisdictional High Court in the case of *PVS Memorial Hospital Ltd (supra*) relied on by the ld. DR what was held by their Lordship was that deduction under wrong provision of law would not save an assessee from the rigours of Sec.

40(a)(ia) of the Act. On the other hand, assessee here was not liable to deduct tax at either under section 194C or under section 194I of the Act. As already mentioned by is, its claim that tax was not deductable u/sec.194C of the Act was accepted by the ld. Assessing Officer. As for the judgment of Hon'ble Jurisdictional High Court in the case of *Cochin Goods Transport Association (supra)* again relied on by the ld. DR what was held by their Lordship was that simple transport contract for carriage of goods without loading and unloading facility, would amount to carrying out ''any work" u/s. 194C (1) of the Act. The judgment does not deal with a situation where there is a dry leasing of trucks for use by the lessee in its business, the way in which it deems fit. Further this, judgment has nothing to do with application of Sec.194I of the Act. As for judgment of Associated Cement Co. Ltd (supra), there also the question was with regard to application of Sec.194C of the Act and interpretation of term 'works contract'. As already mentioned by us, ld. Assessing Officer himself had accepted the contention of the assessee that it was not liable to deduct tax under section 194C of the Act. If revenue felt that Assessing Officer had taken an erroneous view with regard to application of Sec. 194C of the Act, it should have taken recourse to other remedies under the Act, to address such a situation and cannot improve its case now before us. Since assessee was not liable to deduct TDS on payments made on it

for leasing of containarized trucks u/s. 194I of the Act, disallowance u/s. 40(a)(ia) of the Act was not warranted. Such disallowance stands deleted. Grounds No.2 to 5 are allowed.

9. Vide its ground No.6, grievance of the assessee is that remittance of employees contribution to ESI after due date was disallowed u/s. 36(1)(va) r.w.sec 2(24 (x) of the Act.

10. Ld. Counsel for the assessee submitted that assessee had remitted such amounts before due date of filing of return and it was allowable.

11. Per contra, ld. Departmental Representative submitted that by virtue of judgment of Hon'ble Jurisdictional High Court in the case of *CIT vs. South India Corporation 242 ITR 114* employees contribution to ESI/PF remitted after due date could not be allowed u/s. 43B of the Act.

12. We have considered the rival contentions and perused the orders of the authorities below. In our opinion employees contribution which was not remitted within the due date under ESI or PF Act was rightly disallowed by the lower authorities. Judgment of Jurisdictional

High Court is clearly in favour of the Revenue. Ground No.6 of the assessee stands dismissed.

13. Vide its ground No.7, grievance of the assessee is that a sum of Rs.3,00,000/- was disallowed alleging inflation expenditure.

14. Ld. Counsel for the assessee submitted that assessee had produced vouchers for expenditure and the disallowance was made arbitrarily.

15. Per contra, ld. Departmental Representative submitted that assessee could not produce proper vouchers and the disallowance was justified.

16. We have considered the rival contentions and perused the orders of the authorities below. What we find from the order of the ld. Commissioner of Income Tax (Appeals) is that representative of the assessee had agreed for the addition before ld. Assessing Officer during the course of assessment proceedings. This has not been rebutted by the ld. Authorised Representative. It is also not disputed that assessee had relied on self made vouchers for its expenditure. In such circumstance, the disallowance of Rs.3,00,000/- is justified. We do not find any reason to interfere with the orders of the lower

authorities. Ground No. 7 of the assessee stands dismissed.

17. In the result, the appeal of the assessee is partly allowed.

Order pronounced in the open court on 23-03-2017.

Sd/-	Sd/-
(GEORGE GEORGE. K)	**(ABRAHAM P. GEORGE)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य/ACCOUNTANT MEMBER**

Cochin
दिनांक/Dated: 23rd March, 2017
KV
आदेश की प्रतिलिपि अग्रेषित/Copy to:

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant	3. आयकर आयुक्त (अपील)/CIT(A)	5. विभागीय प्रतिनिधि/DR
2. प्रत्यर्थी/Respondent	4. आयकर आयुक्त/CIT	6. गार्ड फाईल/GF

By Order

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(ASSISTANT REGISTRAR
I.T.A.T., Cochin.