IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "D", NEW DELHI

BEFORE SHRI SAKTIJIT DEY, HON'BLE VICE PRESIDENT
and
SHRI S. RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA No.2363/Del/2017
(Assessment Year : 2008-09)

Legend Surface Developers Private Ltd., 127-A, Central Avenue, Sainik Farms, New Delhi – 110 062.	vs.	ITO, Ward 75 (2), New Delhi.
(PAN : AABCL3143M)		
(APPELLANT)		(RESPONDENT)

ASSESSEE BY: None
REVENUE BY : Shri Vijay B Vasanta, CIT(DR)

Date of Hearing : 30.09.2024
Date of Order : 04.10.2024

ORDER

PER S.RIFAUR RAHMAN, AM:

The present appeal filed by the assessee is directed against the order of Ld. Commissioner of Income-tax (Appeals)-41, New Delhi (hereinafter referred to as 'ld. CIT (A)') dated 09.01.2017 for the assessment year 2008-09.

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

1. Ground No.1

1.1 The Ld. CIT(A) has erred both on law as well as on facts while holding the Appellant as "assessee in Default", as held by the Ld. Income Tax Officer, Ward-75(2) (hereinafter referred to as "AO") in his order passed under section 201(1)/201(1A) of the Act, for

non-deposition of taxes deducted u/s 195 amounting to INR 1,27,06,595/- along with applicable interest in respect of amounts paid to M/s RBI Marketing (Netherlands) B.V. and Fowls Ltd. towards license fees.

1.2 The Ld. CIT(A) has erred on law as well as on facts while ignoring the fact that the agreement entered into by the appellant with M/s RBI Marketing (Netherlands) and Fowls Ltd. could not be materialized and no income accrued to M/s RBI Marketing (Netherlands) B.V. and Fowls Ltd on account of cancellation of the agreement.

1.3 The Ld. CIT(A) has erred on law as well as on facts while ignoring the fact as per the agreement with M/s RBI Marketing (Netherlands) B.V. and Fowls Ltd, the withholding tax liability on payment to these parties was to be borne by the appellant. The Appellant also filed the case against M/s RBI Marketing, Netherlands and Fowls Ltd. in Hon'ble Delhi High Court for recovery of amount paid.

1.4 The Ld. CIT(A) has also ignored the provisions of Circular No. 790 dated 20th April, 2000 and 7/2007 dated 23rd October, 2007."

3. None appeared on behalf of the assessee, despite issue of notice for hearing. However, it is noted that nobody has been attending the hearings since 12.01.2021 on behalf of the assessee. The matter was listed for 12 occasions since 12.01.2021 but nobody attended the hearing on behalf of the assessee. Therefore, it is presumed that assessee is not interested in prosecuting its appeal. Hence, we are deciding the appeal ex-parte qua the assessee, after hearing the ld. DR for the Revenue and perusing the material available on record.

4. Brief facts of the case are, a survey operation was conducted u/s 133A of the Income-tax Act, 1961 (for short 'the Act') at the business premises of the deductor company on 12.11.2009. It was incorporated on 04.05.2007 and for the year under

consideration, it was engaged in the business of manufacturing and production of RBI Grade 81 (Natural Soil Stabilizer), which is used for making roads. During the survey operation, books of account of the deductor company were examined on test check basis by the ITO (TDS), Gurgaon. It was observed by the AO that the assessee company had deducted TDS in the Financial Years 2007-08 to 2009-10, but it did not deposit the tax into the Government account till the date of survey. Further, no TDS certificate for the FYs 2007-08 to 2009-10 in Form Nos.16 and 16A were issued and no TDS return was filed. Thereafter, the deductor company vide its letter dated 13.11.2009 surrendered total amount of Rs.2,31,55,853/- towards tax liability. It is pertinent to note that when these cheques were deposited into the Government account, they were returned back by the Bank with remarks *"Exceeds arrangements"* or *"Funds insufficient"*. Thereafter, the assessee sought time to pay tax demand. Under these facts and circumstances, the Assessing Officer after making verification passed an order u/s 201(1)/201(1A) of the Act on 26.11.2009. Thereby, he computed the short deduction/non deduction of TDS u/s 201(1) of the Act at Rs.65,55,801/- and interest u/s 201(1A) of the Act at Rs.5,99,367/-. Thus, vide order dated 30.03.2011, the AO raised total tax demand on the deductor company u/s 201(1)/201(1A) of the Act at Rs.2,38,11,639/-.

5. Against the order dated 30.03.2011, the assessee has preferred an appeal before Ld.CIT(A) who vide his impugned order dated 09.01.2017, sustained the impugned tax demand made by the AO.

6. Aggrieved against the order of ld. CIT(A), the assessee is in appeal before us.

7. Ld. DR relied upon the orders of the authorities below. He pointed out that the assessee itself had surrendered a sum of Rs.2,31,55,853/- as tax liability and the cheques were given by the assessee. The cheques were dishonoured by its banker. Therefore, under these circumstances, grounds raised by the assessee are contrary to the records. He further submitted that in view of the undisputed facts regarding non-deposit of tax deducted at source, the appeal of the assessee deserves to be dismissed. He submitted that ld. CIT (A) elaborately discussed the issues and decided the appeal against the assessee. He further submitted that since beginning the assessee is not appearing before the Tribunal, which shows his negligent attitude in prosecuting its appeal before the Tribunal.

8. Considered the submissions of ld. Sr. DR and material available on record. We find that the AO vide order dated 30.03.2011 has raised the impugned tax demand amounting to Rs.2,38,11,639/- constituting the tax demand u/s 201(1) of the Act and interest on tax demand at Rs.68,59,853/- u/s 201(1A) of the Act. We further find that ld.CIT(A) while adjudicating the issues has observed as under:-

> *"6.5. Ground No: 1*
>
> *6.5.1. "During the financial year 2007-08 the appellant-had made payments to foreign company 'RBI Marketing (Netherlands) and Fowlds Ltd;' towards license fees and had deducted an amount of Rs.1,27,06,595/- u/s 195 of the Act. However, the TDS amount was not deposited by the appellant company in Govt. account.*

6.5.2. Before the AO, the appellant had claimed that the agreement with the foreign company did not materialize, hence the income did not accrue to the non-resident and the amount deducted u/s 195 belonged to the deductor. The appellant claimed that CBDT circulars No. 790 of 2000 and 7 of 2007 laying down procedure for refund of tax deducted u/s 195 were applicable in its case. The appellant stated that it has filed a case before Hon'ble Delhi High Court for recovery of the amount paid.

6.5.3 The AO did not accept the claim of the appellant and held the appellant liable to pay the TDS amount alongwith interest u/s 201(1A).

6.5.4 In the Written submission filed during the appellate proceeding, the AR of the appellant has reiterated the claim. It has been stated that the agreement of the appellant with the Non-Resident company stipulated grossing-up, i.e. any withholding tax was to be borne by the payer. The appellant had deducted TDS u/s 195 of the Act amounting to Rs.1,27,06,595/~ on the payment made to the Non-Resident company. However, the agreement did not materialize and got cancelled. The appellant filed a case for recovery of the amount paid and hence it did not deposit the tax deducted, relying on CBDT circular relating to claim of refund of tax deducted on payment made to non-residents.

6.5.5. The AO in the remand report has commented that the amount had been deducted by the appellant, but as not paid to the Govt. account. The CBDT circular does not provide any exception and the appellant was liable to deposit the deducted amount in the Govt. account.

6.5.6. I have carefully considered the explanation offered by the appellant, but am unable to accept the same Liability to deduct taxes arise the moment a payment is made or a credit is made in the payer's account, Further, in this case the appellant has already deducted the tax, while making the payment. Once tax is deducted, it belongs to the Government and the deductor holds the amount only in a fiduciary capacity. Any' claim' for refund cart only arise after the TDS amount is deposited in Govt. account. The deductor can not by a unilateral decision convert the TDS amount to its personal funds. Tax is deducted with sanction of law and sanctity of the same is required to be maintained. Moreover, section 195 is different from other TDS provisions as it is attracted even "on payment of 'any other sum' to the payee. Hence, unlike domestic

TDS provisions, the question of income arising in the hands of the payee does not arise for application of section 195 of the Act.

6.5.7 Therefore, I am of the considered view that the appellant was liable to deposit the TDS amount in Govt. account and the AO had rightly raised the demand u/s 201 (1)/201(lA). This ground raised by the appellant is rejected.

6.6 Ground 2; 3 and 4:-

6.6.1 The grounds B-l and B-2 of the appellant pertain to the proper calculation of the TDS demand and credit of amounts deposited by the appellant towards the same. In Ground B-2, the appellant has claimed that the opening balance of TDS liability has been included in the TDS demand for the year, resulting in double demand for the same outstanding balances.

6.6.2 In the Remand Report, the AO has mentioned that major payments had been made after passing of order on 30.03.20l1. The details of tax credit has been mentioned in the remand report. The appellant has not pointed out any mistake in the same, and has only requested for taking the same on record. Hence, for these two grounds no grievance remains.

6.7 Ground 5,6 and 7:-

6.7.1 The appellant has raised grounds of appeal against initiation of penalty proceedings u/s 271-C, 271A(2)(g) and 272A(2)(k) of the Act.

6.7.2 Both the AO and the appellant have accepted that the ground is premature. Hence, these three grounds are dismissed."

9. From the aforesaid conclusion drawn by the ld. CIT(A), we observed that the assessee itself had deducted tax, however, the same was not deposited in the bank account. However, it is obligatory upon the assessee to deposit the taxes deducted at source in Government account, which he has not done. Further, the cheques handed over to AO for discharging its tax liability were also dishonoured by its banker. No detail/material is placed by the assessee to demonstrate that it was not liable to

deduct tax. The amount was wrongly deducted, therefore, in the absence of any such evidence, we do not find any infirmity in the findings of the order of authorities below, hence, the same is confirmed. Accordingly, the Grounds raised by the assessee stand rejected.

10. In the result, appeal filed by the assessee is dismissed in the aforesaid manner.

Order pronounced in the open court on this 4th day of October, 2024.

Sd/-	sd/-
(SAKTIJIT DEY)	**(S.RIFAUR RAHMAN)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 04.10.2024
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Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI