

**IN THE INCOME TAX APPELLATE TRIBUNAL
“C” BENCH : BANGALORE**

**BEFORE SHRI GEORGE GEORGE K., JUDICIAL MEMBER
AND
Ms. PADMAVATHY S, ACCOUNTANT MEMBER**

ITA No.244/Bang/2022
Assessment year : 2012-13

Ozone Properties Pvt. Ltd., No.35/1, Yellappa Chetty Layout, Ulsoor Road, Bangalore North, Bangalore – 560 042. PAN: AAACO 6672M	Vs.	The Assistant Commissioner of Income Tax, TDS, Circle 2(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri J.V. Kodhandapani, CA
Respondent by	:	Smt. Priyadarshini Baseganni, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	11.08.2022
Date of Pronouncement	:	18.08.2022

ORDER

Per Padmavathy S., Accountant Member

This appeal by the assessee is against the order of the CIT(Appeals)-11, Bangalore dated 22.2.2022 for the assessment year 2012-13.

2. In this appeal, the assessee is contending the issue of treating it as an ‘assessee in default’ u/s 201(1) of the Income-tax Act, 1961 [the

Act] and levy of interest u/s. 201(1A) of the Act on the following grounds :-

- (a) Ground No 1 - The order passed by the Ld. AO is without jurisdiction on the facts and circumstances of the case and bad in law.
 - (b) Ground No. 2: The order passed by the Ld. AO is beyond reasonable time period and hence is barred by time on the facts and circumstances of the case.
 - (c) Ground No. 3: The order passed by the Ld. AO under Section 201 of the Act is bad in law in as much as the provisions of Section 201 of the Act does not levy any charge on the Assessee to pay the tax at source not deducted but merely treats him as an "assessee in default" and the order is passed not in consonance and read with the provisions of Sec 191.
 - (d) Ground No. 4: The order passed by the Ld. AO is bad in law in as much as the provisions of Section 193 of the Act are not applicable to the facts and circumstances of the case of the Appellant.
 - (e) Grounds No. 5: The impugned order passed by the Ld. AO under section 201 in so far as it is against the Appellant is opposed to and not based on applicable laws, weight of evidence, books of accounts, tax returns, probabilities, facts and circumstances of the Appellant's case.
 - (f) Ground No. 6: The Ld. AO has erred in assessing the case of the appellant and passing order of assessment when the first and the mandatory requirement of assuming jurisdiction over the case of the appellant did not exist.
3. The Ld. CIT(A) -11 erred in passing the order u/s 250 dismissing the appeal in the manner in which it is done and is not considering the facts & circumstances placed before him for consideration.
 4. The Appellant craves leave to add, alter, substitute, delete, amend any or all of the grounds of appeal urged above.
 5. In view of the above and other grounds that may be urged at the time of the hearing of the appeal, the Appellant prays that the appeal may be allowed in the interest of justice and equity.”

3. The assessee is a private limited company engaged in the business of real estate and development of residential apartments, layouts, hospitality, schools and colleges and commercial buildings. For the AY 2012-13, the assessee filed return of income on 22.9.2012 declaring a total loss of Rs.2,76,83,545. The return was assessed u/s. 143(3) on a total loss of Rs.2,29,34,850, u/s. 153A on 6.9.2016 on a total loss of Rs.2,34,07,107 and u/s. 153C of the Act determining a total loss of Rs.2,34,07,107. In all the returns and assessments an amount of Rs.36,16,438 was added as disallowance u/s. 40(a)(ia) for non-deduction of tax at source u/s. 194A.

4. The AO noticed that the assessee had debited an amount of Rs.36,16,438 towards finance cost as interest accrued against Compulsory Convertible Debentures [CCDs] on which tax was not deducted. A notice u/s. 201(1) & 201(1A) of the Act dated 5.6.2017 was issued to the assessee asking to show cause why it should not be held as an assessee in default u/s 201(1) and interest levied u/s. 201(1A). The assessee submitted before the AO that provision for interest is reversed at the beginning of the following year before the due date for remittance of TDS and there was no liability to be discharged before the due date of payment of TDS. The assessee also stated that it was a mere provision in the books of account and no invoice or debit note for interest was received. However, the AO did not accept the submissions of the assessee and proceeded to treat the assessee as an assessee in default u/s. 201(1) and levied interest u/s. 201(1A) of the Act.

5. Aggrieved, the assessee preferred appeal before the CIT(Appeals). Before the CIT(Appeals), the assessee reiterated the submissions made before the AO by relying on the decision in *Karnataka Power Transmission Corporation Ltd. v. DCIT, 383 ITR 59 (Kar)* and *Toyota Kirloskar Motor (P) Ltd. v. ITO, 128 taxmann.com 266 (Kar)*. The CIT(Appeals) rejected the submissions of the assessee and proceeded to confirm the order of the AO. Aggrieved, the assessee is in appeal before the Tribunal.

6. The ld. AR submitted that the assessee has received foreign direct investment from an entity in Mauritius by way of CCDs. The Assessee during the AY 2012-13 made a provision of Rs.36,16,438 towards proportionate interest cost for the period upto 31.3.2012. The ld. AR submitted that TDS was not deducted u/s. 195 as interest neither accrued to the lender nor was due for payment and no claim was made by the investor. He further submitted that though the interest was provided, the assessee and the lender came to an understanding that there will be an interest moratorium until the Tech Park for which the funds were borrowed becomes fully operational, based on which the interest was subsequently reversed at the beginning of the next financial year.

7. The ld. AR drew our attention to the interest waiver letter given by the lender in this regard (pg. 32 of PB). It was also submitted that there was no subsequent payment of interest by the assessee and the payee did not receive any interest from the assessee in order to attract

TDS provisions. In this regard the ld AR relied on the decision of the coordinate Bench of the Tribunal in the case of *Biocon Ltd. in ITA No.1248/Bang/2014 dated 21.3.2022*.

8. The ld. DR submitted that the assessee has entered into an agreement with the lender for issue of CCDs and as per the terms of the agreement, the assessee was liable to pay interest to the lender. The ld DR also submitted that the provision that got reversed in the beginning of the subsequent financial year, whether was provided for again at the end of the next financial year needs to be factually verified. The ld DR supported the order of the CIT(Appeals) where in para 7.10 which is extracted below, the CIT(A) has stated that section 195 does not use the expression "income", but used the expression "sum" and therefore tax deduction has to be made on the sum paid:-

"7.10 Thus the ITAT held that since the assessee had itself made the disallowance under Sections 40(a)(i) & 40(a)(ia) of the Act in the return of income filed, it had accepted its obligation to deduct TDS and hence could not plead that it was not "assessee in default" and therefore held the taxpayer was liable for tax deduction at source and for payment of interest on default thereof. The ITAT held that even though there was disallowance under section 40(a)(ia) / 40(a)(i), it did not mean that provisions of Section 201 were not attracted. The ITAT held that the argument that provisions operate on income and not on payment was erroneous as the Sections 194C,194J and 195 do not use the expression "income" but use "sum" and tax deduction has to be on "the sum paid". In the case under consideration, as discussed supra, the appellant has accepted the order of the AO as passed under Section 143(3) of the Act and as such the ratio of the above decision of ITAT applies to its case. In the case of **Solar Automobiles India (P.) Ltd. v. Deputy Commissioner of Income-tax (TDS), Circle 18(2) [2012] 17 taxmann.com**

(Karnataka), the jurisdictional High Court held that once the interest was credited to the relevant account in the books, the deductor was liable to deduct tax at source even if the interest was not actually paid to the creditors due to losses. ”

9. We have considered the rival submissions and perused the material on record. As per the terms of the debenture agreement, the assessee is liable to pay interest to the lender. It was submitted that the interest was waived by the vendor from the beginning and therefore the interest was reversed immediately in the beginning of the next financial year. The coordinate Bench of the Tribunal in the case of *Biocon Ltd. (supra)* has considered a scenario where no payment is required to be made and the entire amount of provision is reversed in the subsequent year and the applicability of TDS liability on the same. The Tribunal held as follows:-

“10.3 The third scenario is that no payment was required to be made in the succeeding year, since it was ascertained that there was no liability to pay the Amount. Accordingly, entire amount of provision was reversed in the succeeding year. In this scenario, there will be no liability to deduct tax at source from the amount of provision created as on 31.3.2012, as it was found that the said amount is not payable at all to any one. Hence this provision amount cannot be linked to any payee, in which case, there will not be any liability to deduct tax at source from the provision amount. Hence, in our view, the provisions of sec. 201 will not be applicable in this scenario.”

10. From the above, it is clear that if the liability has not crystallized and no payment is required to be made against the provision, then there will be no liability to deduct tax at source against the provision made. We notice that the waiver letter that is submitted before us dated 9.10.2014 does not contain the details as to the period from when the

interest cost is not chargeable and interest is kept in abeyance until when. We also see merit in the contention of the Id. DR that the status of reversal and provision of interest in the subsequent financial year has to be substantiated factually.

11. In view of the above discussion we remit this issue back to the AO with a direction to verify the reversal of the provision made as on 31.03.2012 and the status of liability to pay interest on the CCDs in subsequent periods and decide the allowability in the light of the decision in the case of *Biocon Ltd. (supra)*. Needless to mention that the assessee may be given opportunity of being heard. It is ordered accordingly.

12. In the result, the appeal by the assessee is allowed for statistical purposes.

Pronounced in the open court on this 18th day of August, 2022.

Sd/-
(GEORGE GEORGE K.)
JUDICIAL MEMBER

Sd/-
(PADMAVATHY S.)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 18th August, 2022.

/Desai S Murthy/

Copy to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.