

IN THE INCOME TAX APPELLATE TRIBUNAL

(DELHI BENCH 'G' : NEW DELHI)

**BEFORE SH. SHAMIM YAHYA, ACCOUNTANT MEMBER
AND
SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No. 1957/Del/2020
(Assessment Year : 2016-17)

Shree Vardhman Developers Private Limited, 301-311, Indraprakash Building, 21, Barakhamba Road, New Delhi PAN : AACCV1495M	Vs.	JCIT, Range-77 New Delhi
Appellant		Respondent

Assessee by	Ms. Gunjan Jain, Adv.
Revenue by	Sh. Abhishek Kumar, Sr. DR

Date of hearing:	19.10.2022
Date of Pronouncement:	07.11.2022

ORDER

Per Anubhav Sharma, JM :

The assessee has filed this appeal against the order dated 12.10.2020 passed by the Commissioner of Income Tax (Appeals)-23, New Delhi confirming the penalty order by the Assessing officer u/s 271C of the Income Tax Act, 1961.

2. The assessee company is a builder and deals in construction activity. It had made Infrastructure Development Charges (IDC) of Rs. 4,10,85,000/- to the

Director General Town and Country Planning, Haryana (DGTCP). A proposal of initiation of penalty u/s 271C for relevant F.Y. 2015-16 was received from ACIT, Circle 17(1), New Delhi and it was observed that amount of Rs. 4,10,85,000/- was paid by the appellant to DTCP, Haryana without deduction of tax at source. It was observed that since IDC/ IAC have income element, therefore, it should have being subjected to TDS. Accordingly, penalty order dated 27.02.2020 was passed and the same was challenged before Ld. CIT(A). The appeal was however dismissed by the Ld. CIT(A) on the basis that the penalty order u/s 271C of the Act has been passed by JCIT, Range-77, New Delhi and the notice of demand u/s 156 of the Act sent along with penalty order specified that appeal has to be filed before CIT(A)-41, New Delhi. Accordingly, the ld. CIT(A)-23, New Delhi dismissed the appeal being wrongly filed in that office.

3. The appellant has challenged the order of Ld. CIT(A) on following grounds :-

1. *Under the facts and circumstances of the case, Ld. First Appellate Authority has grossly erred in passing orders u/s 250 of the Income Tax Act, 1961, without giving an opportunity of being heard to the assessee which is against the principal of natural justice, injudicious and bad at law.*

2. *Under the facts and circumstances of the case, Ld. First Appellate Authority has grossly erred in dismissing the appeal without giving an opportunity to the assessee to rectify the mistake in filing of appeal before correct jurisdictional which is against the principal of natural justice, injudicious and bad at law.*

3. *Under the fact and circumstances of the case, Ld. First Appellate Authority has failed to dispose the appeal on merits and passed his order u/s 250 without appreciating the facts of the case which is injudicious, unwarranted and bad at law.*

4. *Under the facts and circumstances of the case, the Ld. Assessing Authority has grossly erred in arriving at a finding that the assessee has made default on account of non- deduction of tax at source u/s 194C amounting to Rs 8,21,700/-.*

5. *Under the facts and circumstances of the case, Id. A.O. has grossly erred in ignoring the fact that the agreement as well as payments for Infrastructure Development Charges (IDC) has been made to Department of Town & Country, Haryana (DTCP) which*

itself is a government department and therefore deduction of tax u/s 194C is not warranted.

6. *Under the facts and circumstances of the case, the Id. Assessing Authority has passed order without application of mind that the Department of Town & Country, Haryana (DTCP) itself is a nodal department to enable regulated urban development in the state of Haryana.*

7. *Under the facts and circumstances of the case, the Ld. Assessing Authority has grossly erred in arriving at a finding that the assessee has made a default of the provisions of section 194C on payments of IDC/IAC to DTCP as the same cannot be termed as payment to contractors.*

8. *Without prejudice to the above and under the facts and circumstances of the case, ld. Assessing Authority has grossly erred in passing the penalty orders u/s 271C, as penalty should not be levied in accordance to the provisions of section 273B of the Income Tax Act, 1961 as the appellant has proved that there was reasonable cause for non- deduction of tax at source on the payment of IDC/IAC.*

9. *The appellant prays for leave to add, amend, alter or withdraw any grounds of appeal.”*

4. Heard and perused the record.

5. It was submitted on behalf of the appellant that the matter in issue as to if EDC charges require deduction of TDS has been decided in favour of the assessee builders and judgment in *M/s. Santur Infrastructure Pvt. Ltd. vs. ACIT, ITA No. 6844/Del/2019; Sarv Estate Pvt. Ltd., New Delhi vs. JCIT, New Delhi ITA no. 5337 & 5338/Del/2019 ; Shiv Sai Infrastructure, New Delhi vs. ACIT, New Delhi ITA No. 5713/Del/2019* have been relied. Ld. DR however supported the order of ld. CIT(A).

6. Appreciating the matter on record, it can be observed that ld. CIT(A) has not disposed of the first appeal before it on merits but has dismissed it as it was wrongly filed before it and the appeal was required to be heard by CIT –41. Thus, there is no finding on merits which can be appreciated in this appeal. However, if Section 251(1)(b) of the Act defining powers of Commissioner is considered it provides that *“in an appeal against an order imposing the penalty, CIT(A) may confirm or cancel such order or vary it so as either to enhance or to reduce the penalty”*. However, here the appeal has been dismissed without

exercising any of the aforesaid powers. In a case where appeal was wrongly filed appropriate course open to Ld. CIT(A) was to have not admit the appeal and to reject the appeal to be presented before appropriate appellate authority. However, once admitted then the disposal should have been in accordance with powers defined u/s 251(1)(b) of the Act only that not being done is a patently legality and the course open to this Tribunal is to either restore it to the files of appropriate appellate authority to decide afresh.

7. However, that would not serve the ends of justice as the issue involved seems to be squarely covered by the co-ordinate bench decision cited by Ld. AR and also a judgment of a Bench on which one of us (the judicial member) was in quorum. In that case **M/s. Tulip Infratech Pvt. Ltd. vs. ACIT ITA No. 6734, 6735 & 6736/Del/2019** it was observed;

“5. On behalf of the assessee the Ld Sr. Advocate 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. Ld. Sr. Counsel specially relied a clarification dated 19.06.2018 issued by Town and Country Planning, Government of Haryana available on page no. 1 of the paper book to impress that HUDA is merely executing agency and there was specific direction of the State Government of Haryana, Directorate of Town and Country Planning, Haryana directing that no TDS is to be deducted out of payment made to Government for EDC. 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 & ITA No. 5805, 5806, 5349/Del/2019 RPS Infrastructure Ltd. vs. ACIT to contend that in regard to similar matter the co-ordinate Bench has 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 clarification dated 19.06.2018 available on page no. 1 of the paper book makes 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.

7. The Co-ordinate Benches in **M/s. Perfect Constech P. Ltd. case and ITA No. 5805, 5806, 5349/Del/2019** title of the case **RPS Infrastructure Ltd. vs. ACIT** have held that assessee was not required to deduct tax at source at the time of payment of EDC.

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 LDAO 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;

“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 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."*

8. In the light of aforesaid, ground no. 4 to 8 are decided in favour of the assessee and **the appeal of assessee is allowed**. Impugned penalty order is set aside.

Order pronounced in the open court on 07th November, 2022.

-Sd/-
(SHAMIM YAHYA)
ACCOUNTANT MEMBER

-Sd/-
(ANUBHAV SHARMA)
JUDICIAL MEMBER

Date:07.11.2022

Binita, SR.P.S

Copy forwarded to:

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

ASSISTANT REGISTRAR
ITAT, NEW DELHI