

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE N. NAGARESH

FRIDAY, THE 05TH DAY OF JULY 2019 / 14TH ASHADHA, 1941

WP(C).No.32433 of 2018

PETITIONER:

T.P. ASSOCIATES
CHULLIYOD ROAD, GANDHI JUNCTION,
SULTHAN BATHERY 673 592,
REPRESENTED BY ITS MANAGING PARTNER C.ASHRAF,
AGED 52 YEARS, S/O C MUHAMMED, CHINGLI HOUSE,
KALLUVAYAL, SULTHAN BATHERY 673 592

BY ADVS.
SRI.A.JAYASANKAR
SRI.ASHWIN SETHUMADHAVAN
SRI.MANU GOVIND
SRI.S.SABARINADH

RESPONDENTS:

- 1 THE KERALA HEAD LOAD WORKERS WELFARE FUND BOARD
REPRESENTED BY CHIEF EXECUTIVE OFFICER,
SRM ROAD, ERNAKULAM, KOCHI-682018.
- 2 THE KERALA HEAD LOAD WORKERS WELFARE FUND BOARD,
WAYANAD DISTRICT COMMITTEE,
REPRESENTED BY ITS CHAIRMAN,
SULTHAN BATHERY SUB OFFICE, AK TOWER,
ASSUMPTION JUNCTION, SULTHAN BATHERY-673592.
- 3 INCOME TAX OFFICER (TDS)
CALICUT, WARD TDS, AAYAKAR BHAVAN, 3RD FLOOR,
NORTH BLOCK, CALICUT-673001.

BY ADVS.
SRI.CHRISTOPHER ABRAHAM, INCOME TAX DEPARTMENT
SRI.THOMAS ABRAHAM, SC, KHWWB
SRI.K.M.V.PANDALAI, INCOME TAX DEPARTMENT
GOVT. PLEADER SRI. RENIL ANTO KANDAMKULATHY

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
05.07.2019, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

[CR]

J U D G M E N T

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The petitioner, who is the Managing Partner of a partnership firm carrying on the business in wholesale and retail of sanitary tiles and hardware materials, raises a grievance that he is put to 'double jeopardy' by the Income Tax authorities and the Kerala Head Load Workers Welfare Fund Board, in the matter of Tax Deduction at Source.

2. It is stated that the petitioner firm has no registered head load workers. Head load work is done by pool workers of the 2nd respondent - Kerala Head Load Workers Welfare Fund Board ('the Board', for short). Payment towards wages are made to the Board regularly. The petitioner has deducted income tax by way of TDS under Section 194C of the Income Tax Act, 1961. Remittances were made to the Board after making such

deductions.

3. The 2nd respondent - Board made objection to such deductions and classified the petitioner as defaulter for short payment made to it. The petitioner was threatened that unless the said amount is paid to the Board forthwith, further services would stand terminated. Subsequently, the Board issued Ext.P3 demand for ₹5,41,117.70 towards unpaid wages. The petitioner states that this amount is the amount covered by Ext.P1 as TDS. A further demand was made by the Board as per Ext.P3 for ₹1,35,279/-. The 2nd respondent has issued Ext.P4 statement dated 28.05.2018 which is the break up of the amounts covered by Ext.P3. On the threat of termination of service by the 2nd respondent - Board, the petitioner has remitted the amounts demanded. The petitioner was also made to pay damages to the Board for the alleged short payment.

4. The petitioner submits that this Court in ***Aspinwall and Company v. The Commissioner of Income Tax*** (W.P.(C) No.5227/2010) has held that

deduction under 194C shall be made and payment shall be made to the Income Tax authorities as deduction of tax at source. In the said judgment, the Board was given liberty to move for exemption from payment of tax, contends the petitioner. The Board has issued Ext.P6 letter stating that its Chartered Accountant has opined that no TDS is liable to be deducted under Section 194C for the payments towards wages and levy made to the Board.

5. The grievance of the petitioner is that on the one hand he is made to deduct TDS and remit it to the Department of Income Tax and on the other hand, the Board is recovering the same amount from the petitioner as short payment and imposing damages also. The petitioner further submits that the Central Board of Direct Taxes has issued Ext.P10 Notification No.63/2016 dated 26.07.2016 invoking Section 10(46) of the Income Tax Act, 1961 and notified the Board in respect of specified income arising to the Board by way of levy collected under the Kerala Head Load Workers Act, 1978 as also sums received as wages

from the employers as per paragraphs 24A and 24B of the Kerala Head Load Workers (Regulation of Employment and welfare) Scheme, 1983 ('the Scheme', for short). The petitioner therefore prays to declare that it is not liable to deduct taxes under Section 194C of the Income Tax Act on amounts payable to the Board. The petitioner has also sought to declare that the Board is liable to refund the amounts paid by the petitioner as per Exts.P3, P4 and P6 to P8.

6. Respondents 1 and 2 - Board authorities have filed a statement opposing the writ petition. The Board stated that the petitioner is not liable to deduct taxes under Section 194C on amounts payable to them. The Board is one statutorily constituted to implement the provisions of the Kerala Head Load Workers Act, 1978. The Central Board of Direct Taxes ('the CBDT', for short) has taken a stand that though the Board has an exemption under Section 10(46) of the Income Tax Act, the same is only a conditional exemption. When Ext.P10 exemption notification

specifically includes income received as levy and sums received as wages, the Income Tax authorities cannot demand deduction of tax at source from persons who are paying the said amounts to the Board. In view of the illegal stand of the Department of Income Tax, the Board has submitted Annexure-R1(a) representation to the CBDT seeking to examine the matter. The Board is awaiting a response to Annexure-R1(a).

7. The 3rd respondent - Income Tax Officer (TDS) filed a counter affidavit. According to the 3rd respondent, the exemption given to the Board is a conditional one and the Board is liable to file returns of income. Ext.P10 notification issued under Section 10(46) does not exempt the Board from the liability of TDS from its receipts. The CBDT has issued a Circular No.18/2017 listing the entities who are exempted from TDS and the Board is not one among those entities. For being exempted from TDS, an entity should be unconditionally exempted from income tax liability. The exemption granted to the Board is not unconditional. The

Board has filed returns of income and claimed refunds amounting to ₹2.84 Crores, ₹3.20 Crores and ₹2.70 Crores for the Assessment Years 2015-16 to 2017-18. Therefore, there is no justification on the part of the Board for not accepting the TDS made by the petitioner. The writ petition is therefore liable to be dismissed, contended the 3rd respondent.

8. Heard learned counsel for the petitioner and for the respondents. The question to be decided is whether the petitioner is liable to deduct TDS under Section 194C of the Income Tax Act, 1961 and whether the Board is justified in insisting that their dues have to be paid without deduction of TDS.

9. Section 194C of the Income Tax Act, 1961 reads as follows:-

“ (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 specified person 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--

(i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;

(ii) two per cent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,

of such sum as income-tax on income comprised therein.”

Liability to deduct TDS therefore arises only if the payment is made by the petitioner in pursuance of a contract between the Board and the petitioner. Admittedly, there is no oral or written contract between the Board and the petitioner to avail services of the head load workers. The status of the

Board has to be considered to see whether Board can be termed as a Contractor.

10. The Board has been constituted by the Government statutorily under Section 14 of the Kerala Head Load Workers Act, 1978 ('the Act, 1978', for short). The Act, 1978 has been enacted to regulate the employment of head load workers in the State of Kerala. In exercise of the powers conferred under Section 13 of the Act, 1978, the Government has made the Kerala Head Load Workers (Regulation of Employment and Welfare) Scheme, 1983. Under the Scheme, no head load worker, who is not a registered head load worker, shall be allowed or required to work in any area to which the Scheme applies. The petitioner has no registered head load workers on its rolls. Therefore, the petitioner has no option than to avail the services of the Board who regulates its own pool of head load workers. Under Clause 10 of the Scheme, every head load worker shall be deemed to be employed by the Committee constituted by the Board. The said Committee is

responsible for the welfare of the head load workers. As per Clause 19, the Committee shall determine the number of head load workers needed for their area and may increase or decrease the number of registered head load workers. The wage amounts payable to the workers are paid only through the Committee. The disciplinary powers over the workers are vested with the Chairman of the Committee. Thus, the petitioner has no control whatsoever over the workers who do the loading and unloading work.

11. The Board and the Committees constituted under it being creature of statutes created for the welfare of head load workers and not being commercial entities, cannot be treated as a contractor for the purpose of Section 194C of the Income Tax Act. When there is no contract between the petitioner and the Board for availing the services of the head load workers and since the petitioner is availing the service of the Board on statutory compulsions, it cannot be said that the services are rendered under any contract. Therefore, Section 194C of the Income Tax Act cannot be applied to

the petitioner in the matter of payments made by the petitioner to the Board. Going through the judgment of this Court in ***Aspinwall and Company v. The Commissioner of Income Tax*** (W.P.(C) No.5227/2010), I find that this Court in the said judgment has not specifically decided whether Section 194C would apply to the payments made to the Board.

12. Assuming that there is a statutory contract between the petitioner and the Board in their transactions, even then the Board is not a commercial entity making profits out of rendering head load workers service and the payments made by the petitioner to the Board were intended to be paid to the head load workers. The said payments cannot be said to be contractual payments. The payments are in the nature of payment of salary/wages. For that reason also, Section 194C cannot be pressed into service.

13. Further more, it has to be noted that the Board has been notified under Section 10(46) of the Income Tax

Act as per Ext.P10. Ext.P10 shows that levy collected by the Board and sums received as wages from employers as per the Scheme, 1983 are exempted from computing the total income of the Board. In the light of the Apex Court decision in ***Associated Cement Company Ltd. v. The Commissioner of Income Tax [(1993) 201 ITR 435]***, the CBDT has issued guidelines under Circular No.681 dated 08.03.1994. Clause (xii) of the Circular states that where any contractor is the recipient of any amount under a contract, but the income of the recipient is not subject to income tax, the said contractor may obtain a certificate from his Assessing Officer under Section 194C(4) for receiving payment without deduction of tax at source. Therefore, even assuming that the Board is a contractor, it can very well obtain a certificate from the Department of Income Tax to exclude its receipts from the petitioner from payment without deduction of tax at source. If the Board has not obtained such certificate, the petitioner need not be burdened with the TDS, especially when the Board has

informed the petitioner that it should not to deduct any TDS from the payments made to the Board.

14. Yet another relevant factor is that the petitioner has deducted TDS from the payments made to the Board and remitted the same to the income tax authorities. The income tax authorities have stated in their counter affidavit that the Board has been enjoying the benefit of refunds for the last few years. It is, therefore, very likely that the Board has received the credit for TDS paid by the petitioner. It is beyond comprehension that when the amount paid by the petitioner to the Board is exempted from tax, the Board is in receipt of TDS credits for the remittances made by the petitioner to the Income Tax Department. It is astonishing that while the facts being so, the Board has realised the same amount from the petitioner also.

In the facts of the case, reliefs need to be granted to the petitioner in this writ petition. Such reliefs are required to be granted in the facts of the case and in the interest of justice, even though the petitioner has not sought

relief of refund as against the 3rd respondent. Accordingly, it is declared that the petitioner is not liable to deduct TDS under Section 194C of the Income Tax Act for amounts payable to respondents 1 and 2. Consequently, if the petitioner makes appropriate application before the 3rd respondent for refund of TDS remitted by it in respect of payments made to respondents 1 and 2, the 3rd respondent shall consider the application treating that Section 194C did not apply to the transactions and refund the amount within a period of two months from the date of receipt of such application from the petitioner. Needless to say, the 3rd respondent will be at liberty to recover the TDS amount from respondents 1 and 2 if credit is given to them in respect of the TDS remitted by the petitioner.

The writ petition is disposed of with the above directions.

Sd/-
N. NAGARESH, JUDGE

aks/06.07.2019

EXHIBIT P8 COPY OF ORDER DATED 12.9.2012 OF INCOME TAX APPELLATE TRIBUNAL, PUNE IN ITS 1062 AND 1064 OF 2010.

EXHIBIT P9 COPY OF COMMUNICATION NO.TDS/CLT/KERALA HEAD LOAD WELFARE BOARD/194C/2018-19/K-84 DATED 23.7.2018 BY THE 3RD RESPONDENT.

EXHIBIT P10 COPY OF NOTIFICATION NO.63/2016 DATED 26.7.2016 BY MINISTRY OF FINANCE.

EXHIBIT P11 COPY OF THE COMMUNICATION DATED 9.8.2018 ISSUED BY THE PETITIONER TO THE 2ND RESPONDENT.

RESPONDENT'S EXHIBIT:

R3(A) TRUE COPY OF CIRCULAR NO.18/2017 OF THE CBDT.

R1(A) TRUE COPY OF THE REPRESENTATION SUBMITTED BY THE BOARD BEFORE CBDT.