IN THE INCOME TAX APPELLATE TRIBUNAL, 'F' BENCH MUMBAI

BEFORE: SHRI AMIT SHUKLA, JUDICIAL MEMBER
&
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA No.3171/Mum/2022
(**Assessment Year :2018-19**)

M/s. Vivriti Cibus 013 2017 Windsor, 6th Floor Office No.604 CST Road Kalina, Santacruz(E) Mumbai – 400 098	Vs.	Income Tax Officer (TDS)-2(3)(3) Mumbai
PAN/GIR No.AACTV5503D		
(Appellant)	..	**(Respondent)**

Assessee by	Shri Percy Pardiwala
Revenue by	Shri Ujjawal Kumar Chavan
Date of Hearing	**04/09/2023**
Date of Pronouncement	**30/11/2023**

आदेश / O R D E R

PER AMIT SHUKLA (J.M):

The aforesaid appeal has been filed by the assessee against order dated 19/10/2022 passed by NFAC Delhi in relation to the order passed u/s.201 for the A.Y.2018-19.

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

"Ground No 1: Appellant being treated as 'assessee in default'

The Commissioner of Income-tax (Appeals) ['learned CIT(A)'] from the National Faceless Appeal Centre erred on facts and in law in dismissing the appeal filed against the order passed under section 201 ('the order") of the Income-tax, Act 1961 ('the Act) of the Income-tax Officer (TDS)-2(3)(3) ['learned AO'] and by treating the Appellant as 'assessee in default'

Ground No 2: Non-applicability of section 194LBC of the Act

The learned CIT(A) erred on facts and in law in upholding the order of the learned AO that tax was required to be deducted at source under section 194LBC of the Act on the amount of excess interest spread paid by the Appellant to the originator.

Without prejudice to the above, the learned CIT(A) ought to have held that, since the payee had furnished its income-tax return ('ITR') under section 139 of the Act had taken into account such sum for computing income in its ITR and had paid the sum tax due on the income declared by them in such ITR. The Appellant could not be regarded as an assessee in default merely because a certificate to this effect in the prescribed form could not be furnished.

Ground No 3: Non-grant of adjournment as requested

The learned CIT(A) erred in not granting sine die adjournments as requested by the Appellant.

Ground No 4: Levy of interest under section 201(1A) of the Act

The learned CIT(A) erred on facts and in law in levying interest under section 201(1A) of the Act.

3. The brief facts are that assessee, M/s. Vivriti Cibus 013 2017 is a securitization trust group which was created by M/s. Catalyst Trusteeship Ltd. to secure pool of loan receivables from

Annapurna Microfinance Pvt. Ltd (AMPL) which hereinafter referred to as 'seller' or 'originator'.

4. Information was received from the office of ITO (TDS-2)(2)(1), Mumbai mentioning that during the course of survey proceedings u/s.133A(2A) conducted on 27/08/2018 at the premises of M/s. Sansar Trust, a securitization trust group operating, managing and controlling under the trusteeship of M/s. Catalyst Trusteeship Ltd., wherein it was noticed that during the F.Y. 2017-18 assessee trust has paid Rs.1,88,67,795/- under the head **'Excess Interest Spread'** (EIS) to originator without deducting TDS thereon. The AO has discussed the *modus operandi* of the securitization trust and observed that assessee trust was liable to deduct TDS on the payment of yield to PTC holders (pass through certificates) u/s.194LBC of the Act. The assessee had not deducted TDS on the payment of EIS to the originator. After referring to Section 194LBC read with Section 115TCA, initiated the proceedings u/s.201 order / 201(1) / 201(1A) to verify the TDS defaults and accordingly issued show-cause notices to the assessee. In response, assessee submitted its submissions and month wise details of EIS payments during the A.Y.2018-19 and also given detailed submissions as to why TDS was not deducted. The relevant portion of assessee's reply has been incorporated in the assessment order. However, ld. AO rejected assessee's contention. For the sake of ready reference, reasoning given by the AO is reproduced herein below:-

- As per deed of assignment, the seller unconditionally and irrevocably sells, transfers, assigns and conveys all the right, title, benefit & interest of the Seller in:

  i) the Receivables; and
  ii) the Underlying Security
  iii) together with all other rights, benefits, powers, risk and guarantees and indemnities in relation thereto as contained in the respective Documents

- As per calculation of Excess Interest Spread (EIS), the EIS remitted to the seller always represents the difference between interest realised from the pool of assets/receivable and yield payable. The EIS is always getting emerged on account of pool of assets/underlying security vested with the Trust/SPV (by virtue of deed of assignment). Therefore, it is clear that the EIS is an income arising on account of securitisation of underlying assets and, therefore, distribution of such income by the assessee Trust do require deduction of TDS u/s 194LBC of the Act.)

- It is contended that EIS is the residual amount that flows to the originator of the loan without the said EIS income being in relation to the investment made by the originator in the ST. It is also contended that EIS income can flow to the originator irrespective of whether such originator holds any securities in the ST or not and that prior to 2012 amendment, there was no requirement for the originator to have minimum investment in the ST and even in such cases the EIS used to flow to the originator.

- Here, it is to submit that EIS is not mentioned in the 2006 guidelines of the RBI. A reference of surplus income found in Para 7.2 of 2006 guidelines,

  "7.2 The originator should effectively transfer all risks/ rewards and rights/obligations pertaining to the asset and shall not hold any beneficial interest in the asset after its sale to the SPV An agreement entitling the originator to any surplus income on the securitised assets at the end of the life of the securities issued by the SPV would not be

deemed as a violation of the true sale criteria. The SPV should obtain the unfettered. right to pledge, sell, transfer or exchange or otherwise dispose of the assets free of any restraining condition."

- Here in the present scenario, the assessee trust is paying EIS to the Originator on monthly basis which is completely different from the conditions mentioned in the year 2006 guidelines of the RBI. However, it do clarifies that whatever is received back by the Originator (EIS) is in the nature of income on the securitization activities.

- The year 2012 guidelines of the RBI, however, read as:

  "1.5.3 At times, the originating NBFCs retain contractual right to receive some of the interest amount due on the transferred assets. This interest receivable by the originating NBFC represents a liability of the SPV and its present value is capitalised by the originating NBFC as an Interest Only Strip (UO Strip), which is an on-balance sheet asset. Normally, a NBFC would recognise an unrealised gain in its Profit and Loss account on capitalisation of future interest receivable by way of VO Stop. However, consistent with the instructions contained in circular dated February 1. 2006 referred to above, NBFCs should not recognise the unrealised gains in Profit and Loss account, instead they should hold the unrealised profit under an accounting head styled as "Unrealised Gain on Loan Transfer Transactions. The balance in this account may be treated as a provision against potential losses incurred on the I/O Strip due to its serving as credit enhancement for the securitisation transactions. The profit may be recognised in Profit and Loss Account only when Interest Only Strip is redeemed in cash. As NBFCs would not be booking gain on sale represented by I/O Strip upfront, it need not be deducted from Tier 1 capital. This method of accounting of Interest Only Strip can be applied to outstanding securitisation transactions as well."

- It clearly shows that besides bringing conditions of MRR (Minimum Retention Requirement) for the Originators, the

year 2012 guidelines also brought forward new accounting for the interest only strip. Thus, the argument of the assessee that EIS flows to the originator of the loan without the said EIS income being in relation to the investment made by the originator in the ST is not correct. After 2012 guidelines, the Originator has to maintain the MRR throughout the securitisation period, therefore, the EIS and the MRR (originator's holding of PTCs) are also interlinked. If the Originator do not keep MRR all the times, the question of EIS do not arise at all. Therefore, EIS is indeed linked with the investment of the Originator in the Securitisation scheme and, hence, the assessee trust must have deducted the TDS u/s 194LBC on the EIS paid to the Originator.

- After recording to Section 115TCA and meaning of securitized debt instrument and the investor has given in the said Section he held that from the above definitions, it can be said that the deed of assignment (wherein Originator and assessee trust-SPV are the parties) is also an instrument in nature of securitised debt instrument which acknowledges the beneficial interest of Originator in respect to receivable in the nature of EIS. Hence, by virtue of above definitions, the Originator can safely be termed as the "investor" holding deed of assignment (securitised debt instrument) which acknowledges the interest of Originator (EIS) in the debt or receivables assigned to the special purpose distinct entity.

- He further held that assessee trust that EIS does not equate with the yield committed to the investors. However, in this respect it is submitted that section 194LBC of the Act creates liability on the payer to deduct TDS on any income payable to the investor, hence, it does not create any difference on the TDS liability u/s 194LBC of the Act on EIS whether it equates with the committed yield or not. On the same line, it does not make any difference that EIS also works as credit enhancement facility. The deduction of TDS is sought only on the EIS which is paid back to the Originator (and not on the interest utilised for credit enhancement, if any) which rightfully in the nature of its income from securitisation trust.

- Moreover, section 115TCA(3) of the Income tax Act says "it is a deeming provision", which means if any income arising or accruing to investors even it not paid or credited to person referred to in sub-section(1), which is investor, shall be deemed to have been credited to the account of the said person(investor) on the last day of previous year. The section 115TCA(3) clears it in explicit terms that whatever income is going out from the Securitization Trust will be income of the investor. Thus, such income payout by the Securitisation Trust is subject to TDS u/s. 194LBC @30%.

5. Accordingly, AO held that assessee trust has committed default u/s.201(1) and 201(1A) of the Act.

6. He further held that assessee trust has also not filed Form 26A in the prescribed format electronically as assessee is still in the process of obtaining certificate from the CA and rejected the claim of the assessee that originator (recipient) has complied with the provision of the Act by taking shelter of the first proviso of Section 201(1) of the Act. Accordingly, he held that assessee has committed default u/s.194LBC by non-deducting TDS on the amount of EIS paid to the originator to the amount of Rs.1,88,67,795/-. The working of default u/s.201(1) has been given in the following manner:-

SI. No.	Month	Month-wise EIS Payment	TDS to be deducted u/s. 194 LBC(30%)
1	Apr. 17	--	--
2	May 17	--	--
3	Jun. 17	--	--
4	Jul. 17	--	-

5	Aug. 17	--	--
6	Sep. 17	--	--
7	Oct. 17	3772100.64	1131630.19
8	Nov. 17	3280594.61	984178.38
9	Dec. 17	3369566.45	1010869.93
10	Jan. 18	2866592.26	859977.67
11	Feb. 18	2835938.68	850781.60
12	Mar. 18	2743001.93	822900.57
		1,88,67,795	**56,60,338**

7. Thereafter, he has computed the interest u/s.201(1A) of Rs.13,97,257/- and finally determined the default with respect to non-deduction of TDS and interest of Rs.70,57,600/-.

8. The ld. CIT(A) after incorporating the entire order of the AO and relevant portion of the assessee's submission has confirmed the order of the AO in every cryptic manner which is reproduced hereunder:-

> *"4. I have perused the order of the AO, submission of appellant and overall facts of the case*
>
> *4.1 The appellant has failed to deduct the TDS on the payment of Rs. 1,88,67,795/- under the head Excess Interest Spread (EIS) The Assessing Officer has explained in detail the TDS liability of the assessee The failure on the part of assessee has resulted into the action of treating it as "assessee in default."*

4.2 As mentioned by the Assessing Officer in para 10 to 10.6 that assessee has not filed Form No. 26A in the prescribed format under Rule 31ACB. It was the duty of the appellant to make the compliance, if it claimed the shelter of first proviso to section 201 (1). Even till the stage of appeal proceedings, appellant is trying to fill Form No. 26A.

The claim that functionality to generate Form 26A was not available on portal is not supported by documentary evidence. This functionality has been available since long back on TRACES portal

4.3 In the case of Ajmera Housing Corporation and Others 2010 (8) SCC 739, Hon'ble Supreme Court has while discussing principles of interpretation of tax statues has held that it is a trite law that taxing statue is to be construed strictly. In the Eagle Flask Industries case 2004 (4) SCR 35, Apex Court held that if a deduction or exemption is available with certain conditions, the conditions are to be strictly complied with, there is no room for equitable consideration in taxing statues.

4.4 The assessee's request to adjourn the appeal proceedings cannot be allowed. In the final opportunity given, appellant has chosen not to respond. In the given facts and circumstances, the order of the A.O. under section 201(1A) is confirmed. Ground No. 1 to 3 are dismissed."

9. Ld. DR has referred to various observations of the AO incorporated in the order and written submissions based on the finding and observation made in the impugned orders.

10. We have heard both the parties at length and perused the relevant finding given in the impugned order as well as materials referred to before us.

11. Before us, ld. Sr. Counsel, Shri Percy Pardiwala explaining the background of the case, submitted that assessee which is a securitisation trust was created to secure pool of loan receivables from Annapurna Microfinance Pvt. Ltd (AMPL) i.e. seller / originator. To acquire the ownership over the pool of loan receivables of Rs.25,27,90,940/-, assessee raised funds by issuing Pass Through Certificates (PTCs) to Indus Ind Bank of an equivalent amount (being Series A1 PTCs) which carried fixed yield of 8.75% per annum. This was provided in declaration of trust itself vide clause no.56. The face value of each PTC was Rs.1/-. Pursuant to the assignment of loan portfolio, the assessee trust became the legal owner of the receivables and all cash flows from borrowers were received by the assessee i.e. principal repayment and interest. As per waterfall mechanism, the cash flow received was to be utilized in the manner provided in Clause 7.6 & 7.6.1. For the sake of ready reference, the relevant clause reads as under:-

> *7.6.A The Waterfall Mechanism is based on the following principles:*
>
> *(a) Series Al interest shall be due and payable on each Payout Dute and Series A1principal shall only be expected on any Payout Date*
>
> *(b)Series Al Principal shall be due and payable on the Series A1 Final Maturity Date*
>
> *(b) All Investor Payouts shall follow the priority of payments as set out in the Waterfall Mechanism.*

7.6.1 Till such time Series A1 PTCS have not been fully redeemed, the Total Collections, the Clean Up Purchase Consideration, if the same has been received, and any monies recovered pursuant to legal proceedings, shall be utilised by the Trustee in the following order of priority

(a) payment of Senior Costs. PROVIDED THAT the Servicing Fee shall only be appropriated from the EIS component of the Total Collections, and if, in any Collection Period the EIS component of the Total Collections is insufficient to make a complete payment of the Servicing Fee, then the deficit portion of the Servicing Fee shall be paid out in the next occurring Collection Period(s);

(b) payment of Overdue Series A1 Interest;

(c) payment of Series A1 Interest due;

(d) payment of expected Series A1 Principal (including any unpaid expected Series A1 Principal pertaining to earlier periods, payable to Series A1 Investors);

(e) any Prepayment Proceeds will be utilized for pre-payment of Series A1 Principal;

(f) reimbursement of the Cash Collateral to the extent drawn on any Payout Date and not reimbursed already; and

(g) for payment to the Residual Beneficiary.

12. Thus, cash flow received was to be utilized, *firstly*, payment of expenses; *secondly*, payment fixed yield and face value of PTCs to Series A1 PTC investors; and *lastly*, the surplus or excess interest rate if any, to AMPL. AMPL essentially receives money from assessee towards surplus of EIS, if any, remaining after meeting all other commitments.

13. Before us, the main issue is whether tax is required to be deducted u/s.194 LBC of the ACT on EIS. For the sake of ready reference relevant provisions of Section 194LBC reads as under:-

> *"(1) Where any income is payable to an investor, being a resident, in respect of an investment in a securitization trust specified in clause (d) of the Explanation occurring after section 115TCA, the person responsible for making the payment shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon, at the rate of---*
>
> *(i) twenty-five per cent, if the payee is an individual or a Hindu undivided family,*
>
> *(ii) thirty per cent, if the payee is any other person.*
>
> *(2)......................................"*

14. From the plain reading of Section it is seen that Section casts an obligation for deduction of tax at source if the following two conditions are satisfied:-

- *Firstly,* **the income is payable to an investor** and
- *Secondly,* **the income is in respect of investment in the securitization trust.**

15. It provides that definition of the term **'investor'** shall have the meaning assigned to it in *Clause (d) of Explanation to Section 115 TCA.* Section 115 TCA in turn defines '**investor'** and securities debt instrument as under:-

> ***"Investor means a person who is holder of any securitised debt instrument or securities or security receipts issued by the securitisation trust***'
>
> *Securitised debt instrument shall have the same meaning as assigned to it in clause F2 (s) of sub-regulation (1) of regulation 2 of the Securities and Exchange Board of India (Public Offer and Listing of Securitised Debt Instruments) Regulations, 2008 made under the Securities and Exchange Board of India Act, 1992 (15 of 1992) and the Securities Contracts (Regulation) Act, 1956 (42 of 1956)'*
>
> *11. Clause (s) of sub regulation (1) of regulation 2 of the Securities and Exchange Board of India (Public offer and listing of Securitised Debt Instruments) Regulations 2008 define Securitised debt instrument ('SDI") as:*
>
> > *any certificate or instrument, by whatever name called, of the nature referred to in sub clause (ie) of clause (h) of section 2 of the Act issued by a special purpose distinct entity*
>
> *12. Sub clause (ie) of clause (h) of Section 2 of the Securities Contracts (Regulations) Act, 1956 states the below:*
>
> > *'any certificate or instrument (by whatever name called), issued to an investor by any issuer being a special purpose distinct entity which possesses any debt or receivable, including mortgage debt, assigned to such entity, and acknowledging beneficial interest of such investor in such debt or receivable, including mortgage debt, as the case may be.*

16. From the above definitions it can be inferred that securities debt instrument basically means any certificate or instrument is issued by special purpose vehicle, i.e., the seruritisation trust which possesses any debt or receivable. We have also gone through RBI guidelines on security regulations formulated in

2012, wherein it has referred to Minimum Retention Requirement (MRR) prescribing the requirement for the 'originators' to have certain minimum financial commitment whenever these loans are securitized. The originator is required to retain certain interest in the loan portfolio over collateralization, i.e., collateralizing of excess receivables etc. which has been provided in the following manner in this case:-

Class of PTCs	Series Al	Over collateralization
PTC national amount	INR 25,27,90,940	1NR 2,19,81,821
Total number of PTCS	12,63,95,470	NA
Coupon Rate	8.75% Coupon	NA
Denominatio n of PTC	INR 2	NA
Expected Maturity Date	17-Mar-19	NA
Final Maturity Date	!7-May-19	NA
Tenor (in years)	0.65	NA
Tenor (in	7.85	NA

months)		
Percentage	92.00%	8.00%
Principal	25,27,90,490	2,19,81,821
Cashflows	26,74,71,839	NA
Rating	A- (SO)	Unrated
Rating Agency	ICRA Limited	
MRR	MRR is met via the cash collateral contributed by the seller (6.50% of pool principal securitised as cash collateral and 8.00% of the pool principal is provided as overcollateralization).	
MRP	Minimum seasoning of 6 installments for fortnightly loans and 3 for monthly loans.	

17. Ergo, once the originator, (AMPL) is not holding any PTC / SDI, it cannot be regarded as 'investor' as per the terms defined in the aforesaid provisions elaborated above. It is only in a situation where the originator has subscribed to the PTCs of the securitization trust and then only it can be regarded as an investor. In case where minimum retention requirement commitment has met via any other permissible alternator, the originator does not have hold in instrument in the securitization trust and therefore, cannot be reckoned as investor. Once the originator has not subscribed in PTCs, but the MRR is

maintained via cash collateral and in the form of ccollateralizing of excess receivables, then the first condition provided in Section 194LBC is not fulfilled and therefore, in our opinion there cannot be any obligation to deduct tax in terms of said Section.

18. The other condition as provided in Section 194LBC which is required to be fulfilled is that the income in the hands of AMPL should be in respect of investment in the securitization trust. As observed by us hereinabove, the cash flow received was to be utilized in the manner provided in the water flow mechanism of the trustee, the Excess Interest Spread (EIS) is the residual amount that flows to the originator and is not pursuant to any investment in the securitization trust or return of investment so made. Even assuming AMPL is to be treated as an investor, then also no tax was required to be deducted u/s.194LBC on the EIS as the said payment was not in respect of investment made by AMPL in the PTCs issued by the assessee. The surplus here especially represents a reward earned by AMPL that its effort of creating pool of loan receivables which is capable of assigning. The MRR requirement was introduced by RBI for the first time in the year 2012 and prior to such there was no requirement for the originator to comply with MRR and even for such bills prior to 2012 EIS was paid to the originator. This further corroborates that EIS cannot be regarded as income in respect of investment. Thus, here in this case second condition is also not fulfilled and accordingly we hold that the TDS liability u/s.194LBC is not applicable on EIS.

19. Our aforesaid finding is based on interpretation of the language provided in the statute where the liability to deduct TDS has been provided, only, where any income is payable to an investor in respect of investment in secutarisation trust. The 'investor' has been defined to mean a person who is a holder of any securitised debt instrument or securities or security receipts issued by the securitization trust. Once AMPL is not an investor and the conditions mentioned in Section 194LBC has not met, then the liability to deduct TDS does not trigger.

20. Before us without prejudice it has been stated that since the payee i.e. AMPL has discharged its liability to deduct tax in respect of EIS, then assessee cannot be regarded as 'assessee in default'. AO had not accepted this plea, because assessee had not submitted prescribed form 26A. Now before us, assessee had furnished form 26A however, it has been stated that when the process to generate form 26A was initiated there was technical glitches on the income tax portal and when income tax portal was migrated to new format in June 2021 and form 26A functionally was enable on the portal only in April / May 2022, therefore, the assessee was not able to file form 26A before the lower authorities, therefore, the same is being filed before the Tribunal in the form of additional evidences. Once, the form 26A has been filed and AMPL has discharged its liability for tax in respect of EIS, ostensibly in terms of proviso to section 201(1), assessee cannot be treated as 'assessee in default'. Since, we

have already held that there is no liability to deduct TDS in the present case, then whether form 26A was filed before the AO or not or has been filed before us due to the reasons as stated above is purely academic. Accordingly, we hold that assessee is not 'assessee in default' and therefore, the entire payment and interest levied by AO is deleted.

21. In the result, appeal of the assessee is allowed.

Order pronounced on 30th November, 2023.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(AMIT SHUKLA)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai; Dated 30/11/2023
KARUNA, *sr.ps*

<u>Copy of the Order forwarded to</u> :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai