IN THE INCOME TAX APPELLATE TRIBUNAL

DELHI BENCH "F", NEW DELHI

BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

AND

SHRI O.P. KANT, ACCOUNTANT MEMBER

	I.T.A. No.2122/DEL/2014	
	A.Y. : 2007-08	
INCOME TAX OFFICER, WARD 14(2), ROOM NO. 209, 2ND FLOOR, CR BUILDING, I.P. ESTATE, NEW DELHI	VS.	M/S PHILANA BUILDERS & DEVELOPERS PRIVATE LIMITED, I-E, NAAZ CINEMA COMPLEX, JHANDEWALAN EXTN., NEW DELHI (PAN:AAECP3348P)
(APPELLANT)		**(RESPONDENT)**

Department by : Sh. FR MEENA, SR. DR
Assessee by : Sh. R.S. SINGHVI, CA

Date of Hearing : 08-08-2016
Date of Order : 05-09-2016

ORDER

PER H.S. SIDHU, JM

Revenue has filed the appeal against the Order dated 21.1.2014 passed by the Ld. Commissioner of Income Tax (Appeals)-XVII, New Delhi pertaining to assessment year 2007-08 on the following ground:-

1. That on the facts and circumstances of the case and in law the Ld. CIT(A) erred in deleting the penalty u/s. 271(1)(c)

amounting Rs. 32,12,599/- imposed by the AO holding that there is no furnishing of inaccurate particulars of income or deliberate attempt to conceal income by the assessee ignoring the fact that the genuineness of expenditure claimed by the assesee cannot be established.

2. That on the facts and circumstances of the case as well as in law, the Ld. CIT(A) erred in deleting the above said penalty ignoring the fact that addition made by the AO was confirmed by the First Appellate Authority.

3. The Appellant craves to be allowed to add any fresh ground of appeal and / or delete or amend any of the grounds of appeal.

2. The facts narrated by the Revenue Authorities are not disputed by both the parties, therefore, the same are not repeated here for the sake of convenience.

3. Ld. DR relied upon the order of the AO.

4. On the other hand, Ld. A.R. of the Assessee relied upon the order of the Ld. CIT(A) and has stated that Ld. CIT(A) has passed a well reasoned order which does not need any interference. Further, Ld. A.R. of the Assessee stated that quantum on which the penalty has been imposed, has also been deleted by the ITAT in ITA No. 1949/Del/2011 (AY 2007-08) vide order dated 11.2.2016. He has also filed the copy of the said Tribunal's order dated 11.2.2016.

5. We have carefully considered the submissions and perused the records. We find that Ld. CIT(A) has elaborately adjudicated the issue vide para no. 6.4

to 6.14 vide his order dated 21.1.2014. The relevant paras no. 6.4 to 6.14 are reproduced as under:-

> *"6.4. In appellate proceedings, the appellant stated that the appellant has actually purchased land during the year and made payments to the consolidator M/s Vikram Electric Equipment (P) Ltd. The genuine nature of the payment is not in doubt. The debatable issue is whether disallowance uls 40(a)(ia) could be made for not deducting tax u/s 194H/194C. The appellant has enclosed copies of the decisions of the Hon'ble ITAT in its group cases wherein it was held that provisions of 194H or 194C were not applicable .*
>
> *6.5. The appellant states that a bonafide claim of deduction has been disallowed. The appellant had furnished all relevant facts and details on record and had not concealed any facts. The facts and details furnished by the appellant were not found to be bogus or false by any authority. No inaccurate particulars had been submitted by the appellant.*
>
> *6.6. Further, in none of the cases quoted which were group concerns of the appellant, it was held by the Ld. CIT(A) or the Hon'ble ITAT that the payment to the consolidator was not a genuine payment. The only issue in all the cases was whether provisions of section 40(a)(ia) of the Act would be applicable.*
>
> *6.7. In the case of ITO vs. Finian Estates the AO had disallowed the amount paid by the appellant out of purchases and reduced it from the closing stock. The amount had been paid to M/s Vikram Electric Equipment (P) Ltd. M/s Vikram Electric Equipment (P)*

Ltd. was a consolidator to acquire and consolidate land holdings. The Hon'ble ITAT stated the amount was duly reflected in the purchases and closing stock. Further that provisions of section 40(a)(ia) would not be apply as no deduction was claimed in the P&L A/c.

6.8. In the case of Zanobi Builders &. Constructions (P) Ltd. vs. ITO, payments were made to MIs Vikram Electric Equipment (P) Ltd. The Hon'ble ITAT stated that no disallowance uls 40(a)(ia) was called for, for not deducting TDS uls 194 or 194H.

6.9. The intention to quote these cases. at this juncture is to show that M/s Vikram Electric Equipment (P) Ltd. is an existing entity and works as a consolidator. In no case the genuineness of the transactions with MIs Vikram Electric Equipment (P) Ltd. has been doubted. In all related concerns MIs Vikram Electric Equipment (P) Ltd. is the consolidator to whom payments were made on a regular basis and the payments have never been considered as non genuine expenditure. In view thereof, the findings of the Hon' ble ITAT establish that M/s Vikram Electric Equipment (P) Ltd. is a genuine existing entity. Further, that TDS on payments made to MIs Vikram Electric Equipment (P) Ltd. is not required to be deducted.

6.10. I shall now consider whether penalty uls 271(1)(c) is leviable on the additions made in this year treating payment to M/s Vikram Electric Equipment (P) Ltd. as non genuine and disallowing the payment made for not deducting TDS.

6.11. In the matter of penalty, it is seen that the appellant had furnished all particulars in respect of income earned and

expenditure incurred. The AO had also not stated that the particulars furnished were inaccurate or there was an attempt to furnish inaccurate particulars.

6.12. The bonafides of the appellant can be seen from the fact that all details were furnished. The action of the appellant is not deliberate or for concealment of income. There was no concealment of material facts. There was no intention of the appellant to conceal income and evade tax and mislead the revenue.

6.13. The Hon'ble Supreme Court of India in K. P. Madhusudan vs. CIT (2011) 118 TAXMAN 324 (SC) held that in the circumstances stated in the Explanation, if the appellant's failure to return his correct income was not due to fraud or neglect, he shall be not deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and consequently be liable to be penalty provided by that section. In view of the above, the onus is on the appellant to prove that there was no fraud or neglect in filing correct income, which the appellant has proved.

6.14. The Hon'ble Supreme Court in the case of CIT vs. Reliance Petroproducts (P) Ltd. observed that making an incorrect claim in law cannot tantamount to furnishing inaccurate particulars. The appellant had given an explanation, which is bonafide. There is no furnishing of inaccurate particulars of income or deliberate attempt to conceal income. The penalty of Rs.32,12,599/- is therefore deleted. The grounds of appeal are ruled in favour of the appellant."

5.1 Even otherwise, we note that in assessee's own case in ITA No. 1949/Del/2011 for A.Y. 2007-08 vide order dated 11.2.2016, the Tribunal had adjudicated the issue vide para no. 6 to 9.6 at pages 5 to 12 and deleted the quantum addition in this regard also. The relevant portion is reproduced as under:-

> *"6. We have heard the rival submissions of the ld. AR and the DR and have perused the paper book filed before us.*
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> *7. The ld. AR submits that on identical set of facts, the issue has been decided in favour of the assessee and against the revenue by the 'D' Bench of the ITAT in ITA No. 2361/D/2011 and ITA No.1953/D/2011 for the AY 2007-08 in the case of M/s Finian Estate Developers P. Ltd. order dated 5th October, 2011. We further submit that the 'H' Bench of the Tribunal in the case of Zebina Real Estate P. Ltd. vs. ITO in ITA No. 1429/D/2011 and 1430/D/2011 order dated 12.4.2013 followed the judgment of Tribunal in the case of Finian Estates Developers P. Ltd. 142 TTJ 545 (Del) and allowed the appeal of the assessee.*
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> *7.1. The ld. AR further submitted that against the order of Finail Estate Developers (supra) the Revenue has not preferred any appeal before the Hon'ble High Court.*

7.2. The ld. AR has also placed reliance on the decision of this Tribunal in the case of Penthea Builders & Developers P. Ltd. in ITA No. 1951/D/2011 for AY 2007-08 on identical set off facts. The ld.AR submits that the Revenue had preferred an appeal in the case of Panthea Builders and Developers (supra) in ITA No. 270/2005 before the Hon'ble Jurisdictional High Court. The Hon'ble High Court at para 11 has observed the following facts:

> *"11. In its order dt. 5th October, 2011, the ITAT examined the nature of the MoU between Finian and VEEPL with particular reference to the clauses therein and concluded that Finian was transacting with VEEPL "on a principal to principal basis" and that it could not be said that the payment to VEEPL was for rendering services. Consequently, it was held that section 194H of the Act was "not at all applicable". The ITAT noted that in terms of clause 3.2 of the MoU no sum was due to be paid to VEEPL for the services rendered by it till it procured 27 acres of land. The amount paid to VEEPL was duly reflected by Finian in its purchases and the closing stock and no sales had been made during the year in question. The payment of 2% of the sale amount of VEEPL as consideration for*

transferring VEEPL's rights in the land was in terms of Clause 3.2 of the MoU and it had not been shown that such payment was not a fair compensation.

12. As already noticed hereinbefore, no appeal was filed by the Revenue in this Court against the decision of the ITAT on the above aspect in the case of Finian.

13. ……..It is submitted that while in the case of Finian the Consolidator invested its own funds for 7 ITA No. 1949/Del/2011purchasing the land for the 'acquirer' in the present case of ZREPL the acquirer paid from its own funds. However, ld. Counsel for the Revenue has been unable to show any difference in the actual clauses of the MoU between ZREPL and VEEPL when compared to the MoU between Finian and VEEPL. In the circumstances, the Court is unable to appreciate on what basis it could be said that the arrangement between ZREPL and VEEPL was not on a 'principal to principal' basis. With the Revenue having accepted the decision of the ITAT in the case of ITO vs. Finian Estates Developers P. Ltd., and with there being nothing to distinguish it in relation to the case of ZREPL, the Court is not inclined to interfere with the impugned order of the ITAT which, in the opinion of the Court, has rightly relied upon its earlier decision in the case of Finian.

16. Having considered at length the submissions of ld. Counsel for the Revenue, the pleadings and the documents not only in the case of PBDPL but also in the case of Finian,

the Court is unable to find any distinction between the two cases as far as the clauses in the MoU between the parties and VEEPL or the payment made to the later pursuant thereto. Again, with the Revenue having accepted the decision of the ITAT in the case of Finian, and with the Revenue being unable to bring out any distinguishing feature as far as the case of PBDPL, the Court sees no reason why it should interfere with the impugned order of the ITAT."

7.3. The ld.AR submitted that in the facts of the present case before us, the assessee has the payment to Vikram Electric Equipment P. Ltd., on account of transfer of certain rights of Vikram Electric Equipment P. Ltd. in the lands transferred to the assessee, and was not towards any services rendered. The ld.AR submitted that as a consolidator, Vikram Electric Equipment P. Ltd. was to contact the local farmers in and around Gurgaon, who were willing to sell their land.

7.4. He submitted that Vikram Electric Equipment P. Ltd. was making payments from its account to the farmers and thereto have certain rights in the land. On the ultimate transfer of land to the assessee through Vikram Electric Equipment P. Ltd., the final payment was to be made to the farmers. Towards the right of Vikram Electric Equipment P. Ltd. 2% of the cost of land (in some cases, even a higher amount) was to be paid to Vikram Electric Equipment P. Ltd. as mutually agreed. This was the mutually agreed price.

7.5. The ld.AR submitted that Vikram Electric Equipment P. Ltd. worked for land acquisition and after scrutiny of the concerned

documents of the land, Vikram Electric Equipment P. ltd. would suggest the appropriate land for purchase by the assessee. He submitted that Vikram Electric Equipment P. ltd. thus acted with the farmers on its own account rather than for and on behalf of the assessee, on principle to principle basis, with the farmers on the one hand and the assessee on the other.

7.6. The ld.AR further submitted that this being so, the provisions of neither section 194C nor section 194H get attracted to the payment made by the assessee to Vikram Electric Equipment P. Ltd. It has been submitted by the ld.AR that the payment along with payment made to the farmers directly represented the purchase of the cost of land and had been correctly treated as such in the assessee's books of account. It has been contended that alternatively, in any case, the payment made to Vikram Electric Equipment P. Ltd. has not affected the taxable profits of the assessee during the year.

The total purchases were lying as closing stock, as observed by the Taxing authorities also and the effect of adjustment with regard to the amount paid to Vikram Electric Equipment P. Ltd. would arise only on and in the instances of sale of land by the assessee. It is thus submitted that no disallowance u/s 40(a)(ia) of the Act is called for much less any consequential action u/s 201 of the Act. It has been contended that Vikram Electric Equipment P. Ltd. had an important role to play as a consolidator, since the assessee required contiguous land holdings in order to develop a colony. The ld.Ar submitted that in case land which was agreed to be acquired by Vikram Electric Equipment P. Ltd. was not found to be suitable by the assessee, it was Vikram Electric Equipment P. Ltd.

which would have to bear the consequences, indicating that Vikram Electric Equipment P. Ltd. was not acting as an agent on behalf of the assessee, but was working on a principle to principle basis, independently.

8. On the other hand, the stand of the Ld.DR, has been that MOU signed by the assessee and Vikram Electric Equipment P. Ltd. lays down that Vikram Electric Equipment P. ld. Makes it clear that Vikram Electric Equipment P. Ltd. was acting as an agent of the assessee, rendering services, for which, the provisions of section 194H of the Act are applicable and it is correctly applied by the ld. CIT(A).

9. We have perused the agreement in this regard. It is seen that clause 3.2 of the MOU between the assessee and Vikram Electric Equipment P. Ltd. makes it clear that Vikram Electric Equipment P. Ltd. or its agent agreed to assign their rights to purchase the land in favour of the assessee. It would be appropriate to reproduce here, the said clause 3.2:

> *3.2 In consideration of the consolidator or its agent/nominee assigning its right to purchase the land in favour of the Buyer Company and causing the land owners to execute the sale deeds directly in favour of the Buyer Company, the Buyer Company shall pay the consolidator such sum as may be mutually agreed. However, it is specifically agreed by the consolidator that no sum shall accrue to it on this account till it procures 27 acres of land for the Buyer company (unless the Buyer Company decides*

to procure less than 27 acres through the consolidator) and all the issues relating to possession and mutation of such land are settled to the satisfaction of the Buyer Company.

9.1. The above clause also makes it evident that unless the assessee decided to procure less than 27 acres of land through Vikram Electric Equipment P. Ltd. Vikram Electric Equipment P. Ltd. was to procure 27 acres of land for the assessee, failing which, no payment was to be made by the assessee to Vikram Electric Equipment P. Ltd.

9.2. This clearly shows that Vikram Electric Equipment P. Ltd. was transacting on a principle to principle basis and it cannot be said that the payment was made by the assessee to Vikram Electric Equipment P. Ltd. for rendering of any service. The provisions of sec. 194H of the Act are, therefore, not at all applicable.

9.3. Moreover, the amount paid to Vikram Electric Equipment P. Ltd. was duly reflected by the assessee in the purchases closing stock. No sales had been made during the year under consideration. It has not been shown to be otherwise. In such a scenario, in our considered opinion, no disallowance is called for.

9.4. Pertinently, no addition having been made for the year by the Assessing Officer, the alternate contention of the assessee to the

effect that no addition can be made during the year, stands accepted by both the Authorities below.

9.5. The provisions of section 40(a)(ia) of the Act in any case do not apply, the assessee having not claimed any deduction for any expenses on account of payment to Vikram Electric Equipment P. Ltd. either in its profit and loss account or in the computation of taxable income filed. It was only that the Assessing Officer recorded a loss of Rs. 19,700/-. This obviously, did not include any addition of either Rs. 4.02 crores or Rs. 1.24 crores.

9.6. In view of the above discussions, the grievance of the assessee is found to be correct and is accepted as such. Consistent with the view taken therein, as it is undisputed that the facts are identical, we allow this appeal of the assessee. The grounds raised by the assessee stands allowed."

6. Keeping in view of the facts and circumstances of the case, we find that Ld. CIT(A) by relying upon the Hon'ble Supreme Court of India decision in the case of CIT vs. Reliance Petroproducts (P) Ltd. has observed that the assessee had given an explanation, which is bonafide. There is no furnishing of inaccurate particulars of income or deliberate attempt to conceal income, hence, he rightly deleted the penalty in dispute. Even otherwise, we note that the addition on which the penalty in dispute was levied, has already been deleted by the ITAT vide order dated 11.2.2016 in ITA No. 1949/Del/2011 (2007-08), as aforesaid, hence, the penalty in dispute will not survive. In view of the

above, we uphold the order of the Ld. CIT(A) and dismiss the Appeal filed by the Revenue.

7. In the result, the appeal filed by the Revenue stands dismissed.

Order pronounced in the Open Court on 05/09/2016.

Sd/-	Sd/-
[O.P. KANT]	**[H.S. SIDHU]**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Date 05/09/2016

"SRBHATNAGAR"

Copy forwarded to: -

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

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches