IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F" NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI O. P. KANT, ACCOUNTANT MEMBER

I.T.A. No.5795/DEL/2015
Assessment Year: 2012-13

Paramount Villas Pvt. Ltd., 208, 2nd Floor, Sikkha Mansion LSC, Savita Vihar, New Delhi.	v.	ITO (TDS), Ward-51(1), New Delhi.
TAN/PAN: DELP17086G		
(Appellant)		(Respondent)

I.T.A. No.6540/DEL/2015
Assessment Year: 2012-13

ACIT, Circle-76(1), New Delhi.	v.	Paramount Villas Pvt. Ltd., 208, 2nd Floor, Sikkha Mansion LSC, Savita Vihar, New Delhi.
TAN/PAN: DELP17086G		
(Appellant)		(Respondent)

Appellant by:	Shri Ashwani Taneja, Adv.		
Respondent by:	Shri Atiq Ahmad, Sr. D.R.		
Date of hearing:	15	05	2018
Date of pronouncement:	13	08	2018

O R D E R

PER AMIT SHUKLA, J.M.:

The aforesaid cross appeals have been filed by the assessee as well as by the Revenue against the impugned order dated 07.09.2015, passed by the CIT (Appeals)-XLI, New Delhi in relation to the order passed u/s.201(1)/201(1A) of the Act for the Assessment Year 2012-13.

2. The facts in brief are that the assessee-company is engaged in the business of real estate development and executing residential project at Greater Noida named 'Paramount Golf Foreste'. During the course of the assessment proceedings, assessee in response to the query, furnished the details with regard to the TDS on the payment made to UPSIDC, from where the Assessing Officer noted that assessee has not deducted TDS for the payment of annual lease rent of Rs.2,92,02,984/- paid to UPSIDC u/s.194-I.

3. In response to the show cause notice, assessee filed its detailed submission wherein it was contended that the lease rent was paid as onetime payment for lease of land for long period of 99 years on a lump sum basis; and only 1% of the plot premium was treated as lease rent for the period of 1st ten years. The assessee had purchased land from UPSIDC which was a lease hold land taken for 99 years from farmers. Entire purchase of land has treated as stock-in-trade and it was contended by the assessee that same should not be treated as rent. However, the Assessing Officer held that assessee should have deducted TDS u/s.194-I @ 10%; and accordingly, held that the amount of Rs.29,20,298/- was TDS payable u/s 194I and treated assessee as 'assessee in default' in terms of Section 201(1) and also levied interest of Rs.9,51,928/-.

4. Before the ld. CIT(A), the assessee submitted that only 1% of the cost of purchased land from UPSIDC at the most

can be treated as lease rent and be treated as part of rent, hence TDS default should be restricted to Rs. 2,98,258/- which is 10% of the lease rent paid of Rs.29,28,580/-. One important fact which was pointed out that, UPSIDC has submitted its account and also confirmed that the amount paid by the assessee has been credited in the statement of P&L account and income tax has been paid thereon on the taxable profit. The entire amount paid by the assessee was credited by UPSIDC under the head 'Lease Rent Received Account' as per their accounting policy. It was further pleaded that in view of *proviso* to Section 201 which came into effect from 01.07.2012, the assessee cannot be treated as 'assessee-in-default' if the person to whom the payment has been made, has furnished his return of income u/s.139; has taken into account such sum for computing the income in such return of income; and has paid the tax due on the income declared by him in such return of income, if the person furnishes a certificate to this effect from an accountant in such form as may be prescribed, then no liability can be fixed u/s.201. Since this is a beneficial provision to remove the rigors, therefore, it has to be given retrospective effect.

5. Ld. CIT (A) held that assessee is a developer of a property and he is in the business of purchasing the property and developing it and finally selling them to the customers. The assessee has treated the land as work-in-progress and also drew attention to the following account showing the treatment of land purchase:-

Particulars	***FY 2010-11***	***FY 2011-12***
Opening balance	_	*93126774*
Land allotment cost	-	*2016857150*
Stamp Duty	-	*111935572*
Lease Rent	-	*29202985*
Interest on principal amount	-	*247990608*
Payment to farmers	-	*45185242*
Total	-	*2451172257*
TRANSFER TO SALE		
Land Cost	-	*57610344*
Construction and other overhead	-	*249655150*
Closing stock	*93126775*	*3795483271*
Details of closing stock		
Land cost	-	*2393561913*

Ld. CIT(A) held that even though the term 'Lease Rent' has been used in the books of the UPSIDC, but the fact remains that the land has been taken for 99 years and therefore, it is lump sum payment for which no TDS u/s.194-I is required, because it is not in the nature of rent. However, he held that in so far as lease rent component is concern, he held that 201(1) is applicable and for the balance he held that payment being made for purchase of land which is stock-in-trade does not attract the TDS provisions.

6. Before us, the learned counsel submitted that it is not in dispute that, firstly, whatever payment has been made to UPSIDC they have credited to their P & L account and has

shown it as their income in the return of income and had paid taxes thereon, therefore, in view of the judgment of Hon'ble Delhi High Court in the case of **CIT vs. Ansal Land Mark Township Pvt. Ltd., ITA No.160 & 161 of 2015;** and **Hon'ble Supreme Court judgment** in the case of **CIT vs. M/s. Calcutta Export Company,** vide judgment and order dated 24th April, 2018, wherein it has been held that the *proviso* added u/s.201(1) and 40(a)(ia) has to be given retrospective effect. He further drew our attention to the **CBDT Circular No.35 of 2016 dated 13th October, 2016,** wherein it has been held that one-time non refundable upfront charges paid by the assessee for acquisition of leasehold rights over an immovable property cannot be constituted as rental income and assessee is not obliged to deduct tax at source u/s.194I. Thus, on this ground alone assessee cannot be treated as 'assessee-in-default' u/s. 201(1). Apart from that, he submitted that on merits also now there are catena of decisions that, if lease premium paid by the assessee to the authorities for acquiring a leasehold land for a very long term, then it does not fall within the meaning of rent u/s.194-I. In support, he relied upon the following judgments.

1. *ITO (TDS), Mumbai vs. Navi Mumbai SEZ (P.) Ltd., (2014) 147 ITD 261 (Mum-Trib.)*
2. *Trill Infopark Ltd. vs. ITO (TDS), (2016) 385 ITR 0465 (Mad)*
3. *Foxconn India Developer (P) Ltd. vs. ITO, (2016) 288 CTR 0173 (Mad.)*

7. On the other hand, learned Department Representative

strongly relied upon the order of the Assessing Officer.

8. We have heard the rival submission and also perused the relevant findings given in the impugned orders as well as material referred to before us. It is an undisputed fact that assessee has paid to UPSIDC, one-time lease premium for acquiring a plot for a period of 99 years for which assessee has paid Rs.2,92,02,985/-; and 1% of the cost of the land purchased by UPSIDC was treated as lease rent. It has been brought on record that UPSIDC had submitted its account where it has duly confirmed that the amount paid by the assessee has been credited in the statement of P&L account and income tax has been paid thereon on the taxable profit. The entire account has been credited to the head 'Lease Rent Received Account'. Once that is so, then in view of the *proviso* to Section 201 which came into effect from 01.07.2012, then assessee cannot be held as 'assessee-in-default'. The said *proviso* reads as under:

> *"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"

9. This *proviso* has been held to have retrospective effect by the Hon'ble Delhi High Court in the case of ***Ansal Land Mark Township Pvt. Ltd. (supra)*** and by the Hon'ble Supreme Court in the case of ***CIT vs. Calcutta Export Co. (supra)***, wherein it has been held that the *proviso* brought u/s. 40(a)(ia) and 201, has to be given retrospective effect. Moreover, now the CBDT has issued a **Circular no.35 of 2016** (supra), wherein it has been clarified as under:

"*Section 194-I of the Income-tax Act, 1961 (the Act) requires that tax be deducted at rates from payment of any income by way of rent. For the purposes of this section, "rent" has been defined as any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or building or machinery or plant or equipment or furniture or fittings.*

2. The issue of whether or not TDS under section 194-1 of the Act is applicable on 'lump sum lease premium' or 'one-time upfront lease charges" paid by an assessee for acquiring long term leasehold rights for land or any other property has been examined by CBDT in view of representations received in this regard.

3. The Board has taken note of the fact that in the case of The Indian Newspaper Society (ITA No. 918 & 920/2015), the Hon'ble Delhi High Court has ruled that lease premium paid by the assessee for acquiring a plot of land on an 80 years lease was in

the nature of capital expense not falling within the ambit of Section 194-1 of the Act. In this case, the court reasoned that since all the rights easements and appurtenances in respect of the said land were in effect transferred to the lessee for 80 years and since there was no provision in lease agreement for adjustment of premium amount paid against annual rent payable, the payment of lease premium was a capital expense not requiring deduction of tax at source under section 194-1 of the Act.

4. Further, in the case Foxconn India Developer Limited (Tax Case Appeal No. 801/2013), the Hon'ble Chennai High Court held that the one-time non-refundable upfront charges paid by the assessee for the acquisition of leasehold rights over an immovable property for 99 years could not be taken to constitute rental income in the hands of the lessor, obliging the lessee to deduct tax at source under section 194-1 of the Act and that in such a situation the lease assumes the character of "deemed sale". The Hon'ble Chennai High Court has also in the cases of Tril Infopark Limited (Tax Case Appeal No. 882/2015) ruled that TDS was not deductible on payments of lump sum lease premium by the company for acquiring a long-term lease of 99 years.

5. In all the aforesaid cases, the Department has accepted the decisions of the High Courts and has not filed an SLP. Therefore, the issue of whether or not TDS under section 194-1 of the Act is to be made on lump sum lease premium or one-time upfront lease charges paid for allotment of land or any other property on long-term lease basis is now settled in favour of the assessee.

6. In view of the above, it is clarified that lump sum lease premium or one-time upfront lease charges, which are not adjustable against periodic rent, paid or payable for acquisition of long-term leasehold rights over land or any other property are not payments in the nature of rent within the meaning of section 194-I

of the Act. Therefore, such payments are not liable for TDS under section 194-I of the Act."

10. From the aforesaid circular, it is absolutely clear from the CBDT circular that such a onetime non refundable upfront charges paid by the assessee for acquisition of leasehold right or lump sum payment of lease premium for acquisition of over an immovable property for 99 years, no TDS is required to be deducted u/s.194-I. Thus, in view of the CBDT Circular and also the fact that the deductee has shown the amount paid as income and also paid taxes thereon, therefore, the assessee cannot be treated as 'assessee-in-default' and consequently, no interest u/s.201(1A) can be charged. Accordingly, Revenue's appeal is dismissed.

11. In assessee's appeal, assessee has challenged treating of lease rent of Rs.29,28,580/- liable for deduction of TDS u/s.194-I by the CIT(A) has become infructuous in view of our finding given therein that the deductee has already paid the taxes on such payment. Thus, the assessee's appeal is treated as allowed.

12. In the result, the appeal of the assessee is allowed and the appeal of the Revenue is dismissed.

Order pronounced in the open Court on 13th August, 2018.

Sd/-	Sd/-
[O.P. KANT]	**[AMIT SHUKLA]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

DATED: 13th August, 2018

PKK: