

**INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "G": NEW DELHI**

**BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**

ITA Nos. 5337 & 5338/Del/2019
Asstt. Years: 2014-15, 2015-16

M/s. Sarv Estate Pvt. Ltd. Central Wing, GF, Thapar House, 124, Janpath, New Delhi – 110 001.	Vs.	JCIT, Range 77, New Delhi. PAN AAQCS0231G
(Appellant)		(Respondent)

Assessee by:	Shri Rohit Jain, Advocate, Ms. Tejasvi Jain, CA and Ms. Somaya Jain, CA
Department by :	Shri N.K. Bansal, Sr. DR
Date of Hearing	20/08/2019
Date of pronouncement	13/09/2019

ORDER

PER AMIT SHUKLA, J.M.:

The aforesaid appeals have been filed by the assessee against impugned order dated 30.4.2019 passed by Ld. CIT(Appeals) 31 in relation to the penalty proceedings u/s 271C for the assessment years 2014-15, 2015-16. Assessee has challenged levy of penalty u/s 271C mainly on the following grounds:-

- I. *“That the Commissioner of Income Tax Appeals [‘CIT (A)] erred on facts and in law in confirming the penalty order dated 29.01.2018 passed by the assessing officer, levying penalty of Rs.7,16,000 under section 271C of the Income Tax Act, 1961 (‘the Act’) for alleged failure to deduct tax at source under section 194C on payment of external development work charges (‘EDC’) aggregating to Rs.3,58,00,000.*
- 1.1 *That the CIT(A) erred on facts and circumstances of the case and in law in not appreciating EDC payment was made to Haryana Urban Development Authority (‘HUDA’) for and on behalf of Department of Town and Country Planning (‘DTCP’), which is not amenable to tax withholding under Chapter XVII, in terms of section 196 of the Act.*
- 1.2 *That the CIT(A) erred in alleging that the act of appellant in depositing demand drafts in the office of DTCP issued in the name of the Principal Officer of HUDA was an eye wash to circumvent the provisions of section 194C of the Act.*
- 1.3 *That the CIT(A) erred in not appreciating that provisions of section 194C of the Act are not applicable, inter alia, since: (a) there was no privity of contract between HUDA and the appellant; (b) external development is undertaken by DTCP/ HUDA for the community at large and no ‘work’ is undertaken specifically for the appellant.*
2. *Without prejudice, the CIT(A) erred in not appreciating that the appellant, in any case, had ‘reasonable cause’ for not deducting tax at source and therefore, there was no warrant to impose penalty under section 271C of the Act.”*
2. Facts in brief are that assessee is a private limited company engaged in the business of real estate development in the state of

Haryana. The assessee company obtained license dated 7.5.2012 from Directorate of Town and Country Planning, Haryana under section 3 of the Haryana Development and Regulation of Urban Areas Act, 1975 for development of land parcel into commercial colony upon payment of the requisite charges including external development charges amounting to Rs. 3,98,00,000/- for the assessment year 2014-15; and Rs. 3,58,00,000/- for the assessment year 2015-16. The AO has levied penalty u/s 271C for Rs. 7,96,000/-; and Rs. 7,16,000/- respectively, on the ground that assessee has not deducted TDS from EDC paid to HUDA u/s 194C of the Act. The said order has been confirmed by the Ld. CIT (A) in a very detailed manner.

3. Before us Ld. Counsel for the assessee submitted that since payments of EDC is made to the DTCP, which is nothing but payment to the Government of Haryana, in view of the provisions of section 196 of the Act, tax is not required to be deducted at source. Though detail submissions were made by him, however in sum and substance, his submissions are elaborated hereunder:
 - i. In terms of the provisions of section 196, which overrides other provisions of Chapter XVII, including, but not limited to sections 194C, it is patently clear that any payment made by an assessee to the Government is not liable to TDS; ergo, an assessee making any payment to the Government without withholding tax at source, cannot be deemed/ held to be in default of provisions of Chapter XVII of the Act.
 - ii. In the present case, it is undisputed that EDC, though paid by the appellant to HUDA, is at the direction and / or on behalf of and / or through DTCP, and such payment is made pursuant to agreement entered into with the Government of Haryana through DTCP (referred infra). Being so, the said payment is clearly

payment made to the State Government of Haryana, inasmuch as DTCP is a wing of the State Government of Haryana, having no separate legal existence.

- iii. That payment of EDC is required to be made to the DTCP, the license giving authority of State Government of Haryana, as a precondition for acquiring the license for development of the urban area. DTCP, the nodal department of Government of Haryana which is responsible to regulate the use of the land in order to prevent ill planned urbanization and haphazard urbanization in or around the towns in the State of Haryana, also governs the grant of license to a colonizer/ developer upon terms set out in the license agreement.
- iv. That the HDRUA Act was enacted with a view to regulate the use of land in order to prevent ill-planned urbanization in or around the towns in the State of Haryana.
- v. Section 2(g) of the HDRUA Act defines the phrase 'external development works' to include all such amenities required for development of the urban area in the periphery of / or outside the limits of the colony/ area for the benefit of such colony/ area such as water supply, sewerage, roads, electrical works, drainage, etc., which are necessary to ensure access to basic civic amenities to the public at large with a view to bring the urban area into a habitable condition. The said external development amenities are required to be carried out by the local authority/ State Government in the State on the periphery off outside any particular colony/ area.
- vi. Further, any company/ association possessing land for conversion thereof into colonies is required to apply for grant of license in terms of section 3 of the HDRUA Act.

- vii. As per section 3(3)(a) of the HDRUA Act if the competent authority is satisfied with regard to the existence of the requisites contemplated under sub-section (2) thereof, the competent authority may grant license to convert the land into colony, subject to fulfilment of the obligations specified therein, including, inter alia, payment of proportionate EDC charges for development works to be carried out by the Government or any other local authority outside the periphery of the colony.
 - viii. It is thus evident that the prime responsibility to collect EDC is that of the DTCP, the nodal department of the Government, which, in turn, can undertake the development work on its own or through any other local authority.
 - ix. As a practice, DTCP directs colonizers/ developers to pay the proportionate amount of EDC, as decided, determined and recoverable by DTCP to pay the same in the name of HUDA (which is a local authority as per the provisions of section 3 of the HDRUA Act), which effectively is a payment to DTCP in discharge of legal obligation under the said Act.
4. He further pointed out that DTCP and HUDA are two separate departments and governed by two different Acts exercising separate functions and having separate governance and also highlighted various provisions relating to these two. He submitted that under the provisions of the HDRUA Act, only DTCP, which is a department of State Government of Haryana, is empowered and authorized to grant license to the private colonizers for development of Residential, Commercial, Industrial and IT Park/Cyber Park Colonies, responsible for external development works to be executed in the periphery of colony for the benefit of area as a whole, determine charges for external development works from each of the colonizer/developer,

require each colonizer/developer to furnish the bank guarantee in favour of Director, DTCP for part of the proportionate EDC and decide & direct the manner and mode of payment of such EDC. He further pointed out that DTCP, being a department of State Government of Haryana has relied upon HUDA to carry out the external development work as directed by DTCP. Under these circumstances, as a practice, DTCP directs colonizers/developers to pay the proportionate amount of EDC, as decided, determined and recoverable by DTCP to pay the same to HUDA (which is a local authority as per the provisions of Section 3 of the HDRUA Act) which effectively is a payment to DTCP in discharge of legal obligation under the said Act.

5. Thereafter, Shri Rohit Jain drew our attention to the various provisions of various tax and rules and modalities which govern the levy, collection and payment of EDC and default thereof and submitted that:

- (i) Chargeability for levy and collection of EDC charges arises under the HDRUA Act and Rules framed thereunder. The said Act specifically provides that the amount of EDC is required to be determined and levied by Director, DTCP;*
- (ii) DTCP is a department of State Government of Haryana;*
- (iii) Amount of EDC is payable to DTCP at the prescribed rates and in the manner demand by it. Further such rates or terms of EDC may be revised by DTCP and the appellant/developer is bound to pay the balance of enhanced charges. DTCP also provides for the manner and mechanism to discharge such liability and follow-up for the outstanding dues, if any;*

- (iv) *The payment of EDC is made in the office of DTCP and acknowledged at the counter of DTCP only;*
- (v) *DTCP has the authority to invoke bank guarantee furnished by the appellant/developer against the amount of EDC in case of defaults.”*

6. He also drew our attention to the agreement dated 16.5.2012 entered into between the assessee and DTCP i.e. license giving authority of State Government and also drew our attention giving clauses of the agreement to point out that EDC is in fact payable to DTCP which is nothing but part of the Government of Haryana. It is not disputed either by the Assessing Officer or the CIT (A) that the payment is received by HUDA through DTCP department. However, the Assessing Officer proceeded to hold that the assessee is required to deduct TDS which is erroneous. He also drew our attention the clarification dated 19.6.2018 issued by DTCP wherein it has been clarified that HUDA is only an executing agency working for and on behalf of the State Government established for carrying out External Development Works for which funds are given to HUDA through DTCP and further clarified that EDC is deposited in the consolidated fund of the State Government and no TDS is deducted from the EDC paid to HUDA. He further made a detailed submission as to non applicability of section 194C on such kind of payment and lastly he submitted that penalty is not leviable u/s 271C in view of 273B as there was reasonable cause for the reasons stated above by him and he strongly relied upon the order of the Tribunal in the case of **RPS Infrastructure Ltd. vs. ACIT.**

7. On the other hand Ld. DR strongly relied upon the order of the Ld. CIT (A) and CBDT Circular wherein the board has clarified that TDS is required to be deducted on such payment.

8. After considering the aforesaid submissions and relevant findings given in the impugned orders, though we may feel persuaded with some of the arguments raised by the Ld. Counsel, however, we find that under the facts and circumstances it is clearly borne out that assessee did had bonafide reason for not deducting the TDS. Firstly, for the reason that the license was granted by DTCP which is a Governing authority and it has clarified that EDC charges are paid to HUDA; and secondly, DTCP has issued a clarification to the effect that no TDS is required to be deducted precisely. Precisely on similar set of facts, this Tribunal in the case of **RPS Infrastructure Ltd. vs ACIT** has deleted the penalty after observing and holding as under :-

“11. We have heard the rival submissions, perused the relevant findings given in the orders passed by the authorities below and the various judgments and materials relied upon by both the sides. On going through the facts, we note that dispute is with regard to non-deduction of tax in respect of payment of EDC charges made by the assessee to HUDA. As per the AO, HUDA is neither a local authority nor Government, thus, the payments made to it by the assessee on account of EDC charges were liable for TDS under section 194C of the Act. Since, assessee has failed to deduct the TDS; therefore, it is liable for penalty under section 271C of the Act. On the other hand, the case of the assessee is that obligation to pay EDC charges is arising out of the license granted by DTCP and these payments are to be made for obtaining the license and as per the direction of the DTCP, the same have been paid to HUDA. Further, these payments are not in the nature of payment or in pursuance of works contract. There is no privity of contract between the assessee and the HUDA. On the contrary, the agreement is between Assessee Company and the DTCP which admittedly is a Government Department as agreement has been signed by DTCP on behalf of Governor of

Haryana. We are of the view that we need not go in all these issues. From the facts, it is evident that the payments have been made by the assessee to HUDA which is an authority of Haryana Government created by enactment of Legislature for carrying out developmental activities in the state of Haryana. Such Authorities admittedly are not in the category of local authority or Government. These payments were made during the year 2013-2016 and during this period, that is, prior to issue of CBDT Circular dated 23.12.2017, there was no clarity as regard the deduction of tax on these payments. We are of the view that the assessee was under a bonafide belief that no tax is required to be deducted at source on such payments, firstly, for the reason that agreement was between DTCP, who is Governmental authority and licence was granted by the Government and EDC charges was directed to be paid to HUDA, therefore, this could led to reasonable cause that TDS was not required to be deducted; Secondly, DTCP had issued a clarification dated 29.06.2018 to the effect that no TDS was/is required to be deducted in respect of payments of EDC and this clarification issued by DTCP, covers both past and future as the words used are was/is. This shows that Governmental authority itself has demanded not to deduct TDS. In case even if tax was required to be deducted on such payment but not deducted under a bonafide belief then no penalty shall be leviable under section 271C of the Act as there was no contumacious conduct by the assessee. Our view is fully supported from the judgment of the Hon'ble Supreme Court in the case of **Commissioner of income tax vs bank of Nova Scotia, 380 ITR 550**, wherein the Hon'ble Court has held as under:

“2. The matter was pursued by the Revenue before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal vide order dated 31.03.2006 entered the following findings:

"11. We have carefully considered the rival submissions. In the instant case we are not dealing with collection of tax u/s 201(1) or compensatory interest u/s 201(1A). The case of the assessee is that these amounts have already been paid so as to end dispute with Revenue. In the present appeals we are concerned with levy of penalty u/s 271-C for which it is necessary to establish that there was contumacious conduct on the part of the assessee. We find that on similar facts Hon'ble Delhi High Court have deleted levy of penalty u/s 271-C in the case of Itochu Corporation 268 ITR 172 (Del) and in the case of CIT v. Mitsui & Company Ltd. 272 ITR 545.

Respectfully following the aforesaid judgments of Hon'ble Delhi High Court and the decision of the ITAT, Delhi in the case of Television Eighteen India Ltd., we allow the assessee's appeal and cancel the penalty as levied u/s 271-C."

3. Being aggrieved, the Revenue took up the matter before the High Court of Delhi against the order of the Income Tax Appellate Tribunal. The High Court rejected the appeal only on the ground that no substantial question of law arises in the matter.

4. On facts, we are convinced that there is no substantial question of law, the facts and law having properly and correctly been assessed and approached by the

Commissioner of Income Tax (Appeals) as well as by the Income Tax Appellate Tribunal. Thus, we see no merits in the appeal and it is accordingly dismissed.”

12. *The above judgment has been followed by the Coordinate Bench of the ITAT DELHI in the case of DCIT TDS) , ACIT, TDS AND JCIT, TDS, Dehradun Versus The Joint Secretary Organizing Committee For Winter Games whereby the penalty levied under section 271C has been deleted by recording the following findings:*

“31. We have carefully considered the rival contentions and perused the orders of the lower authorities. On looking to the facts of the case as discussed by us in appeal of the assessee and revenue in 201(1) and 201(1A) proceedings above, we find that the belief of the assessee is bonafide and failure to deduct tax at source u/s 194C of the Act is for a reasonable cause. The ld Assessing Officer could not show any contemptuous conduct on part of the assessee for non-deduction of tax at source. There could also not be any reason for non-deduction as assessee has made most of the payments to the public sector undertaking. The Hon'ble Supreme Court in the case of CIT Vs. Bank of Nova Scotia in 380 ITR 550 has approved the decision of the Hon'ble Delhi High Court wherein, it has been held that it is necessary to establish 'contumacious conduct' on the part of the assessee for failure to deduct tax at source for levy of penalty u/s 271C of the act. In the present case, all the recipients have also furnished a certificate that they have received the payment. In view of this, we reverse the order of the ld CIT (A) confirming the levy of the penalty of ₹ 1152461/- u/s 271C of the Act in absence of any finding to show

contumacious conduct on the part of the assessee. Ld OA is directed to delete the penalty levied u/s 271C of the act. Accordingly, appeal of the assessee in ITA No. 1576/Del/2015 for AY 2010-11 is allowed.”

Similarly in the case of Virgin Mobile India Pvt. Ltd versus JCIT (TDS) , Range-51, Room No. 406, New Delhi No.- ITA No. 3431/Del/2015 dt. November 28, 2018, the Coordinate Bench of ITAT has deleted the penalty levied under section 271C of the Act.

13. In view of the above facts and the analysis, we hold that there was a reasonable cause for non-deduction of tax at source by the assessee company. Further, in the absence of any findings that the assessee has deliberately avoided the TDS provision and as such there is no contumacious conduct on the part of the assessee. Accordingly, we reverse the findings of the lower authorities and direct the AO to delete the penalty for all the three years.

14. In the result, all the three appeals of the assessee are allowed. ”

10. Accordingly following the aforesaid observations, we hold that no penalty is leviable u/s 271C and same is directed to be deleted.

11. In the result appeals of the assessee are allowed.

Order Pronounced in the open court on 13th September, 2019.

sd/-

(DR. B.R.R.KUMAR)
ACCOUNTANT MEMBER

sd/-

(AMIT SHUKLA)
JUDICIAL MEMBER

Dated: 13/09/2019

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

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ITAT, New Delhi