IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI

BEFORE SHRI R.C. SHARMA (AM) AND SHRI RAM LAL NEGI (JM)

ITA No. 4902/MUM/2015
Assessment Year: 2010-11

M/s Mahek Construction, Office No. 7 & 8, Patidar Complex, Kannamwar Nagar No. 2, Vikhroli (East), Mumbai - 400083 PAN: AANFM5785D	**Vs.**	The Income Tax Officer (TDS)-2(3), Room No. 708, 7th Floor, K.G. Mittal Ayurvedic Hospital Building, Charni Road, Mumbai - 400002
(Appellant)		**(Respondent)**

Assessee by : Ms. Ritika Agarwal (AR)
Revenue by : Shri Suman Kumar (DR)

Date of Hearing: 19/03/2018
Date of Pronouncement: 11/04/2018

O R D E R

PER RAM LAL NEGI, JM

This appeal has been filed by the assessee against order dated 21.10.2014 passed by the Ld. Commissioner of Income Tax (Appeals)-12, Mumbai, pertaining to the assessment year 2010-11, whereby the Ld. CIT (A) has dismissed the appeal filed by the assessee against order dated 29.11.2011 passed u/s 201 (1) and 201 (1A) of the Income Tax Act, 1961 (for short 'the Act').

2. Brief facts of the case are that a survey action u/s 133A was carried out in the case of City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO). During the course of survey, it was noticed that the assessee company was allotted a plot at Kalamboli Navi Mumbai on payment of lease premium of Rs. 2,02,66,484/- in the F.Y. 2009-10 and the assessee had not deducted the tax at source on payment of the said premium. Accordingly, the assessee was asked to show cause as to why the amount paid to CIDCO should

not be treated as lease rent and why the assessee should not be treated as assessee in default u/s 201 (1)/201 (1A) of the Act for non deduction of tax at source. The assessee did not respond the show cause notice. One more opportunity was given by issuing another letter. However, neither the assessee attended nor filed any written submissions. Accordingly, the AO passed the order u/s 201 (1) and worked out the amount of TDS default u/s 201 (1) at Rs 21,36,945/- and after calculating the total interest raised the demand of Rs. 26,40,856/-. The assessee challenged the order passed by the AO before the Ld. CIT (A). However, the assessee did not appear before the Ld. CIT (A) despite service of notices and ultimately the Ld. CIT (A) proceeded ex-parte against the appellant assessee and confirmed the action of AO by dismissing the appeal in limine.

3. Aggrieved by the order of Ld. CIT (Appeals), the assessee has preferred this appeal before the Tribunal on the following effective ground:-

1. *"Because, ld. CIT (A) erred in law and on facts in treating the appellant as appellant in default and thereby confirming the demand of Rs. 21,38,945/- u/s 201(1) of the Act and interest thereon amounting to Rs. 501,911/- u/s 201(1A) of the Act.*
2. *Because, ld. CIT (A) has erred in law and on facts in not considering the fact that the lump sum payment (i.e. lease premium) is paid by appellant to (CIDCO) for acquiring development and lease-hold rights for a period of 60 years under the Agreement of Lease is not "rent" within the meaning of section 194-I of the Income Tax Act, 1961 (the Act) and hence not liable for deduction of tax at source.*

3. *Because, ld. CIT () has erred in law and on facts in not considering that "rent and "premium" are separately defined in section 105 of the Transfer of Property Act, 1882.*

4. *Because, ld. CIT (A) has failed to consider that lease premium is in the nature of capital expenditure for*

acquisition of leasehold rights in any immovable property. Hence the premium for transfer of land under lease will be taxable in the form of capital gain u/s 45 of the Act in the hands of the lessor (appellant).

5. *Because, ld. CIT (A) should have adjudicated the appeal on the basis of statement of facts and grounds of appeal filed instead of dismissing it in limine.*

4. The assessee has moved an application for condonation of delay of 256 days in filing the present appeal on the ground that the concerned CA who was the authorized representative of the assessee sought adjournments during the appellate proceedings and finally failed to appear and present the case. Accordingly, the Ld. CIT (A) had to dispose of the appeal ex-parte. The assessee could not file the present appeal due to difference of opinion among the partners of the appellant firm. The assessee has enclosed an affidavit with the application sworn by one of the partners of the assessee firm in support of its contention. The Ld. counsel for the assessee submitted that since the delay was not intentional and due to inaction on the part of the assessee, the application may be allowed and the delay may be condoned in the interest of justice.

5. On the other hand, the Ld. departmental representative opposed the application on the ground that the reason mentioned by the assessee is not sufficient to condone the delay.

6. Sub-section 5 of section 253 of the Income Tax Act provides that the Tribunal may admit appeal or permit filing of memorandum of cross- objection of respondent after expiry of relevant period of limitation referred to in sub-section 3 and 4 section 253, if it is satisfied that there was sufficient cause for not presenting it within that period. The expression "sufficient cause" in this section has also been used in section 5 of Indian Limitation Act, 1961. This

expression has come for consideration before the Hon'ble High Courts as well as before the Hon'ble Supreme Court, and the Hon'ble Courts are unanimous in observing that the expression "sufficient cause" is to be considered with justice oriented approach. The Hon'ble Supreme Court in the case of *Collector Land Acquisition vs. Mst. Katiji & Others, 1987 AIR 1353* has observed as under:

> *"1. Ordinarily a litigant does not stand to benefit by lodging an appeal late.*
> *2. Refusing to condone delay can result in a meritorious matter being thrown out at the very threshold and cause of justice being defeated. As against this when delay is condoned the highest that can happen is that a cause would be decided on merits after hearing the parties.*
> *3. "Every day's delay must be explained" does not mean that a pedantic approach should be made. Why not every hour's delay, every second's delay? The doctrine must be applied in a rational common sense pragmatic manner.*
> *4. When substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done because of a non-deliberate delay.*
> *5. There is no presumption that delay is occasioned deliberately, or on account of culpable negligence, or on account of mala fides. A litigant does not stand to benefit by resorting to delay. In fact he runs a serious risk.*
> *6. It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so."*

So, in view of the judgment of the Hon'ble Supreme Court aforesaid we allow the application and condoned the delay in filing the present appeal and allowed the Ld. counsel for the assessee to argue the case on merit.

7. On merits, the Ld. counsel for the assessee submitted that the issue involved in this case is covered by the decision of Mumbai ITAT in the case of *ITO (TDS) Mumbai vs. Surti Developers Pvt. Ltd. 2017 (4) TMI 707* ITAT, Mumbai, *ITO (TDS) vs. B.K.S. Galaxy Realtors Pvt. Ltd. 2016 (12) TMI 1342* ITAT, Mumbai and decision of Delhi ITAT in the case of *ITO vs. Indian News paper Society ITA No. 5207 and 5207/Del/2012*. The Ld. counsel further submitted that in these cases it has been held that lease premium paid for long term lease is not rent within the meaning of section 194I of the Act and the provisions related to TDS u/s 194I of the Act is not applicable to such lease rent. The Ld. counsel further submitted that since the issue has already been decided in favour of the assessee by the various Benches of the Tribunal, the impugned order is not in accordance with the decisions of the Tribunal, therefore the same is liable to be set aside.

8. On the other hand, the Ld. Departmental Representative (DR) relied on the concurrent findings of the authorities below. The Ld. DR further submitted that since the Ld. counsel has passed the impugned order ex parte, the issue may be restored to the file of the Ld. CIT(A) for fresh adjudication after hearing the appellant/assessee.

9. We have heard the rival submissions and also perused the material on record. The only issue involved in this case is whether the lump sum payment i.e. lease premium paid by the appellant assessee to CIDCO for acquiring development and lease hold rights for a period of 60 years under

the agreement of lease is not rent within the meaning of section 194I of the Act. Both the authorities below have held that the payment on account of lease premium is the rent within the meaning of section 194I as rent means any payment by whatever name called under any lease etc. for the use of any land etc. as defined in Explanation 1 to section 194I. Since, the assessee has argued that the issue involved in the present case is covered by the decision of the coordinate Bench, we do not consider it necessary to restore the issue to the file of the Ld. CIT(A) for fresh adjudication. As pointed out by the Ld. counsel for the assessee the coordinate Bench has decided the identical issue in favour of the assessee in the case of *Surti Developers Pvt. Ltd.* (supra) by relying on the earlier decisions of the Mumbai and other Benches of the Tribunal on the identical issue. The observations of the Bench in the aforesaid case read as under:

> *"6. We have heard the learned DR and perused the material on record. The issue in the present appeal is whether the lease premium paid for a long term lease of 60 years can be termed as 'rent' within the meaning of section 194I of the Act. We find that the issue is squarely covered by the decision of the Co-ordinate Bench as mentioned at para 4 here-in-above.*
>
> *In Wadhwa & Associates Realtors Private Limited (supra), during the A.Y. 2008-09, the assessee took plot of land from MMRD and made payment of lease premium for allotment of plot of land as also payment for additional built up area and fees for FSI. It is held in the above case that (i) since premium was not paid under lease but was paid as price for obtaining lease, it preceded grant of lease and, therefore, by any stretch of imagination, it could not be equated with rent which was paid periodically, (ii) payment for additional FSI area could not be equated to rent, and (iii) assessee was not liable to deduct tax at source on both types of payment u/s 194I of the Act.*
>
> *In Navi Mumbai (SEZ) Private Ltd. (supra), it is held lease premium paid by assessee to CIDCO for acquiring leasehold land for a period*

of 60 years in order to develop a Special Economic Zone (SEZ) amounted to capital expenditure which did not fall within the meaning of 'rent' u/s 194I and therefore, the assessee was not liable to deduct tax at source while making the said payment. In Dhirendra Ramji Vora (supra), it has been held y the Tribunal that the lease premium paid to CIDCO does not qualify to be a 'rent' within the meaning of section 194I so as to be exilible for deduction of tax at source there under.

In Indian Newspaper Society (supra), the Mumbai Development Authority leased out land in question to the assessee for a period of 80 years for a consideration comprising lease premium of a sum. The AO held that the provision of section 194I was applicable on such lease payment. The Commissioner (Appeals) having found that such payment was not an advance rent but was a lease payment in the nature of capital expenditure, held that such payment did not fall within the ambit of section 194I of the Act. The Tribunal held that since payment of lease premium was not be made on periodical basis but it was onetime payment to acquire land with right to construct a commercial complex thereon, section 194I was not applicable.

6.1 As the facts remain similar, we follow the order of the Co-ordinate Bench in the decisions mentioned at para 6 here-in-above and hold that the payment of lease premium of Rs. 60,55,050/- does not fall within the ambit of section 194I of the Act and therefore, the assessee is not liable to deduct tax at source while making the said payment. Accordingly, we uphold the order passed by the learned CIT (A).
7. In the result, the appeal filed by the Revenue is dismissed."

10. Since, the co-ordinate Bench of the Tribunal has decided the identical issue in the case of Surti Developers Pvt. Ltd.(supra) and since the facts of the present case are similar to the facts of the aforesaid case, we respectfully following the decision of the coordinate Bench, set aside the findings of the Ld. CIT(A) and allow the sole ground of appeal of the

assessee and delete the demand raised on account of TDS default and interest computed thereon.

In the result, appeal filed by the assessee for assessment year 2010-2011 is allowed.

Order pronounced in the open court on 11th April, 2018.

Sd/-	*Sd/-*
(R.C. SHARMA)	(RAM LAL NEGI)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated: 11/04/2018

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**