

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH : C : DELHI

BEFORE SHRI C.M. GARG, JUDICIAL MEMBER
AND
SHRI M. BALAGANESH, ACCOUNTANT MEMBER

ITA No.2095/Del/2018
Assessment Year: 2012-13

KMP Expressways Ltd.,
E-9, 3rd Floor,
South Extn. Part II,
New Delhi.

Vs ACIT,
Circle-75(1),
New Delhi

PAN: AACCK9384Q

(Appellant)

(Respondent)

Assessee by	:	Shri G.S. Grewal, CA & Ms Harsimran Grewal, CA
Revenue by	:	Shri Anuj Garg, Sr. DR
Date of Hearing	:	17.05.2023
Date of Pronouncement	:	01.06.2023

ORDER

PER M. BALAGANESH, AM:

This appeal in ITA No.2095/Del/2018 for AY 2012-13 arises out of the order of the Commissioner of Income Tax (Appeals)-41, New Delhi [hereinafter referred to as 'Id. CIT(A)', in short] in Appeal No.488/2016-17/CIT(A)-41 dated 01.02.2018 against the order of assessment passed u/s 263/201(1)/201(1A) of

the Income-tax Act, 1961 (hereinafter referred to as 'the Act') dated 28.12.2016 by the Assessing Officer, Circle-75(1), New Delhi (hereinafter referred to as 'Id. AO').

2. The assessee has raised the following grounds of appeal:-

"1. That the Id. CIT(A) has erred by upholding the appellant in default for the amount of Rs. 1,32,27,488/- as default u/s 201(1) on non-payment of TDS.

2. That the Id. CIT(A) has erred by upholding the appellant in default for the amount of Rs.2,78,95,420/- as interest u/s 201(1 A) on non-payment of TDS.

3. The appellant craves leave to add, alter, amend, modify or delete all or any of the above ground of appeal at any time on or before the hearing as may be advised."

3. We have heard the rival submissions and perused the material available on record. The assessee was awarded a project for the development, design, financing, producing, engineering & construction, operation and maintenance of 135.65 kilometre-long Kundli- Manesar- Palwal (KMP) Expressway in the State of Haryana on Build, Operate and Transfer (BOT) basis. In the course of execution of this contract, the assessee had to make several payments falling within the ambit of various provisions of Chapter XVII-B of the Act with regard to TDS compliance. The only dispute before us is whether the assessee could be treated as an 'assessee in default' in respect of various payments made to SREI Infrastructure Finance Ltd. The Id. AO, on going through the TDS returns filed for the various quarters observed that the assessee had deducted tax at source while making payment to SREI Infrastructure Finance Ltd, but had not deposited the same to the account of the Central Government. Accordingly, the assessee was treated as an 'assessee in default' u/s 201(1) of the Act and, consequentially, interest u/s 201(1A) of the Act was charged on the assessee.

Before the Id.CIT(A), the assessee placed on record copy of Form No.26A containing the Chartered Accountant's certificate confirming the fact that the payee, i.e., SREI Infrastructure Finance Ltd had duly accounted the receipts from the assessee as its income and paid due taxes thereon. Accordingly, the assessee pleaded that in view of the second proviso to section 201(1) of the Act, the assessee cannot be treated as an 'assessee in default'. The Id.CIT(A), however, observed that the second proviso to section 201(1) of the Act was introduced in the statute only w.e.f. 01.07.2012 and, hence, the said certificate filed by the assessee in Form No.26A from the Chartered Accountant of Payee cannot be used for the year under consideration as a shelter for not to be treated as an 'assessee in default. Aggrieved, the assessee is in appeal before us.

4. In our considered opinion, the second proviso to section 201(1) of the Act, though introduced w.e.f. 01.07.2012 have been held to be retrospective in operation by the decision of the Hon'ble Jurisdictional High Court in the case of *CIT vs. Ansal Landmark Township Pvt. Ltd., reported in 377 ITR 635*. Hence, the contention of the Id.CIT(A) in this regard is dismissed. However, we find that the Id. AO in his order had treated the assessee as an 'assessee in default' in respect of various payments made which falls within the ambit of provisions of sections 194C, 194A, 194I, and 194J of the Act. But on perusal of Form No.26A filed by the assessee, which is enclosed in pages 9-11 of the paper book, we find that only the payments that are covered u/ss 194A and 194J of the Act were included therein. The said certificate is silent with regard to the payments that are covered u/s 194I and 194C of the Act. Moreover, the figures mentioned in Form No.26A does not exactly match with the figures pointed out by the Id. AO in his order. Considering all these facts and circumstances, we deem it fit and

appropriate in the interest of justice and fair play, to restore this issue to the file of the Id. AO for *denovo* adjudication in accordance with law. The Id. AO is directed to apply the second proviso to section 201(1) of the Act which has been held to be retrospective in operation by the decision of the Hon'ble Jurisdictional High Court, referred to supra. The assessee is also directed to furnish complete reconciliation of the payments with the corresponding TDS element thereon and also reconcile the same with Form No.26A issued by the Chartered Accountant of SREI Infrastructure Finance Ltd. The assessee is also at liberty to furnish further fresh evidences, if any, in support of its contentions. Accordingly, the grounds raised by the assessee are allowed for statistical purposes.

5. In the result, the appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 01.06.2023

Sd/-

(C.M. GARG)
JUDICIAL MEMBER

Sd/-

(M. BALAGANESH)
ACCOUNTANT MEMBER

Dated: 01st June, 2023.

dk

Copy forwarded to:

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

Asstt. Registrar, ITAT, New Delhi