

INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "F": NEW DELHI
BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI PRASHANT MAHARISHI, ACCOUNTANT MEMBER

ITA Nos.4837 to 4839/Del/2015
(Assessment Years: 2011-12 to 2013-14)

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| Addl.CIT (TDS), CGO-1, Hapur Chungi Ghaziabad. Sector-128, Noida. | Vs. | The Principal Officer, M/s Jaypee Sport International ltd., PAN: AABCJ9037E |
| (Appellant) | | (Respondent) |

ITA Nos.4291 to 4293/Del/2015
(Assessment Years: 2011-12 to 2013-14)

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| M/s Jaypee Sport International Ltd., Sector-128, Noida. PAN: AABCJ9037E | Vs. | DCIT (TDS), Noida. |
| (Appellant) | | (Respondent) |

ITA Nos.4840 to 4842/Del/2015
Assessment Years: 2011-12 to 2013-14

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| Addl. CIT (TDS), CGO-1, Hapur Chungi, Ghaziabad. | Vs. | M/s Jaypee Infratech Ltd., Sector-128, Noida. AABCJ9042R |
| (Appellant) | | (Respondent) |

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|-----------------------|---------------------------|
| Assessee by : | Smt Sulekha Verma, CIT DR |
| Revenue by: | Shri A. K. Garg, Adv |
| Date of Hearing | 18/07/2019 |
| Date of pronouncement | 30/07/2019 |

O R D E R

PER BENCH

1. All these batch of 9 appeals have been remitted by the Hon'ble Allahabad High Court as per order dated 25.04.2019 in appeals filed by the Additional Commissioner of income Tax(TDS), Ghaziabad where the penalties levied

by the ld Additional Commissioner of income tax (TDS) have been deleted by the order passed by the coordinate bench in ITA No. 4837 to 4839/Del/2015 filed by the Revenue for AY 2011-12 to 2013-14 and ITA No. 4291 to 4293/Del/2015 for AY 2011-12 to 2013-14 filed by the assessee namely M/s. Jaypee Sports International Ltd. together with that ITA No. 4840 to 4842/Del/2015 for AY 2011-12 to 2013-14 filed by the Additional CIT (TDS) in case of M/s. Jaypee Infratech Ltd. The Hon'ble High Court noted that the tribunal has deleted the penalty on the assessee giving the benefit of section 273B of the Income Tax Act which provides that in case of a reasonable cause penalty, otherwise exigible u/s 271C of the Income Tax Act could not be imposed. The Hon'ble High Court further noted that the Tribunal came to the conclusion that in the facts of the case no deduction of tax at source could be made prior to the date of survey on 24/2/2014 as no other order against the assessee required deduction of tax at source at that time, when the assessee made payment of lease and rent was existing. The Hon'ble High Court further noted that the judgment of the Hon'ble Delhi High Court with regard to lease money being treated as "rent" was only delivered on 16/02/2017 cast an obligation on the assessee to make deduction of tax at source on these lease payments i.e. "rent" also. Subsequently the Hon'ble Supreme Court has also delivered the judgment in the case of New Okhla Development Authority Vs Commissioner of Income Tax and Others reported in 406 ITR 209 (SC) in which the Hon'ble Supreme Court has opined that the word 'rent' means any payment by whatever name called under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land and came to the conclusion that lease money or any rent as "rent" within the meaning of

section 194I of the Income Tax Act. Therefore, the Hon'ble High Court was of the view that the matter requires fresh consideration by the coordinate bench. Therefore, it remanded the matter back to the tribunal and the matter remanded shall be reconsidered by the Tribunal within a period of 3 months from the date of issuance of a certified copy of the order of the Hon'ble High Court. Thus, the above appeals are restored to the file of the Income Tax Appellate Tribunal.

2. Therefore, batch of 9 appeals comprises of 6 cross appeals in respect of Jaypee Sports International Ltd relating to Assessment Years 2011-12 to 2013-14 and the remaining 3 appeals of the revenue in respect of Jaypee Infratech Ltd for Assessment Year 2011-12 to 2013 – 14 were back to the file of the coordinate bench. All these appeals are related to the penalty levied u/s 271C of the Income Tax Act, 1961 (the act).
3. The fact shows that there was a survey under section 133A of The Income Tax Act on the assessee on 24/2/2014 to verify the applicability of the provisions of the tax deduction at source. During the course of survey, it was known that the assessee has made payment of lease rent and interest to Yamuna Express Industrial Development Authority (Yamuna Development Authority) without deduction of tax at source under section 194I and 194A respectively of The Income Tax Act. Therefore, orders u/s 201 (1) and 201(1A) of the income tax were passed. Therefore, the penalty was also imposed on the assessee u/s 271C of the act for non deduction of tax at source accordingly. The learned CIT (A) deleted the penalty with respect to the interest payment but upheld the same in relation to the lease rent payment. Therefore both the parties are in appeal before us.

4. The learned authorized representative submitted that common issue in all these appeals have been restored to the file of the coordinate bench is whether the assessee had reasonable cause or not in not deducting the tax at source under section 194I of the Income Tax Act from lease rent paid to Yamuna Industrial Development Authority or not. He referred to the facts of the case that both the assessees were allotted land at Yamuna Industrial Development Authority in trenches from 2009 onwards. Each allotment was only lease for 90 years. The allottees were given full right of development and construction on the said land and further transferring the same. In consideration of the lease by Yamuna development authority, lease premium and external development charges as a one-time cost was payable and in addition, the companies were also liable to pay a recurring annual lease rent @ 1 to 2.5% of the lease premium. Therefore the issue was whether the recurring annual lease rent was liable for tax deduction under section 194I of the income tax act or not. The assessee companies were under the bona fide belief that it was a sale of land only lease for 90 years did not fall within the ambit of Rent u/s 194I of The Income Tax Act. He contended that no tax is required to be deducted according to the assessee for following reasons:-

a. Section 194 I requires tax deduction from income paid by way of rent.

Explanation below the section defines rent to mean any payment for the "use" of any land building machinery plant etc.

b. The word for the **use of** implied that the lease rent only be given for use and not transfer by way of a sale. In other words, the "lessor should continue to be the owner and the lessee tenant.

- c. In the 90 years lease wherein the lessee required the rights of development and construction on the land and further transfer it for profit, it cannot be said that the land is given **for use**. It is a form of sale. A landlord-tenant relationship cannot be predicted in such a lease.
- d. The Hon'ble Supreme Court as well as various High Courts have uniformly held that as long as lease is of 90 or 99 years, it amounts to a deemed sale and transfer of a capital asset. He further referred to the CBDT circular number 35/2016 dated 13/10/2016.
- e. Coordinate bench of ITAT in the judgment dated 13/05/2015 in Earnest Towers private limited ITA No. 265/Kol/2012 has held that the term used in section 194 I could not be extended to cover within its ambit lease wherein the lessee had the right to change the character of the demised property and further transfer it for profit.
- f. Delhi bench in Greater Noida Industrial Development Authority has held that the word leasing used in section 65 (105) (ZZZ) of Finance Act 1994 for the purpose of service tax does not cover long-term leasing where the property is given with right to transfer, assign and mortgage. Such transfers are more akin to sale and not renting a property.
- g. Respondent company was dealing with the state government authority who insisted on the payment of lease without deduction of tax at source as they were claiming that they were a local authority under the provisions of section 10 (20) of the Income tax act and hence exempt from tax. They were litigating on this issue which was finally decided against them by the Hon'ble Supreme Court in 406 ITR 290.

Till then, in absence of any direct pronouncement on the issue at the relevant time, it was difficult for the assessee companies to defy that authority and deduct tax source on such lease payments.

- h. On the similar facts and circumstances in the case of Rajesh projects Ltd 392 ITR 483(Del) the Hon'ble Delhi High Court directed that since the petitioner could not make the deductions due to the insistence of Greater Noida, the said authority should pay the tax for past., and the payments made henceforth shall be subject to tax deduction at source. The court also directed that the income tax authorities shall not pursue any coercive methods for the recovery of penalty once the basic liability with interest is satisfied. He therefore submitted that this judgment was further approved by the Hon'ble Supreme Court in 406 ITR 209.
- i. The assessee company started deducting tax from the lease rent from the financial year 2014-15 onwards immediately after the Department objected to non-deduction. The companies also paid up the tax demanded by the assessing officer for the financial year 2010 – 11, 2011 – 12 and 2013 – 14 with interest. He further referred to the details of payment made by the assessee company. He therefore stated that the default on the part of the assessee companies was thus not deliberate or contumacious.
- j. In view of this he submitted that the assessee company at that relevant time had a reasonable cause for non-deduction of tax on the lease rent paid to Yamuna development authority. He further stated that the High Court and Supreme Court judgments on the issue were rendered later and were not available at relevant time.

- k. The finding of reasonable cause by the coordinate bench in its order dated 23/11/2017 is based on a consideration of relevant facts.
 - l. He therefore submitted that it does not call for any change in view of the Supreme Court decision in 406 ITR 209.
 - m. He further stated that the above judgment of the Hon'ble Supreme Court merely confirms the High Court judgment which was already rendered and considered by the coordinate bench.
 - n. In view of these facts he stated that there is no reason to hold that assessee has any contumacious conduct in non-deduction of tax at source on the rental income paid to Yamuna Development Authority.
 - o. He therefore submitted that the penalty u/s 271C of the income tax act should not have been levied by the learned assessing officer and confirmed by the learned CIT – A. He further submitted that the coordinate bench in its original order has correctly deleted the above penalty.
5. With respect to the applicability of section 194A of the income tax act on interest payments, he submitted that the learned CIT (A) has deleted the penalty in respect of the interest following his own order in the quantum of appeal. He further stated that the such deletion was upheld by the coordinate bench dismissing the appeal of the revenue as per order dated 31/8/2017 in revenues quantum appeals for 4280 and 4281 of 2015 which now issue stands settled against the Department as per the order of the Honourable path High Court in 386 ITR 504 and of the Honourable Supreme Court in 406 ITR 161. He further referred to the decision of the Honourable Allahabad High Court in the present impugned case and stated that there is no order in favour of the revenue by the Honourable High

Court on this issue as it only delete with the issue of Non deduction of tax at source of lease rent paid to Yamuna Development Authority.

6. In view of the above facts he submitted that so far as the issue of non-deduction of tax on lease rent paid to Yamuna development authority and consequent penalty u/s 271C of the income tax act has only been set aside by the Honourable High Court to the file of the coordinate bench which are the appeals of the revenue. With respect to the levy of the penalty u/s 271C with respect to the interest paid to Yamuna development authority, there is no decision of the Honourable High Court and therefore the same stands concluded by the decision of the coordinate bench.
7. The learned departmental representative vehemently opposed the submission made by the learned authorized representative. It was submitted that appellant's submission on reasons for non-deduction of tax on lease payment does not have any merit. It was further stated that coordinate bench in its order in para number 17 has already held that any of lease rent expressed in terms of percentages rent are subject to tax deduction at source relying upon the decision of the Honourable Delhi High Court in case of Rajesh projects India private limited vs Commissioner of income tax 78 taxmann.com 263. It was further stated that decision of the Honourable Delhi High Court has also been upheld in case of the decision of the Honourable Supreme Court of India in case of New Okhla Development Authority in 406 ITR 209. It was further stated that the Honourable High Court High Court has relied upon this decision of the Honourable Supreme Court and remanded the case back to the file of coordinate bench for re-adjudication. It was further argued that if the wordings of the section are clear than benefits which are not available under that section cannot be

confirmed by ignoring or misinterpreting the words in that section. Therefore it was contested that the provisions of the income tax act in respect of section 194I is clear and wide and Honourable coordinate bench has erred in holding that there was a reasonable cause for non-deduction of tax u/s 273B of the income tax act. It was further stated that revenue has challenged the decision of the coordinate bench for part of deletion u/s 201 (1) and 201 (1A) before the Honourable Delhi High Court and also submitted status of the revenues appeal before the Honourable High Court which are pending. In view of this, it was submitted that the penalty levied by the learned assessing officer may be confirmed with respect to the non-deduction of tax on lease rent and interest payment to Yamuna development authority.

8. The learned authorized representative vehemently submitted that issue in these appeals are not with respect to the collection of any tax u/s 201 (1) or interest u/s 201 (1A) of the income tax act but with respect to the levy of penalty u/s 271C of the income tax act. He further submitted that assessee has deposited all the taxes demanded for non-deduction of tax by the revenue. Further there is a reasonable belief available with the assessee for non-deduction of tax on interest as well as rent payment made to Yamuna Development Authority. Therefore the issue is squarely covered under the provisions of section 273B of the income tax act. Moreover he submitted that there is no contumacious conduct proved by the revenue of the assessee for non-deduction of tax at source. He therefore submitted that issue is squarely covered in favour of the assessee by the decision of the Honourable Supreme Court in case of 380 ITR 550 in CIT vs Bank of Nova Scotia wherein it has been held that the tax and interest u/s 201 (1)

and (1A) has been paid and no case has been made by the revenue for levy of the penalty in absence of any contumacious conduct, penalty levied by the learned assessing officer has been correctly cancelled by the coordinate bench.

9. We have carefully considered the rival contention and perused the orders of the lower authorities. We have also carefully considered the decision of the Honourable Allahabad High Court wherein the matters have been remanded to the file of the coordinate bench. The Honourable High Court has only considered the issue of deduction of tax with respect to lease rent payment made by the assessee to Yamuna Development Authority. The Honourable High Court directed to consider the decision of the Honourable Supreme Court in 406 ITR 209. Further, the revenue has also stated that in case of Rajesh Projects Private limited Vs Commissioner of Income Tax 78 taxmann.com 263 the Honourable High Court has also held that tax is deductible on rent payment made by several assessee to Yamuna Development Authority. However, we are not here on the issue of the deductibility of tax at source and consequent order u/s 201 of the Income Tax Act holding the 'assessee is in default'" as well as charging of the interest u/s 201 (1A) of the income tax act but on the issue of levy of penalty u/s 271C of the income tax act for failure to deduct tax at source on lease payments as well as interest to Yamuna Development Authority. Assessee has deposited the tax along with interest on these issues. Necessary challans are also enclosed before us. Later on assessee has also started deducting tax at source on lease payments to that authority. Revenue has not proved that assessee has acted in defiance of the statutory provisions with intentions. Conduct of the assessee is neither

"rebellious" nor "insubordinate". It has been held that unless such conduct of the assessee is established penalty, in these circumstances where the assessee has deposited the taxes along with interest, penalty u/s 271C of the act is not sustainable. The issue is squarely covered by the decision of the Honourable Supreme Court in 380 ITR 550 wherein the issue of penalty u/s 271C of the income tax was considered and the order of the Honourable High Court in ITA No. 1521 of 2006 dated 01/11/2006 has been upheld. The Honourable High Court held that no substantial question of law arises in the case of the appeal filed by the revenue against the deletion of penalty u/s 271C of the Income Tax Act by the coordinate bench. The Honourable Supreme Court also noted in para number 2 of its order referring to para number 11 of the coordinate bench. The coordinate bench has held as under:-

“11. Carefully considered the rival submissions. In the instant case, we are not dealing with collection of tax under section 201 (1) or compensate interest u/s 201 (1A). The case of the assessee is that these amounts have already been paid so as to end dispute with the revenue. In the present appeal, we are concerned with levy of penalty u/s 271C for which it is necessary to establish that there was contumacious conduct on the part of the assessee. We find that on similar facts the Honourable Delhi High Court have deleted levy of penalty u/s 271C in case of CIT vs Itouchu Corp reported in (2004) 268 ITR 172 (Delhi) and in case of CIT vs Mitsui and Co Ltd reported in (2005) 272 ITR 545 (Delhi). Respectfully following the aforesaid judgments of the Honourable Delhi High Court and the decision of the income tax appellate Tribunal Delhi, in the case of television 18 India Ltd, we allow the assessee's appeal and cancel the penalty levied u/s 271C.”

10. Based on these facts the Honourable Delhi High Court as well as the Honourable Supreme Court has also confirmed the deletion of the levy of the penalty u/s 271C of the act in case of bank of Nova Scotia. Therefore now contumacious conduct of the assessee, coupled with nonpayment of taxes along with interest is a necessary ingredient to levy penalty u/s 271C of the income tax act. In present case undisputedly when assessee has

already deposited tax u/s 201 and compensatory interest u/s 201 (1A) of the income tax act it is for revenue to show that whether the assessee has contumacious conduct or not. In the present appeals before us the revenue could not show us any fact / reason that there is a contumacious conduct on part of the assessee.

11. In view of this, we do not see any reason, to sustain the penalty levied by the learned AO for non-deduction of tax at source on rent and interest payment made to Yamuna Development Authority. In view of this

a. the penalty imposed by The Additional CIT (TDS) by passing an order u/s 271C of the income tax act on 31/10/2014 of INR 2 3059862/-, Rs. 4361288/- and Rs. 7704921/- for assessment year 2011 - 12, 2012 - 13 and 2013 - 14 and confirmed by the learned CIT(A) are not sustainable in law in case of Jaypee Sports International Ltd. Accordingly we reverse the order of the learned lower authorities and direct the learned assessing officer to delete the above penalty levied for non-deduction of tax at source on lease rent paid to Yamuna Express Development Authorities. Accordingly, appeal is filed by the assessee are allowed.

b. The penalty imposed by the learned additional Commissioner of income tax (TDS) by passing an order u/s 271C of the income tax act dated 31/10/2014 for Rs. 451080273/-, Rs. 26851157/- and Rs. 54417163/- for assessment year 2011 - 12, 2012 - 13 and 2013 - 14, deleted by the learned CIT(A) with respect to the interest payment made to Yamuna Development Authority without deduction of tax at source, we confirm the order of the ld CIT (A). Accordingly, we uphold

the order of the learned CIT(A) and appeal filed by the revenue on this issue are dismissed.

c. With respect to Jaypee Infratech Ltd , the penalty is levied by the learned assessing officer The Additional Commissioner Of Income Tax (TDS) by passing an order u/s 271C of the income tax act on 31/10/2014 for Rs. 45356/-, Rs. 44067/- and Rs. 43948/- for assessment year 2011 - 12, 2012 - 13 and 2013 - 14 which are upheld by the learned CIT(A) for non-deduction of tax at source on lease rent paid by the assessee, we reverse the order of the lower authorities and allowing the appeal of the assessee direct the ld AO to delete the same.

d. With respect to Jaypee Infratech Ltd, penalty as imposed by the Additional Commissioner Of Income Tax (TDS) by passing an order u/s 271C of the income tax act on 31/10/2014 levying penalty of Rs. 55889925/-, Rs. 65061768/- and Rs. 59779267/- for assessment year 2011 - 12, 2012 - 13 and 2013 - 14, deleted by the learned CIT(A) , we uphold the order of the ld CIT (A) and the appeal of the revenue against the same are dismissed.

12. In the result all the appeals filed by the assessee in case of both the assessee for all the three AYs are allowed and appeal filed by the revenue for both the assessee for all the three AYs are dismissed.

Order pronounced in the open court on 30/07/2019.

-Sd/-
(AMIT SHUKLA)
JUDICIAL MEMBER

-Sd/-
(PRASHANT MAHARISHI)
ACCOUNTANT MEMBER

Dated: 30/07/2019
A K Keot

Copy forwarded to

1. Applicant
2. Respondent
3. CIT
4. CIT (A)
5. DR:ITAT

ASSISTANT REGISTRAR
ITAT, New Delhi