IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'H' : NEW DELHI)

BEFORE SH. ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER

ITA No. 4940/Del/2019, A.Y. 2014-15
ITA No. 4941/Del/2019, A.Y. 2015-16
ITA No. 4942/Del/2019, A.Y. 2017-18

T.S. REALTECH PRIVATE LIMITED E-26, PANCHSHEEL PARK NEW DELHI – 110017 PAN : AADCK3222C	VS.	ACIT, RANGE-76 NEW DELHI
(APPELLANT)		**(RESPONDENT)**

Assessee by	Sh. R.S. Ahuja, CA
Revenue by	Sh. M. Baranwal, Sr. DR

Date of hearing:	05.07.2022
Date of Pronouncement:	12 .07.2022

ORDER

PER ANUBHAV SHARMA, JM:

The assessee has filed the two appeals against orders dated 30.04.2019 for the assessment year 2014-15 & 2017-18 and third appeal is directed against the order dated 09.05.2019 for assessment year 2015-16 passed by the CIT(A)-31, New Delhi (hereinafter referred as Ld. First Appellate Authority or in short Ld. 'FAA') arising out of an appeal before it against the order dated 24/01/2018 passed u/s 271C of the Income Tax Act, 1961 (hereinafter referred as 'the Act') by the AO-CPC, Bangalore (hereinafter referred as the Ld. AO).

The appeals raise similar grounds so to avoid contradictory findings. They are adjudicated by this common order and for convenience the facts and grounds of AY 2014-15 are being taken on record.

2. The facts in brief are the Assessee company is a private limited company incorporated on 01.07.2006 and is engaged in the business of Development of housing and commercial projects. Appellant company paid External Development Charges, hereinafter referred to as EDC, to Haryana Urban Development Authority, hereinafter referred to as HUDA, during F.Y. 2013-14 Rs. 3,63,70,000/-. The appellant Company has claimed that it has been paying the said EDC to HUDA, being a state Government Organisation, without deducting of tax treating it as an exempt entity as per section 196 of the Income Tax Act. The Assessing Officer passed the order u/s 271(C) of the income tax act imposing a penalty of Rs. 7,27,400/- for non deduction of TDS under section 194C on the basis of Office Memorandum issued by CBDT dated 23rd December, 2017 vide F. No. 370133/37/2017-TPL wherein the payment to HUDA has been treated as a payment to development authority of state government of Haryana and not to Government of Haryana. Thereby the provision of TDS was made applicable on EDC payments by the developers to HUDA.

2.1 The background to the issue are that a survey u/s 133A was carried out at the business/office premises of the Haryana Urban Development Authority (HUDA) by the DCIT (TDS), Panchkula who forwarded the details and findings of the survey. On detailed examination of the survey report and verification of the facts of the case of assessee, the LD.AO noticed that TDS was not made on payment of External Development Charges (EDC) and accordingly penalty u/s 271C was initiated. In response, the assessee filed stating that provisions of section 194C. were not applicable on payment, of EDC because the payment was made to the Government and not to the HUDA.

The Ld. Ld. AO examined the submission of assessee and mentioned that in the present case, the assessee has paid EDC to HUDA for carrying out civil works, construction work and other related works. The Ld. AO noticed that demand drafts for EDC payment were issued in the name Chief Administrator, HUDA. The Ld. AO further mentioned that HUDA Develops Urban Infrastructure for which it was receiving EDC charges from various parties. Although EDC was shown as Current liability in the balance sheet by the HUDA, but in the Notes to the accounts forming part of balance sheet shows that EDC are received for execution for various External Development works and as and when development work is carried out, the EDC liabilities are reduced accordingly. Then the Ld. AO examined business model of HUDA and on the basis of statement recorded during the course of survey of Sh. Ram Kumar, Senior Ld. AO, HUDA, he noticed that HUDA was engaged in acquiring land, developing it and finally handing over to the customers for a price. The lands were developed by HUDA though the same were identified and acquired by Urban Estate Department, Haryana Government, but the ownership and possession was transferred to HUDA for payment of consideration. The Ld. AO also examined scope of External Development Work (EDW) as per Haryana Development and Regulation of Urban Area Act, 1975 which includes water supply, sewerage, drains, necessary provision for treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal etc. The EDC charges are fixed by HUDA from time to time by issuing letters/circulars. It was noted by the Ld. AO that all the demand drafts for EDC charges were drawn in favour of Chief Administrator, HUDA though routed through Director General, Town and Country Planning, Government of Haryana. In view of the above mentioned facts, the Ld. AO was of the view that HUDA is taxable entity who was rendering services for External Development Work and receiving the consideration for such services. Accordingly, in view of Circular No. 681 of CBDT dated 08/03/1994, the TDS

was applicable on EDC charges. Thereafter, the LD.AO has reproduced various circulars dated 15.01.2002, 08.07.2002, 25.09.2009 and 14.08.1996 issued by Accounts Officer, for Chief Controller of Finance, HUDA, Panchkula vide which EDC charges were fixed. Finally, the Ld. AO was of the view the assessee has paid EDC for the works carried out by HUDA and hence the same was liable for TDS u/s 194C Ld. AO also noticed that certain tax deductor sought clarification regarding applicability of TDS provisions on EDC charges paid to HUDA and the *CBDT* vide *OI in F.No. 370133/37/2017-TFL* dated *23/12/2017* has clarified that when EDC is paid to Government of Haryana, the same would be exempt from TDS provisions. It was further clarified by the CBDT that in the instant case, it appears that the developer has made the payment in the nature of EDC not to the Government but to the HUDA which is a Development Authority of State Government of Haryana and is a taxable entity under the Income Tax Act, 1961 and hence TDS provisions would be applicable on EDC payable by the developer to HUDA.

2.2 Accordingly after referring to the provisions of section 271C and the decisions of the various authorities particularly the decision of Hon'ble High Court in the case of ***CIT(TDS) vs M/s IKEA Trading Hong Kong Ltd in 179 Taxman 309 (Del),*** the Ld. AO has held that there is no time limit for initiation of penalty, and for imposition of penalty u/s 271C, order u/s 201(1)/201(1A) is not necessary. Since there was no reasonable cause within the meaning of section 273B for non deduction of TDS on EDC, the Ld. AO imposed penalty and aggrieved assessee had filed appeal before the Ld. CIT(A) which was dismissed.

3. Now before the Tribunal the assessee has come in appeal raising following grounds :-

" (A) That on the facts & circumstances of the case the learned ITO & the CIT(A) erred in :

a) Levying a penalty of Rs.7,27,400/- on the facts and circumstances of the case.

b) Imposing a penalty in spite of the fact that the Assessee has paid EDC to HUDA treating it as Development Authority of Haryana Govt, being an exempt entity u/s 196 of the Income tax Act.

c) Imposing penalty on the basis of Office Memorandum issued by CBDT dated 23rd December 2017 vide ***F.*** No.370133/37/2017-TPL wherein the payment to HUDA is a payment to a development authority of a State Government of Haryana and not to the Govt. Therefore, the provisions of TDS would be applicable on EDC paid.

d) In applying the Office Memorandum dated 23.12.2017 on payments made in preceding years retrospectively.

e) Department circulars and notifications are not binding on the Assessee and therefore the penalty needs to be quashed.

f) The AO has also noted in detail the accounting entries made by HUDA in its balance Sheet which indicates that EDC is a capital receipt & therefore as the per the judgment of the Hon'ble Supreme Court M/S New Okhla Industrial vs Commissioner Income Tax on 2 July, 2018 no TDS is required to be deducted. In any case if two views are possible no penalty is leviable.

g) In treating HUDA which is a Statutory body under Haryana Urban Development Authority Act 1977 as a non-govt body. The Hon'ble Allabahad High Court in the case of 'CIT (TDS) Vs. Canara Bank' 386 ITR 504 (All.) has elaborately discussed the distinction between a corporation established under an Act and body incorporated under an Act. The Hon'ble High Court while relying upon the decision of the Hon'ble Supreme Court in the case of Dalco Engineering (P.) Ltd. v. Satish Prabhakar Padhye [2010] 4 SC C378 has observed that a company incorporated under the Companies Act is not created by the Company Act but comes into existence in accordance with the provisions of the said Act and that there was a well-marked distinction between body created by a statute and a body which after coming into existence is governed in accordance with the provisions of a statute.

h) There is sufficient detail & case laws to say that TDS on HUDA on EDC which is a capital payment then penalty is not leviable. No penalty on technical or venial ground.

i) There being no escapement of tax, as HUDA has fulfilled all its tax obligations, No penalty can be levied. Hon'ble Supreme Court in the case of M/s Hindustan Steel Ltd. vs State of Orissa (1972) 83 ITR 26(SC) and decision of Hon'ble High Court of Delhi in Escorts Finance Ltd. (2009) 226 CTR (Del) 105 wherein it was held that where facts are clearly disclosed in the return, penalty cannot be levied merely because an amount is not allowed or taxed as income.

j) One single penalty order passed for all 3 years FY 2013-14, FY 2014-15 &

2016-17.

(B) The Assessee craves leave to add, alter or amend the grounds of appeal at & before the hearing."

4. Heard and perused the record.

5. On behalf of the assessee the Ld. AR submitted that the payments made to HUDA were only for the purpose of facilitating the payments due on account of EDC charges towards Town and Country Planning, Government of Haryana. It was submitted that when the payments are made to the Government or local authority, no tax is required to be deducted. He also referred to judgment of ITAT Delhi Bench in **ITA no. 6907/Del/2019 M/s. Perfect Constech (P) Ltd. vs. Additional Commissioner of Income Tax, M/s Sarv Estate Pvt. Ltd. V JCIT, Range 77ITA no 5337 and 5338/Del/2019 and M/s Santur Infrastructure Pvt Ltd V ACIT Range 77 ITA no 6844/Del/2019** to contend that in regard to similar matter the co-ordinate Benchs have held that there was no default of non-deduction of TDS in regard to payments made to HUDA on account of EDC charges.

5.1 On the other hand, Ld. DR relied the Circular of CBDT whereby directions have been issued for deduction of TDS in payments made to authorities like HUDA. It was submitted that HUDA was neither Government department nor a local authority. Therefore any payment being made to it was to be subjected to TDS u/s 194C of the Act.

6. Giving thoughtful consideration to the matter on record, the Co-ordinate Bench orders in **M/s. Perfect Constech P. Ltd. case** and in **RPS Infrastructure Ltd. vs. ACIT ITA No. 5805, 5806, 5349/Del/2019**, which is also relied in **M/s Santur Infrastructure Pvt Ltd V ACIT (supra)** cast sufficient light on the controversy where in it is held that assessee builder or developers or colonizers are not required to deduct tax at source at the time of payment of EDC to the HUDA.

7.1 As for convenience the relevant findings at para no. 5 in **M/s. Perfect**

Constech Pvt. Ltd (supra) is reproduced;

> *"**5**. We have heard the rival submissions and have also perused the material on record. It is seen that in Para 4.3.2, subparagraph (iv) of the order passed u/s 271C of the Act, the LD.AO has himself noted that the demand draft of the EDC amounts are drawn in favour of the Chief Administrator, HUDA though routed through the Director General, Town and Country Planning, Sector-18, Chandigarh. He has also referred to the notes to accounts to the financial statements of HUDA wherein it has been stated that "other liabilities also include external development charges received through DGTCP, Department of Haryana for execution of various EDC works. The expenditure against which have been booked in Development Work in Progress, Enhancement compensation and Land cost." Undisputedly, the payment of EDC was issued in the name of Chief Administrator, HUDA. It is also not in dispute that HUDA has shown EDC as current liability in the balance sheet, but in the 'Notes' to the Accounts Forming part of the Balance Sheet, it has been shown that EDC has been received for execution of various external development works and as and when the development works are carried out, the EDC's liabilities are reduced accordingly. It is also not in dispute that HUDA is engaged in acquiring land, developing it and finally handing it over for a price. It is also not in dispute that EDC is fixed by HUDA from time to time. However, the fact of the matter remains that payment has been made to HUDA through DTCP which is a Government Department and the same is not in pursuance to any contract between the assessee and HUDA. Thus, the payment of EDC is not for carrying out any specific work to be done by HUDA for and on behalf of the assessee but rather DTCP which is a Government Department which levies these charges for carrying out external development and engages the services of HUDA for execution of the work. Therefore, it is our considered view that the assessee was not required to deduct tax at source at the time of payment of EDC as the same was not out of any statutory or contractual liability towards HUDA and, therefore, the impugned penalty was not leviable. We note that similar view has been taken by the Co-ordinate Benches of ITAT Delhi in the cases of Santur Infrastructure Pvt. Ltd. vs. ACIT in ITA 6844/Del/2019 vide order dated 18.12.2019, Sarv Estate Pvt. Ltd. vs. JCIT in ITA No.5337 & 5338/Del/2019 vide order dated 13.09.2019 and Shiv Sai Infrastructure (Pvt.) Ltd. vs. ACIT in ITA No.5713/Del/2019 vide order dated 11.09.2019. A similar view was also taken by the Co-*

ordinate Bench of ITAT Delhi in case of R.P.S Infrastructure Ltd. vs. ACIT in 5805, 5806 & 5349/Del/2019 vide order dated 23.07.2019. Therefore, on an identical facts and respectfully following the orders of the Co-ordinate Benches as aforesaid, we hold that the impugned penalty u/s 271C of the Act is not sustainable. The order of the Ld. CIT (A) is set aside and the penalty is directed to be deleted."

7.2 Similarly para no. 11 in **the case RPS Infrastructure Ltd (Supra)** is also reproduced below where in the question of justification of penalty under Section 271C of the Act was also examined;

*"**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 LD.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 assesse 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:*
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> *"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 h*aving *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."*

8. Further in case of **TDI Infrastructure Ltd Versus Addl CIT, ITA no 6653/Del/2019,** vide order dated 6/7/2022, the Bench, to which one of us was in quorum, had taken into consideration a clarification memo no DTCP/ACCFTS/AO(AQ) /CAO/2894/2018 dated **19.06.18** issued by the Directorate of Town and Country Planning, Haryana which made it very obvious that receipts on account of EDC are being deposited in the Consolidated Fund of the State, accordingly directions were issued to colonizer like present assessee, to not deduct TDS. Once the fact of receipt of amounts received by HUDA being deposited in Consolidated Fund of State is established, there can be no second opinion that Assessee was rightly directed by DTCP, Haryana to not deduct the TDS. Even otherwise no intentional default is attributed to assessee and the default, if any, was on account of ambiguity which had arisen out of a direction contained in a statutory document, so no penalty can be justified u/s 271C of the Act, which is meant to address contumacious conduct.

9. As a wholesome effect of above, the Bench is of considered opinion that levy of penalty u/s 271C of the Act cannot be sustained. The grounds raised in the appeals are allowed. Appeals are accordingly allowed. The impugned orders are set aside.

Order pronounced in open court on this 12th day of July, 2022.

Sd/-	**Sd/-**
(ANIL CHATURVEDI)	**(ANUBHAV SHARMA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date:- 12.07.2022
Binita, Sr.P.S

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI