आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री कुल भारत, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI KUL BHARAT, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 483/JP/2015
निर्धारण वर्ष/Assessment Year : 2010-11.

M/s R.F. Properties Pvt. Ltd., (Now known as World Trade Park Ltd), Jaipur.	बनाम Vs.	The ACIT (TDS), Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN No. JPRR 04161 D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 565/JP/2015
निर्धारण वर्ष/Assessment Year : 2010-11.

The ACIT (TDS), Jaipur.	बनाम Vs.	M/s R.F. Properties Pvt. Ltd., (Now known as World Trade Park Ltd), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN No. JPRR 04161 D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

आयकर अपील सं./ITA No. 445/JP/2015
निर्धारण वर्ष/Assessment Year : 2013-14.

The ACIT (TDS), Jaipur.	बनाम Vs.	M/s R.F. Properties Pvt. Ltd., (Now known as World Trade Park Ltd), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN No. JPRR 04161 D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Shri Rajive Sahai & Shri Ashish Sharma (Advocates)
राजस्व की ओर से/ Revenue by: Smt. Roshanta Meena (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 07.06.2017.
घोषणा की तारीख/ Date of Pronouncement : 29/ 06/2017.

आदेश/ ORDER

PER SHRI KUL BHARAT, JM.

These three appeals one by the Assessee and two by the Revenue pertaining to the different AY i.e. 2010-11 and 2013-14 are directed against the different order of the Ld. CIT(A)-3, Jaipur, dated 23.03.2015 and 27.02.2015 respectively.

2. At the time of hearing, the respective Representatives of the parties submitted that the common issues are involved in these appeals, related to liability of tax-deduction at source. Therefore, it was submitted that the Revenue's appeal in ITA No. 445/JP/2015 pertaining to the **Assessment Year 2013-14** may be taken up first.

ITA No. 445/JP/2015.

3. First we take up the Revenue's appeal **in ITA NO. 445/JP/2015** pertaining to the AY 2013-14.

The Revenue has raised the following grounds of appeal:-

"1. The Ld. CIT(A) has erred on facts in stating in para 6.1 of his order that 'That AO has noted that TDS was not deducted under various heads and accordingly demand u/s 201(1) and 201(1A) was raised as under…..; though in the order u/s 201(1) passed by AO, no such findings were made and in the demand was raised on the ground that the assessee has not deposited the tax deducted by it, a reflected not only in his books of accounts but also affirmed in statements of the managing director of the company during survey and also in the audited balance sheet and thus the findings of Ld. CIT(A) are based on incorrect facts.

2. The Ld. CIT(A) has erred in facts and in law in applying the ration of Hon'ble Supreme Court's decision of M/s Hindustan Coca Cola, which is applicable only in the cases involving non deduction of TDS whereas in this case the TDS was already deducted by the assessee was not deposited in the government's account. Thus the assessee cannot be

allowed to take relief under provision to s. 201(1) of the Income tax Act.

3. The Ld. CIT(A) has also erred in facts and in law relying upon the certificate of accountant under proviso to sub section (1) of section 201(1) of the Income Tax Act, though this provision also applied to the cases involving non deduction of TDS only and not on cases involving TDS deducted but not deposited by the assessee."

4. Briefly stated the facts are that the survey action was carried on the office premises on 31/10/2013 during the survey proceedings. A TDS verification was carried out and it was found, that the assessee had been deducting TDS but did not deposit in the Government Account for several years. A detailed show cause notice pertaining to the Financial Year 2010-11, 2011-12, and 2012-13 was issued and after considering the submissions, the AO declared the assessee in default for not depositing the tax deducted into the Government Account. Therefore, in respect of the Financial Year 2012-13 a demand of Rs. 2,25,82,380/- was raised on account of non-deduction of tax and interest thereon of Rs. 6060841/-.

5. Against this, the assessee preferred an appeal before Ld. CIT(A), who after considering the submissions partly allowed the appeal and deleted Rs. 1,98,06,433/- and confirmed the demand of Rs. 27,75,947/. However, in respect of the interest u/s 201(1A) of the Act he directed the AO to charge interest from the date of deductibility of TDS till the date of payment of tax by the deductee. Ld. D/R vehemently argued that Ld. CIT(A) was not justified in deleting the demand. He submitted that Ld. CIT(A)has relied upon the judgment of the Hon'ble supreme Court rendered in the case of Hindustan Coca-Cola Beverage Pvt. Ltd. vs. CIT 293 ITR 226(SC). He submitted that ratio of the Hon'ble Supreme Court is not applicable

on the facts of the present case. He submitted that the ratio is applicable where the assessee has not deducted tax at all. But in the present case the assessee had deducted or after deducting the tax failed to deposit the same as per the provision of law. Therefore, he is liable to be deemed to be assessee in default.

5.1 On the contrary, Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. He submitted that the total demand of Rs. 28643221/- was raised including the amount of Rs. 19806433/- u/s 201 (1A) of the Act and interest of Rs. 54,59,620/- thereon. He submitted that Ld. CIT(A) observed that in respect of amount paid to M/s Deewan Housing Finance Ltd. the payee has included in his books of accounts, on this receipts and also paid due tax on it. This fact is verified by the AO also in his remand report the Ld. Counsel placed reliance on the judgment of the Hon'ble Supreme Court in the case of M/s Hindustan Coca-Cola Beverage Pvt. Ltd. (supra). He also placed reliance on the CBDT Circular, therefore, he supported the order of the Ld. CIT(A).

5.2 We have heard the rival contentions, perused the material available on record, there is no dispute with regard to the fact, that statement recorded in the survey proceedings, the managing director of the assessee company admitted the fact that, amount were deducted but could not be deposited into the Government Account, on account of Financial crisis of the company. However, it was stated that the deductee had already disclosed the receipts in their respective returns and paid to due tax thereon. Now, the issue required to be adjudicated is whether the Ld. CIT(A) has rightly applied the ratio of the Hon'ble Supreme Court rendered in the case of Hindustan Coca-Cola Pvt. Ltd Beverage vs. CIT 293 ITR 226. For the sake of

clarity it would be the relevant that the provisions of Act, i.e. section 201 is reproduced herein for the sake of clarity, Section 201 of the Act speaks as under:-

"***201. Consequences of failure to deduct or pay***

[(1) where any person, including the principal officer of a company-
(a) Who is required to deduct any sum in accordance with provisions to this Act; or
(b) referred to in sub-section (1A) of section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole, or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

[Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-
(i) has furnished his return of income under section 139;
(ii) has taken into account such sum for computing income in such return of income; and
(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:]

Provided [further] that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.]
[(A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,-

(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and
(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,

and such interest shall be paid before furnishing the statement in accordance with provisions of sub-section (3) of section 200:]

[Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso of sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident.]"

5.3 As per the above provisions in case any person who is required to deduct any sum in accordance with the provision of the Income Tax Act, does not deduct, or does not pay, or after deducting fails to pay, the whole or any part of the tax, as required by or under the Act. Then such person shall without prejudice to any other consequences which he may incur deem to be assessee in default in respect of such tax. Therefore, there is no ambiguity so far the provision of law is concerned. Admittedly, this provision relate to the person who is liable to deduct the tax as per the provision of the Act. The consequences of non-deduction, non-payment or after deducting failure to pay the whole or part of the tax leads to such person to be deem to be assesee in default in respect of such tax. In the present case, admittedly, the assessee has in some cases after deducting the tax had not paid such tax to the Government by depositing the same in the account of the

Government. The Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd. Vs. CIT (2007) 293 ITR 226 (SC) has held as under:-

> *"10. Be that as it may, Circular No. 275/201/95-IT (B) dated January 29, 1997, issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under section 201 (1) of the Income-Tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to the charge interest under section 201 (1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under section 271C of the Income-Tax Act".*
>
> *11. In the instant case, the appellant had paid the interest under section 201 (1A) of the Act and there is no dispute that the tax due had been paid by the deductee-assessee (M/s Pradeep Oil Corporation). It is not disputed before us that the circular is applicable to the facts situation on hand."*

5.4 Before the Ld. CIT(A), the contention of the assessee had been that deductee had already paid due tax on such receipts. The Ld. CIT(A) accepted this contention of the assessee and following the judgment of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. vs. CIT 293 ITR 226 deleted the demand of tax. The contention of the Revenue is that the judgment of the Hon'ble Supreme Court is not applicable on the facts of the present case, as in this case the assessee has deducted tax but did not deposit same. This contention of the Revenue is ex facie incorrect as in the case of Hindustan Coca Cola Beverage Pvt. Ltd. vs. CIT (Supra), the contention of the assessee was that the payment by the company were in nature of the contractual payment on which tax was deducted u/s 194C of the Act at 2 per cent. However, the AO held that the warehousing charges were in the nature of rent as defined in Explanation to Section 194-I of the Act. Therefore, it

was not the case where tax was not deducted but it was the case where tax was deducted under a different provision at a different rate. Now, it is to be examined in the light of the judgment of Hon'ble Supreme Court in the case of Hindustan Coca Cola vs. CIT (supra), whether the Circular No. *275/201/95-IT*, dated 29-1-1997, issued by CBDT helps the assessee under the facts of the present case. As per this instruction no demand visualized under section 201(1) of the Income Tax Act should be enforced after the deductor has satisfied the officer in charge of TDS, that the taxes have been paid by the deductee – assessee. Therefore, so far liability towards payment of tax u/s 201(1) of the Act is concerned, if the assessee demonstrates that the due taxes have been paid by the deductee – assessee, no action for recovery of demand can be taken. In our view, this instruction has wider amplitude than the proviso to Section 201(1) which confines the immunity from recovery of tax from the failure the deductor on failure to deduct tax but the Instruction No. 275/205/95-IT(B) covers all the situation as visualized u/s 201(1) of the Act. In the present case the Ld. CIT(A) has deleted the disallowance on the ground that the deductee – assessee has declared the receipts into their respective returns and due taxes have been paid.

We are of the view, that as per the Instruction No. 275/205/95 (supra) read with section 201(1), the assessee is required to furnish the requisite certificate certifying that the deductee – assessee has taken into the income tax return the receipts and paid due taxes thereon. In the absence of such certificate the Ld. CIT(A) should not have deleted the disallowance. Therefore, we set aside the order of the Ld. CIT(A) for limited purpose for verifying that the deductee has taken into account, the

receipts pertaining to the assessee and paid due tax thereon. This ground of the Revenue's appeal is allowed for statistical purposes.

ITA No. 565/JP/2015.

6. Now, we take up **Revenue's appeal i.e. ITA No. 565/JP/2015 pertaining to the AY 2010-11.**

The Revenue has raised the following grounds of appeals:-

> "1. Whether on facts and in law the Ld. CIT(A) justified in holding assessee default for failure to deduct the taxes and apply the ratio of Hon'ble Supreme Court decision of M/s Hindustan Coca Cola Beverage Ltd. Where as in this case, the TDS was already deducted but not deposited the tax in to Govt. account. Hence, the Ld. CIT(A) erred in deleting the demand on different facts."

7. The parties have adopted the same arguments as were adopted in ITA No. 445/JP/2015 pertaining to AY 2013-14. For the same reasoning, this ground of the Revenue's appeal is allowed for statistical purpose.

ITA No. 483/JP/2015.

8. Now, we take up assessee's appeal in **ITA No. 483/JP/2015 pertaining to the AY 2010-11.**

The Assessee has raised the following grounds of appeal:-

> "1. That the Ld. CIT(A) is wrong and has erred in law in confirming the action of Ld. AO that assessee was liable to deduct TDS on consultancy charges of Rs. 1,10,30,000/- (charges Rs. 1,00,00,000/- and service Tax Rs. 10,30,000/-) credited in the account of Sincere Architects & Engineers P. Ltd. During the Financial Year though the transaction of proving required consultancy was not at all fulfilled by payee and so amount was neither payable to it nor paid and entry of credit made provisionally was cancelled in some subsequent financial year.
>
> 2. That the appellant craves the permission to add to or amend to any of the above grounds of appeal or to withdraw any of them."

9. The only effective ground is against the confirming the action of the AO that assessee was liable to deduct TDS on consultancy charges of Rs. 1,10,30,000/- credited in the account of Sincere Architectural & Engineers Pvt. Ltd. The Ld. Counsel for the assessee reiterated the submissions as made in the written submissions. It is contended that the Ld. CIT(A) had confirmed that assessee was liable to deduct TDS on consultancy charges of Rs. 1 crores and service Tax Rs. 10,30,000/- (total-1,10,30,000/-) thought the consultancy was not provided and the amount was neither payable, nor paid and credit entry made provisionally, canceled subsequently. In support of the contention is that the reliance was placed upon the judgment of the DIT vs. Ericsson Communication 378 ITR 395(Delhi) and also reliance was placed upon the decisions of the Hon'ble Supreme Court in the case of CIT vs. Excel Industries 358 ITR 0295 (SC).

9.1 On the contrary, Ld. Departmental Representatives opposed the submission.

9.2 We have heard the rival contentions, perused the material available on record. The contention of the assessee is that no payment was made; in fact, the provisional entry was passed as no consultancy services are rendered. Therefore, the same was reversed, under this facts, the assessee was not liable to deduct the tax.

9.3 In the present case Ld. CIT(A) confirmed that the assessee was liable to deduct tax on consultation charges of Rs. 1,10,30,000/-. In respect of the amount credited on account of consultancy fees in respect of M/s Sincere Architectural and Engineers Pvt. Ltd., the contention of the assessee is that the professional work

which was assigned was subsequently, cancelled. The notional liability, was made in anticipation of transaction of consultancy, which never materialized as the project, had to be abandoned due to various litigations. The transactions in the books of assessee and M/s Sincere Architects have been examined and verified by the AO. Ld. Counsel for the assessee placed reliance on the judgment of the Hon'ble Delhi High court in the case of DIT vs. Ericson Communication 378 ITR 395(Del.) in support of the contention that where mere passing of books entries, which were subsequently reversed would not give rise to an obligation to deduct tax by the assessee as there was no debt could be said to be acknowledged by the assessee. The Hon'ble Delhi High Court has held as under:-

> *"In our view, mere passing of the book entries, which are reversed, would not give rise to an obligation to deduct tax at source by the assessee, as clearly, there is no debt that can be said to be said to be acknowledged by the assessee. Imposition of an obligation to deduct tax at source in these circumstances would amount to enforcing payments from one person towards a tax liability of another, even where the person does not acknowledge that any sum is payable. Thus, in our view, is contrary to the scheme of the provisions relating to collection of tax at source under the Act."*

In the present case remand report was sought from the AO. The AO stated that such entries were reversed by both parties and no tax was payable on such amount. Therefore, in our considered view, the ratio of the Hon'ble Delhi High court in the case of DIT vs. Ericson Communication 378 ITR 395(Del.) is applicable in this case as well. Respectfully following the same, we direct the AO to delete the addition.

This ground of the assessee's appeal is allowed.

10. Ground no. 2, is general in nature and needs no separate adjudication.

11. The appeal of the assessee is allowed.

12. In the result, appeal of **Assessee in ITA No. 483/JP/2015** is allowed and Appeals of the Revenues **in ITA Nos. 445/JP/2015 & 565/JP/2015** are allowed for statistical purpose in the terms indicated in para no. 5 of this order.

Order pronounced in the open court on Thursday, the 29th day of June 2017.

Sd/-	Sd/-
(विक्रम सिंह यादव)	(कुल भारत)
(VIKRAM SINGH YADAV)	(KUL BHARAT)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

Jaipur
Dated:- 29/06/2017.
Pooja/
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. The Appellant- M/s R.F. Properties Pvt. Ltd, (Now Known as World Trade Park Ltd.), Jaipur.
2. The Respondent- The ACIT(TDS), Jaipur.
3. The CIT(A).
4. The CIT,
5. The DR, ITAT, Jaipur
6. Guard File (ITA No. 483, 565 & 445/JP/2015)

आदेशानुसार / By order,

सहायक पंजीकार / Assistant. Registrar