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IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'B': NEW DELHI)

BEFORE SHRI U. B. S. BEDI, JUDICIAL MEMBER
And
SHRI T. S. KAPOOR, ACCOUNTANT MEMBER

ITA Nos.4878 & 4879/DEL/ 2012
(Assessment Years :2008-09 & 2009-10)

ACIT (TDS) 2nd Floor, G-Block Shopping Complex, Sector-20 Noida (APPELLANT)	Vs.	Delhi Public School Sector-30 Noida **PAN:MRTD00793** (RESPONDENT)

ASSESSEE BY :Shri Sanjeev Kavatra, CA,
REVENUE BY : Mrs. Y. Kakkar, Sr.DR.

ORDER

PER BENCH:

These are two appeals filed by the Revenue against the order of the Commissioner of Income Tax (Appeals), NOIDA dated 14.06.2012 for the assessment years 2008-09 & 2009-10. Similar grounds of appeals has been taken in both the appeals and main grievance of the Department is that assessee was required to deduct TDS under the provisions of section 194 (I) and CIT(A) has wrongly allowed relief to the assessee. For the sake of convenience the grounds of appeal as appearing in assessment year 2008-09 are reproduced below:-

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"1.1 The CIT (A) has erred on facts and in law in canceling the order dated 14.06.2012 passed by the ACIT (TDS), Noida and in directing that provisions contained in section 194 C is applicable on the payment made by M/s Delhi Public School, Sector-30, Noida for hiring of buses, ignoring the fact of the case that the deductor company is liable to deduct the tax u/s 194-I w.e.f. 01.06.2007.

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

i) Section 194-I (a) (introduced w.e.f. 01.06.2006) is applicable and the Board circular No.558(dated 28.03.1990) is not applicable as it was issued prior to the introduction of section 194-1.

ii) Sub clause (a) of section 194-I clearly mention 'ten percent for the use of any machinery of plant or equipment' and section 43(3) provides inclusion of vehicle under plant. Thus the AO has applied the provisions of section 194-I read with section 43(3) of the Income Tax Act."

2. The brief facts of the cases are that assessee is a school. It had taken on hire vehicles, which were used for carrying students from their homes to school and from school to homes. The assessee has deducted tax u/s 194(c) for making payments to bus owners in view of contracts entered into by it with them. The AO relying upon the provisions of section 194 (i) read along with section 43 (3) of the Income Tax Act, held that plant includes vehicles and, therefore, with effect from 01.06 2007, the hiring of a vehicle will come into provisions 194(I) and, therefore, assessee should have deducted tax u/s 194 (I). The assessee pleaded that the payments made by assessee were on account of specific contracts with the contractors who were awarded the work concerning the transportation of childere. Driver and contractor were

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also appointed by the contractor. It was also submitted that after the school's trips were over the contractors were free to utilize the vehicle for any manner and for any purpose. It was further submitted that in no manner the school was using vehicles other than for or the carrying out transportation of school children. The AO however held that name of the school was written on the buses and buses were in exclusive possession of school and transporter can, in no case play buses other than for school purposes. Thus, it was a clear case of payments which were essentially made for hiring of buses. In view of the above, the AO calculated the difference in the amount of tax as was required to be deducted u/s 194(i) and as per provisions of section 194(c).

3. Aggrieved with the order, the assessee filed appeal before CIT (A) and reiterated its submissions before the CIT (A). Complete provisions of section 194(i) were explained and on the basis of provisions it was argued that assessee was required to deduct the tax u/s 194 (c) which it had deducted correctly and deposited within time. The assessee also relied upon certain case laws, which were in favour of assesee. After going through the submissions made by assessee. The Ld. CIT (A) decided the matter in favour of assessee by holding as under:

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"1. From a careful perusal of copies of Transport Contracts entered into by the assessee with the different transporters/ contractors and placed on record by the appellant it is found that the contract has been awarded to various transporters for transportation of students to/ from school. The contract is on a per trip basis for specified route. The rates per trip are frozen for a period of one year. The vehicle i.e. the school bus remains in possession of the transporter and the staff required to operate the vehicle is also engaged by the transporter. All costs incurred for running and maintenance of buses including the salaries of driver and conductor have to be incurred by the transporter. Once the trips made by these buses for carrying and dropping children from/ to school are complete, the transporter is at liberty to use the vehicle in any manner.

2. Based upon above facts it clearly emerges that the contract between the appellant and the transporter contractor is in the nature of a work contract where under services have been rendered by the trans port contractor it also needs to be emphasized that the appellant itself has not utilized the buses but they were used by the transport contractors for fulfilling the obligations set out in the contract agreement.

3. After carefully considering various clauses of the sample contract agreement it becomes abundantly clear that the arrangement in terms of the aforesaid agreement is of the nature of transport agreement and not one for hiring of vehicles, the agreement being for transportation of students to/ from school.

4. In view of the above I am of the considered view that given the facts of the present case, the provisions of section 1941 of the Income Tax Act are not applicable since the expression plant and machinery used in explanation to section 1941 refers to plant and machinery used by the assesee in its business by hiring them but not hiring of transport services.

5. It is also noteworthy that clause (iv) of the explanation to section 194C of the Act defines "Work to include "carriage of goods and passengers by any mode of transport other than by railways." As per the transport contracts entered into by the

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appellant, the activity of transport contractor will be a simple activity of carriage of passengers by any mode of transport other than by railways. Thus such transport contracts would be covered by section 194C and not sec1941.

6. The argument raised by the appellant that buses are not covered by the definition of the term plant and machinery as used in sec 1941 is also correct. The reliance placed by the AO on the definition of the term plant and machinery in sec 43(3) of the Income Tax Act is misplaced since the said definition is only relevant for the purposes of sec.28 to 41.

7. The issue involved in the instant appeal is also covered by the following decision of ITAT relied upon by the appellant in its written submissions.

a) Lotus Valley Education Society Vs. ACIT (TDS) Noida 46 SOT 77 (Delhi) (URO)
b) Ahmedabad Urban Development Authority vs. Assistant CIT 46 SOT 75 (Ahmedabad) (URO
c) ACIT (TDS) vs Accenture Services Pvt. Ltd. 44 SOT 290 (Mumbai)
d) ITO vs Indian Oil Corporation 15 Taxmann. com 210. Delhi ITAT

Identical issue has been decided by the Delhi ITAT in ITA No.3254 & 3255/ Del/2010 in the case of Lotus Valley Education Society Vs. ACIT (TDS) Noida in favour of the assessee by holding that provisions of sec 1941 could not be applied in the case of transportation contracts for transportation of school children.

In the case of Ahmedabad Urban Development India vs. ACIT TDS Circle Ahmedabad (ITA No. 1637/AHD/2010) similar issue concerning rate of TDS to be deducted on hiring of cars was decided. The contention of the revenue was that provisions of sec 1941 are applicable whereas the assessee argued that it was the contract for hiring of vehicles and therefore TDS was to be deducted u/s 194C @ 2%. The dispute was decided by the ITAT in favour of the assessee.

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In the case of ACIT vs. Accenture Service Pvt. Ltd. (ITA No. 5920,5921 & 5922/ Mumbai/2009) the dispute involved pertained to applicability or otherwise of the provisions of sec 1941 on hiring of vehicles for transportation of its employees. The contention of the Revenue was that when all the vehicles provided to the assessee were contracted vehicles and remained with the assessee during the duty and were at the disposal of the assessee then it is not a simple case of hiring of vehicles for transportation but the vehicles were taken on lease by the assessee at assessee's disposal for all time and not for any particular services or for a particular destination. After considering the rival contentions it was held by the ITAT that the payment made by the assessee for hiring vehicles for transportation of its employees qualifies for TDS u/s 194C while adjudicating the issue ITAT also observed as under:-

The transport services provider had to provide the vehicle along with requisite staff and relevant facilities, full maintenance and repair 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 difference locations to the places of its clients. Though, as per the agreement vehicles provided for the requirements of the assessee were dedicated but it was not the case of hiring of vehicles only without other facilities. Thus, it was a kind of wel lease wherein the assessee was utilizing the transport services provided by the service provider without making any arrangements of its own but all the arrangements were the responsibility and obligation of services provider.

Classification of vehicles as plant and machinery under I. T Rules for the purpose of depreciation u/s 32 does not per se change the nature of services provided by the service provider who is running the vehicle on hire.

The expression plant and machinery used in explanation of sec 1941 refers to only plant and machinery used by the assessee in

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its business by hiring them but not the hiring of transport service.

In addition to the above citations, the Delhi ITAT in the case of ITO vs. Indian Oil Corporation 15 Taxmann. Com 210 has also taken the same view in as much as that arrangement for transportation of petroleum products was essentially a contract for transportation of goods and not an arrangement of hiring of vehicles, tax was required to be deducted at source from payment to carrier in terms of provisions of sec.194C and not under 1941.

In the light of the above and relying on the decisions of case laws cited by the appellant and discussed above, I reject the AO's action in invoking provisions of sec 194-1 and hold that in the appellant's case, in respect of the payments made to the transport operators/ constructors, the provisions of section 194C are applicable. Accordingly, the grounds taken by the appellant on this score succeed."

4. Aggrieved, the Revenue is in appeal before us. At the outset, the Ld. DR submitted that case of the Revenue is against them and it is covered by various decision of ITAT which were dealt by CIT (A) in his order. Hoever, he relied upon the order of AO. The Ld. AR supported the order of CIT(A).

5. We have heard the rival parties and have gone through the material placed on record. We observe that issue is squarely covered against the Revenue in various cases decided by Hon'ble ITAT. The facts and circumstance of the present cases are similar to the facts and circumstances of the case law in the case of Lotus Valley Education Society Vs. ACIT (TDS), which was decided by Delhi Bench in ITA No.3254 & 3255 /Del/

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2010. It contents at page 37 of the said order vide para 6 deals the issue as under:

> "We have carefully considered the rival submission in the light of material placed before us. A careful consideration of the assessment order would reveal that AO while holding that assessee is liable for deduction of tax at source under the provisions of sec. 1941 of the Act has mainly rested his case on the ground that is the "rent" as defined in explanation u/s 1941 and the assessee has paid rent in respect of buses utilized by him being in the nature of plant. In our opinion, simply for the reason that "rent" being explained under explanation given u/s 1941 in respect of a plant will not make the relevant payments liable for deduction u/s 1941. The sum and substance of the transaction has to be seen and it has to be decided that under which section the case of the assessee would fall. If one goes by the logic adopted by the AO, then the same will also be equally applicable in respect of Sec. 194 C where also under explanation-III to sub sec (2) of sec. 194C, the "work" has been defined or explained which according to clause(c) thereto includes "carriage of goods and passengers by any mode of transporter other than by railways." According to the transport contract entered into by the assessee, the activity of the transport contractor will be a simple activity of carriage of passengers by any mode of transport other than by railways. The object of the assessee to enter into such agreement was a simple activity of carrying its students and staff from their homes to the school and similarly from school to their homes. The assessee has no responsibility whatsoever regarding the buses to be utilized for that purpose which was the sole responsibility of the transport contractor. The transport contractor only was liable to keep and maintain the required number of buses for such activity at their own expenses with the specified standards. Therefore, the said contract is purely in the nature of services rendered by the transport contractor to the assessee. The assessee was not having any responsibility whatsoever regarding the transport vehicles used in such activity. As against that, "rent" which is defined in explanation to sec.194 inter-alia is for the use of "plant" which according to

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the AO includes buses. Hence, according to the facts of the present case, assessee itself has not utilized the buses being plants but they were used by the transport contractor for fulfilling the obligations set out in the contract agreement. Therefore, the provisions of Sec. 194 I could not be applied to the facts of the present case and it has to be held that assessee has rightly deducted tax at source under the provisions of sec. 194C of the Act. Ground Nos. 2 and 3 raised in both the appeals are allowed."

6. The facts and circumstances of the present cases being similar therefore, following the above, we do not see any infirmity in the order of CIT (A). Hence the appeals filed by Revenue are dismissed.

Order pronounced in Open Court on 24th /05/ 2013

Sd/-	Sd/-
(U. B. S. Bedi)	(T.S. Kapoor)
Judicial Member	Accountant Member

Dated the 24th day of May, 2013
S.Sinha

Copy forwarded to
1. APPELLANT
2. RESPONDENT
3. CIT
4. CIT (A)
5. CIT(ITAT), New Delhi.

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