

Bombay High Court The East India Hotels Ltd. vs Central Board Of Director Taxes on 6 March, 2009 Bench: Ranjana Desai, J.P. Devadhar IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2104 OF 1994

1. The East India Hotels Ltd.)
a company limited by shares)
incorporated under the)
Companies Act, 1913, having)

registered office at No.4,)
Mangoe lane, Calcutta 700 001,)
West Bengal.)

2. Jaswant Singh Bhatia, a)

Shareholder and Director,)
Administration of petitioner)
No.1, residing at 66, Amrita,)

Little Gibba Road, Malabar
Hill, Mumbai - 400 006.

)
)..Petitioners.

V/s.

1. Central Board of Director Taxes)
North Block, New Delhi 110 001.)
)
2. Union of India)..Respondents.

Mr.P.J.Pardiwala, senior Advocate i/b. Mulla & Mulla
C. B. & C. for the petitioners.

Mr.Suresh Kumar, Advocate for the respondents.

CORAM : SMT. RANJANA DESAI AND J.P.DEVADHAR, JJ.

JUDGMENT RESERVED ON : 20TH FEBRUARY, 2009.

JUDGMENT PRONOUNCED ON : 6TH MARCH, 2009.

JUDGMENT (PER J.P.DEVADHAR, J.)

1. Validity of the CBDT circular No.681 dated 8th March, 1994 is challenged in this Writ Petition. -= : 2 : -=

The said circular provides that all service contracts are covered under section 194C of the Income Tax Act, 1961 ('Act' for short). As a result whereof, every customer of the petitioner No.1 hotel, while making payment to the hotel for occupying its room and availing other facilities / amenities provided by the hotel is required to deduct income tax at the rate specified in section 194C of the Act.

2. The petitioner No.1 company operates a number of Five Star Deluxe Hotels all over India. The company as a chain of hoteliers offers various

facilities / amenities to its guests all of which are essential for carrying on the hotel business. The services rendered by the petitioners apart from boarding and lodging are, providing highly trained / experienced multi-lingual staff, 24-hour service for reception, information and telephones, house-keeping of the highest standard, select restaurants, bank counter, beauty saloon, barber shop, car rental, shopping centre, laundry / valet, health club, business centre services etc. The question is whether these services would constitute 'carrying out any work' under section 194C of the Act ?

3. Section 194C which deals with the liability

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of a person to deduct income tax while making payments to contractors and sub contractors for the work done, was inserted into the Act with effect from 1/4/1972.

Relevant portion of section 194C as originally inserted reads thus:- "194C. Payments to contractors and sub- contractors - (1) Any person responsible for paying any sum to any resident {hereafter in this section referred to as the contractor} for carrying out any work {including supply of labour for carrying out any work} in pursuance of a contract between the contractor and- (a) the

Central Government or any State Government; or

(b) any local authority; or

(c) any corporation established by or under a

Central, State or Provincial Act; or (d) any company; or (e) any co-operative society, shall at the time of credit of such sum to the account of the contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to two per cent. of such sum as income-tax on income comprised therein. " 4. Section 194C as inserted did not define the word 'work'. However, a circular No.86 dated 29th May, 1972 was issued by the Deputy Secretary to the Government of India, inter alia stating therein that section 194C would apply only in relation to "work -- : 4 : -- contracts" and "labour contracts" and that Section 194C would not apply to contracts for sale of goods. By way of illustration, it was stated that

contracts for the construction of the buildings or dams or laying of roads and air fields or railway lines or erection / installation of plant and machinery would be in the nature of contract for work and labour covered under Section 194C but, contract for sale of sea or river crafts would be a contract for sale and as such would fall outside the purview of section 194C of the Act. It was further stated in the said circular that

contracts for rendering professional services by lawyers, physicians, surgeons, engineers, accountants, architects, consultants, etc. would not be regarded as contracts for "carrying out any work" under section 194C of the Act.

5. Another circular bearing No.93 dated 26th

September, 1972 was issued by the Deputy Secretary to the Government of India clarifying that service contracts which do not involve the carrying out of any

work would be outside the scope of section 194C of the Act.

6. Thus, since inception there was no dispute

that all service contracts are outside the purview of

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section 194C of the Act. Accordingly, no tax was required to be deducted by a person making payment to

the hotel for availing the facilities / amenities

provided by the hotel.

7. However, by relying upon a decision of the

Apex Court in the case of Associated Cement Co. Ltd.
V/s. Commissioner of Income Tax & Anr. reported in

201 I.T.R. 435 (S.C.),
(S.C.) the CBDT issued the impugned

circular No.681 on 8/3/1994 stating therein that
section 194C

would apply to all types of contracts
including transport contracts, service contracts,
advertisement contracts, broadcasting contracts,
telecasting contracts, labour contracts, material
contracts and work contracts.

8. Challenging the aforesaid circular No.681
dated 8/3/1994 various writ petitions were filed. This

Court in the case of Chamber of Income-Tax Consultants
& Ors. V/s. Central Board of Director Taxes & Ors.
reported in 209 I.T.R. 660 (Bom.) held that the

circular No.681 is illegal to the extent it holds that
the tax is to be deducted from the amounts payable to
lawyers, chartered accountants, etc. towards their
professional fees.

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9. Similarly, in the case of Bombay Goods
Transport Association & Anr. V/s. Central Board of

Direct Taxes & Ors. reported in 210 I.T.R. 136 (Bom),
(Bom)

this Court held that the circular No.681 is illegal in

so far as it applies to the transport contracts. 10. Further, in the case of Advertising Agency Association of India & Anr. V/s. Central Board of Director Taxes & Ors. reported in 210 I.T.R. 152 (Bom.), (Bom.) this Court held that the circular No.681 is illegal in so far as it applies to advertising agencies. 11. In the light of the aforesaid decisions, the Parliament deemed it fit to insert section 194J into the Act by Finance Act, 1995 with effect from 1/7/1995 so as to bring the fees for professional or technical services within the purview of deduction of tax at source. Similarly, the Parliament deemed it fit to insert Explanation III to section 194C by Finance Act, 1995 with effect from 1/7/1995. Explanation III to section 194C reads thus :- " Explanation III- For the purposes of this section, the expression "work" shall also include- (a) advertising ;

(b) broadcasting and telecasting including
production of programmes for such

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broadcasting or telecasting;

(c) carriage of goods and passengers by any mode
of transport other than by railways; (d) catering. "

12. Thus, by inserting Explanation III to
Section 194C of the Act with effect from 1-7-1995, the

provisions relating to deduction of tax at source have
been enlarged by bringing in some of the service

contracts within the purview of section 194C. In other
words, by inserting Explanation III the word 'work' in
section 194C

has been expanded so as to include four
types of service contracts within the purview of
section 194C.

13. Admittedly, the services made available by
the petitioners to its customers is not covered under

any of the categories specified in Explanation III to section 194C.

14. The question, therefore, to be considered is, whether the services rendered by a hotel to its customers in providing hotel room with various facilities / amenities constitutes 'carrying out any

work' within the meaning of section 194C of the Act ? 15. As rightly contended by Mr.Pardiwala, - = : 8 : =- learned senior Advocate appearing on behalf of the petitioners, the above issue is no longer res integra. The Apex Court in the case of Birla Cements Works V/s. Central Board of Direct Taxes & Ors. reported in 248 I.T.R. 216 (S.C.) has considered the scope and ambit of section 194C of the Act, validity of circular No.681 and also true import of the decision of the Apex Court in the case of Associated Cements Co. Ltd. (supra) and held thus:- " The key words in section 194C are "carrying out any work". Learned counsel for the appellant contended that a word of collection of words should fit into the structure of the sentence in which the word is used or collection of words formed. The contention is that in the context of section 194C, carrying out any work indicates doing something to conduct the work to completion or something which produces such result. The mere transportation of goods by a carrier does not affect the goods carried thereby. The submission is that by carrying the goods, no work to the goods is undertaken and the context in which the expression "carrying out any work" has been used, makes it evident that it does not include in it the transportation of goods by a carrier. In Bombay Goods Transport Association v. CBDT (1994) 210 ITR 136, the Bombay High Court quashing the impugned circular has held that the expression "carrying out any work" would not include the carrying of goods. In Calcutta Goods Transport Association v. Union of India [1996] 219 ITR 486 (Cal), a similar view has been expressed by the Calcutta High Court. It has also been pointed out in this decision that Parliament had sought to bring professional services and other

works within the net of tax deduction at source. If such “works” were already covered by section 194 C, it was wholly unnecessary for Parliament to introduce separate statutory provisions in this regard and, thus, it follows — : 9 : — that the word “work” is to be understood in the limited sense as a product or result. The carrying out of work indicates doing something to conduct the work to completion or an operation which produces such result. In V.M. Salgaocar and Bros. Ltd. v. ITO (1999) 237 ITR 630, the Karnataka High Court has concurred with the view expressed by the Bombay and Calcutta High Courts. The High Courts of Gujarat, Madras, Orissa and Delhi have also expressed similar views. On the other hand, as already noticed, the Rajasthan High Court in the judgment under appeal has expressed the contrary view relying upon the decision in Associated Cement Co. Ltd.’s case [1993] 201 ITR 435 (SC). Two interpretations are reasonably possible on the question whether the contractor for carrying of goods would come or not within the ambit of the expression “carrying out any work”. One of the two possible interpretations of a taxing statute, which favours the assessee and which has been acted upon and accepted by the Revenue for a long period should not be disturbed except for compelling reasons. There can be no doubt that if the only view of section 194C had been the one reflected in the impugned circular, then the issue of earlier circulars and acceptance and acting thereupon by the Revenue reflecting the contrary view would have been of no consequence. That, however, is not the position. Further, there are no compelling reasons to hold that Explanation III inserted in section 194C with effect from July 1, 1995, is clarificatory or retrospective in operation. We hold that section 194C before insertion of Explanation III is not applicable to transport contracts, i.e. contracts for carriage of goods. For the aforesaid reasons the appeal is allowed, the impugned circular to the extent it relates to transport contracts is quashed. The parties are left to bear their own costs. " 16. Thus, from the above decision of the Apex Court, it is clear that the word ‘carrying out any work’ in section 194C is limited to any work which on — : 10 : — being carried out culminates into a product or result. In other words, the word ‘work’ in section 194C is limited to doing something with a view to achieving the task undertaken or carry out an operation which produces some result. 17. As illustrated in the circular No.86, section 194C would apply to payments for carrying out the work such as constructing buildings or dams or laying of roads and air fields or railway lines or erection or installation of plant and machinery, etc. In all these contracts, the execution of the contract by a contractor / subcontractor results into production of the desired object or accomplishing the task under the contract. 18. The services rendered by a hotel to its customers by making available certain facilities / amenities like providing multilingual staff, 24 hour service for reception, telephones, select restaurants, bank counter, beauty saloon, barber shop, car rental, shopping centre, laundry / valet, health club, business centre services, etc. do not involve carrying out any work which results into production of the desired object and, therefore, would be outside the purview of section 194C of the Act. — : 11 : —

19. The fact that the contracts for supply

of

labour to carry out any work has been specifically

brought within the purview of section 194C and the fact that four categories of service contracts have been specifically brought within the purview of section 194C by inserting Explanation III to section 194C, it cannot be inferred that the services rendered by a hotel to its customers are also covered under section 194C of the Act. In other words, as the services rendered by a hotel to its customers by providing certain facilities / amenities do not constitute 'work' within the meaning of section 194C, the impugned circular No.681 issued by the CBDT to the extent it applies to a customer availing the services rendered by the hotel must be held to be contrary to section 194C of the Act. 20. It is true that the word 'work' in section 194C is not restricted to 'works contract' only as held by the Apex Court in the case of Associated Cement Co. Ltd. (supra). However, as held by the Apex Court in the case of Birla Cement Works (supra) the word 'work' in section 194C has to be understood in a limited sense and would extend only to the service contracts specifically included in the said section by way of Explanation III. Therefore, the argument of the - = : 12 : =- revenue that the service contracts between the petitioner No.1 hotel and its customers is covered under section 194C of the Act cannot be accepted because, neither such a contract constitutes 'work' within the meaning of section 194C of the Act nor those contracts are covered under service contracts specifically included by way of Explanation III to section 194C of the Act. 21. If the contention of the revenue that the word 'any work' in section 194C is very wide enough to include all types of work is accepted, then it would mean that even the hair cutting work done by a barber would be a 'work' covered under section 194C and the person making payment to the barber would be covered under section 194C. Such a wider interpretation is uncalled for, especially when the revenue itself had considered since inception that section 194C is restricted to the works done by contractors / sub-contractors. Apart from the above, the CBDT by its circular No.715 dated 8/8/1995 has clarified that the payments made by persons other than individuals and HUF's for hotel accommodation taken on regular basis will be in the nature of 'rent' subject to TDS under section 194I of the Act. Thus, there is inconsistency in the stand of the CBDT as to whether the services - = : 13 : =- rendered by a hotel to its customers is covered under section 194C or under section 194I of the Act. 22. In the present case, we are concerned with the question as to whether the services rendered by the petitioner hotel to its customers is covered under section 194C of the Act ? 23. As noticed above, the facilities / amenities made available by the petitioner No.1 hotel to its customers do not constitute 'work' within the meaning of section 194C of the Act. Consequently, the circular No.681 dated 8/3/1994 to the extent it holds that the services made available by a hotel to

its customers are covered under section 194C of the Act must be held to be bad in law. 24. For all the aforesaid reasons, the petition is allowed by quashing the circular No.681 dated 8/3/1994 to the extent it holds that section 194C of the Income Tax Act applies to payments by the customers to the petitioner No.1 hotel for availing the facilities / amenities made available by the petitioners. 25. The rule is made absolute in the above terms - = : 14 : =- with no order as to costs. (SMT. RANJANA DESAI, J.) (J.P.DEVADHAR, J.)