

**IN THE INCOME TAX APPELLATE TRIBUNAL
“B” BENCH, MUMBAI**

**BEFORE SHRI PAVAN KUMAR GADALE, JM &
MS PADMAVATHY S, AM**

**I.T.A. No. 4174 & 4171/Mum/2023
(Assessment Year: 2018-19 & 2019-20)**

Nathani Parekh Constructions Pvt. Ltd. 101, 1 st Floor, Nathani Heights, DR D B Marg, Bellasis Road, Mumbai-400008 PAN : AACCN3320K	Vs.	ITO (TDS)-2(3)(1) Room No. 709, 7 th Floor, Smt. K.G. Mittal Ayurvedic Hospital Building, Charni Road, Mumbai - 400002.
Appellant)	:	Respondent)

Appellant/Assessee by : Shri Rajiv Khandelwal, &
Shri Aakash Kumar, CA
Revenue/Respondent by : Shri Laxmi Kant, Sr. DR
Date of Hearing : 10.07.2024
Date of Pronouncement : 11.07.2024

ORDER

Per Bench:

These appeals by assessee are against the orders of the Commissioner of Income Tax (Appeals)-51, Mumbai [for short 'the CIT(A)'] dated 22.09.2023 for AY 2018-19, 2019-20 The issue contended in both these appeals are common and therefore, they were heard together and disposed of by this common order.

2. The assessee is a real estate developer and engaged in the business of development and construction. A survey action in TDS verification under section 133A(2A) was conducted on 15.11.2019 in the case of the assessee. During the

survey proceedings, the Assessing Officer noticed that the assessee has debited the following amounts under the head "Alternate Accommodation/ rent".

AY	Amount – Rs.
2018-19	2,33,48,923
2019-20	58,76,133

3. The AO called on the assessee to explain whether tax has been deducted at source on the above said amount. The assessee submitted before the AO that it has entered into a re-development agreement dated 30.04.2017 with M/s Dalal Estate Co-operative Housing Society Ltd. which was encumbered with more than 300 tenants and that for the purpose of vacating the premises, the assessee had agreed to pay compensation of hardship according to the nature of tenancy occupied by each tenant. The assessee further submitted that these tenants could not be provided that alternate accommodation and therefore, the assessee agreed to pay the above amount as compensation for the hardship of the tenants. The assessee also submitted that the amount paid towards alternate accommodation/hardship allowance does not fall within the definition "Rent" and therefore, tax was not liable to be deducted at source on the said payments. The assessee accordingly submitted that no tax was deducted at source from the payment of alternate accommodation charges/rent.

4. The AO did not agree with the submissions of the assessee and held the same to be unacceptable. The AO held that even if the payment is not liable for deduction under section 194I, section 194IC which was inserted w.e.f. 01.04.2017 is clearly applicable and that the tax ought to have been under the said section. Accordingly the AO passed the order under section 201(1) / 201(1A) of the Act for all the assessment treating the assessee as an assessee in default.

5. On further appeal the CIT(A) upheld the order of the AO by holding that

“7.3 In this regard it is observed that the subject matter of dispute is the payment made by the assessee to the owners/tenants of the Dalal Co-operative Housing Society towards alternate accommodation during the period of re-development/re-construction of the Dalal Estate Apartments property. During such period of re-development/re-construction, the original inhabitants of the property had to vacate the property and to move to any alternate accommodation. These payments were to be made to compensate them for making arrangement of this alternate accommodation. The AO has brought these payments under the ambit of TDS by holding that these payments were made as per the "specified agreement within the meaning of section 45(5A) of the Act and hence were liable for TDS as per the provisions of section 194IC of the Act. The appellant has first tried to argue that these payments were not required to be subjected to TDS as these were not rental payments within the meaning of section 1941 of the Act. In this regard, it firstly held that the AO has not invoked section 1941 of the Act in the case of the appellant for the year under consideration and so the arguments of the appellant in this regard are misplaced and devoid of merits. The AO has rather invoked section 194IC read with section 45(5A) of the Act for holding the assessee to be liable for doing TDS on the impugned payments. In this regard it is also important to first go through the provisions of section 194IC and section 45(5A) of the Act:

7.3.1 Section 19:41C of the Act is reproduced as under:

Notwithstanding anything contained in section 194-1A, any person responsible for paying to a resident any sum by way of consideration, not being consideration in kind, under the agreement referred to in sub-section (5A) of section 45, shall at the time of credit of such sum 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 an amount equal to ten per cent of such sum as income-tax thereon.’

7.3.2 Section 45(5A) of the Act is also reproduced as under:

Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, from the transfer of a capital asset, being land or building or both, under a specified agreement, the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority: and for the purposes of his share, being land or building or both in the project, as

increased by the consideration received in cash if any shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset:

Provided that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion, and the capital gains shall be deemed to be the income of the previous year, in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.

Explanation- For the purposes of this sub-section, the expression-

(1) "competent authority" means the authority empowered to approve the building plan by or under any law for the time being in force;

(ii) "specified agreement means a registered agreement in which a person owning land or building or both agrees to allow another person to develop a real estate project on such land or building or both, in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash;

(iii) "stamp duty value means the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both.'

7.4 A plain reading of section 1941C makes it clear that an assessee is liable for tax deduction while making a payment under an agreement referred to in section 45(5A) of the Act. The "specified agreement under section 45(5A) means a registered agreement in which a person owning land or building or both allows a person to develop a real estate project on such land or building.

7.5 In the present case, the AO has conclusively proved in his order that the re development agreement entered into by the assessee was indeed a specified agreement within the meaning of section 45(5A) of the Act. The agreement which the appellant company entered into with the Datal Estate Co-operative Housing Society Ltd, and members thereof was duly registered with the Sub-Registrar Mumbai Central No. 3 Mumbai City on 09.11.2010 vide number Mumbai 3-10819 2010. By virtue of agreement dated 28:10.2010, appellant company was now having the development rights of the said society having residential and commercial premises. The society was the owner of property bearing C.S. No.

1/332 of Trades Division. Mumbai 400006 admeasuring 5240 sq mtrs or 6340,29 sq yards on which residential flats and commercial shops were situated. In the agreement, it was clearly mentioned that Tenants/Occupants/Owners/Members were in use, occupation, possession and entitled to a room/flat and the tenants /occupants/Trustees/Member of the said property/Building in the Dalal Estate Apartments, have formed a society by name Dalal Estate Co-operative Housing Society Lid, hereinafter called and referred to as "the said society The Tenants Occupants/Owners/Members herein were members of the said society. Hence, the conditions of section 45(5A) were fully fulfilled in the case of assessee The amount of hardship compensation or rental compensation, by whatever name called, paid by assessee to the members of the Society was by virtue of this specified agreement. Therefore, the primary condition of section 1941C r.w.s 45(5A) of the Act was fulfilled and the payment was liable for deduction of tax as per section 1941C of the Act.

7.6 The plea of the appellant that the agreement entered into by it was not with the persona "owning" the land or building is also baseless and devoid of merits as the Agreement for Development dated 30.04.2007 is between the Developer and the Society/Trustees/Owners/Members/Tenants and Inhabitants. Thus, the AO has rightly held this to be specified agreement as per the provisions of section 45(5A) and so any sum paid under this agreement would come under the ambit of section 1941C of the Act and would be fable for TDS.

*7.7. In view of the detailed discussion above, it is held that the payments made by the assessee towards alternate accommodation for AY 2018-19 would be liable for tax deduction under section 1941C r.w.s 45(5A) of the Act. I, therefore, see no infirmity in the action of the AO in treating the assessee as an assessee in default for non-deduction and non-payment of TDS. **These grounds of appeal are accordingly dismissed.**"*

6. The assessee is in appeal against the order of the CIT(A) before the Tribunal. The common issue arising out of the various grounds raised by the assessee is **whether the payment made by the assessee to the tenants of M/s Dalal Estate Co-operative Housing Society Ltd. towards alternate accommodation charges/hardship allowance/rent are liable for tax deduction under section 1941C of the Act.**

7. The ld. AR submitted that the provisions of section 45(5A) talks about the consideration paid towards transfer of a capital asset and that in assessee's case the alternate accommodation charges are not paid towards transfer of capital asset. The ld AR further submitted that the impugned payments are not consideration received within the meaning of section 45 and that the same is a capital receipt not chargeable to tax as has been held by the Hon'ble Jurisdictional High Court. The ld. AR also submitted that the tenant who is the recipient of the amount is not the owner of the land and is party of the re-development agreement in the capacity as a tenant/member and therefore the AO is not correct in holding that the payment would attract TDS under section 194IC.

8. The ld DR on the other hand vehemently argued that for the purpose of section 194IC, the provisions of section 45(5A) should be applied to the limited extend of "any payments done under the specified agreement". Accordingly the ld DR submitted that the impugned payments which are made as part of the re-development agreement entered into by the assessee with the tenants would attract tax deduction under section 194IC. Thus the ld DR supported the order of the CIT(A).

9. We heard the parties and perusal the materials on record. We notice that the assessee has entered into redevelopment agreement dated 30.07.2007 for the development with M/s. Dalal Estate Cooperative Housing Society Ltd. As per the terms of the agreement the assessee agreed to pay a fixed sum per Sq.ft for the temporary alternate accommodation to each of the tenants for the reason that the existing property is to be demolished for re-development. From the terms of the said agreement it is clear that the impugned payment made is in the nature of compensation towards hardship the tenants would have to undergo in order to

handover the vacant possession of the property for demolition and towards the alternate accommodation charges which the tenant has to bear during the time of re-development. From the observations of the CIT(A) as extracted in the earlier part of this order, the contention of the revenue is that as per section 194IC any sum paid by any person under the specified agreement referred to in section 45(5A) shall be subjected to TDS at the rate of 10% and that since the compensation towards hardship is paid as per specified agreement the TDS provisions under section 194IC is applicable in assessee's case. Therefore before proceeding further we will first look at the relevant provisions of Section 45(5A) and Section 194IC

*“45(5A) Notwithstanding anything contained in sub-section (1), where the capital gain arises to an assessee, being an individual or a Hindu undivided family, **from the transfer of a capital asset, being land or building or both, under a specified agreement,** the capital gains shall be chargeable to income-tax as income of the previous year in which the certificate of completion for the whole or part of the project is issued by the competent authority; and for the purposes of [section 48](#), the stamp duty value, on the date of issue of the said certificate, of his share, being land or building or both in the project, as increased by ⁸³[the consideration received in cash, if any,] shall be deemed to be the full value of the consideration received or accruing as a result of the transfer of the capital asset :*

***Provided** that the provisions of this sub-section shall not apply where the assessee transfers his share in the project on or before the date of issue of the said certificate of completion, and the capital gains shall be deemed to be the income of the previous year in which such transfer takes place and the provisions of this Act, other than the provisions of this sub-section, shall apply for the purpose of determination of full value of consideration received or accruing as a result of such transfer.*

Explanation.—For the purposes of this sub-section, the expression—

(i) "competent authority" means the authority empowered to approve the building plan by or under any law for the time being in force;

(ii) "specified agreement" means a registered agreement in which a person owning land or building or both, agrees to allow another person to develop a

*real estate project on such land or building or both, **in consideration of a share, being land or building or both in such project, whether with or without payment of part of the consideration in cash;***

(iii) "stamp duty value" means the value adopted or assessed or assessable by any authority of the Government for the purpose of payment of stamp duty in respect of an immovable property being land or building or both."

*194-IC. Notwithstanding anything contained in [section 194-IA](#), **any person responsible for paying to a resident any sum by way of consideration**, not being consideration in kind, under the agreement referred to in sub-section (5A) of [section 45](#), shall at the time of credit of such sum 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 an amount equal to ten per cent of such sum as income-tax thereon.*

10. Accordingly the provisions section 194IC of the Act would get attracted at the time of credit / payment of any sum by way of consideration under the specified agreement as defined under section 45(5A). Therefore the question here is whether the alternate accommodation/hardship allowance paid by the assessee is a sum by way of consideration under the specified agreement as claimed by the revenue. The term "consideration" is not specifically defined for the purpose of section 194IC, and its meaning has to be inferred from the definition of the term "specified agreement" as extracted above. As per the definition, it is the agreement entered into between the owner and the developer allowing the developer to develop the real estate project ***in consideration of share in the land or building or both in such project***, with or without payment of part of the consideration in cash. Therefore in our considered view any sum paid under the specified agreement, to be treated as a "consideration" should have been paid as part of a share in the land or building or both including cash payments. In the given case, the payment towards alternate accommodation/hardship allowance is in the nature of a compensation paid by the developer towards hardship suffered by the owner /

tenant due to dispossession and is not paid as part of a share in the land or building or both. The terms of the agreement in assessee's case makes it clear that the payment is made towards compensation for handing over the vacant possession of the property and towards rent if any payable by the tenants in the alternate accommodation until the completion of the re-development. Therefore we are of the view that the "Alternate accommodation charges / rent" cannot be treated as a consideration paid as part of a share in the land or building or both under the specified agreement, and would not fall within the provisions of section 194IC. Accordingly we hold that the assessee cannot be treated as an assessee in default for non-deduction and non-payment of TDS under section 194IC of the Act and we set aside the order of the AO passed in this regard.

11. In result the appeals of the assessee for AY 2018-19 to 2019-20 are allowed.

Order pronounced in the open court on 11-07-2024.

Sd/-

(PAVAN KUMAR GADALE)
Judicial Member

**SK, Sr. PS*

Sd/-

(PADMAVATHY S)
Accountant Member

Copy of the Order forwarded to :

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

BY ORDER,

(Dy./Asstt. Registrar)
ITAT, Mumbai