IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI L.P. SAHU, ACCOUNTANT MEMBER

ITA No. 1950/Del/2011
Assessment Year: 2007-08

Philia Estate Developers Pvt. Ltd. 1-E, Naaz Cinema Complex Jhandewalan Extension New Delhi – 110 055 PAN AAECP2582R (Appellant)	vs.	ITO Ward-14(2) New Delhi. (Respondent)

Appellant by: Shri R.S. Singhvi, CA
Respondent by: Shri Ashis Chandra Mohanty, Sr. DR

O R D E R

PER CHANDRA MOHAN GARG, JUDICIAL MEMBER

This appeal has been filed by the assesee against the order of the Commissioner of Income Tax (Appeals) – XVII, New Delhi dated 24.2.2011 passed in the first appeal No. 198/CIT(A)XVII/Del/09-10 for asstt. year 2007-08. The grounds raised by the appellant assessee read as under :-

1. *"That the impugned order dated 24.02.2011 passed by the learned Commissioner of Income-tax(Appeals)XVII, New Delhi is bad in law and wrong on facts.*
2. *That on the facts and circumstances of the case, the learned Commissioner of Income-tax(Appeals)XVII has erred in law in upholding*

the action of the Assessing Officer treating the amount payable to the consolidator amounting to RS.37,22,734/- as non genuine expenditure.

2.1 That on the facts and circumstances of the case, the learned Commissioner of Income-tax(Appeals)XVII has erred in law in upholding the action of the Assessing Officer in making disallowance u/s 40(a)(ia) of the Income-tax Act, 1961 amounting to RS.37,22,734/- paid by the assessee to the consolidator for transfer of rights.

2.2 That on the facts and circumstances of the case, the learned Commissioner of Income-tax(Appeals)XVII has erred in holding that the consolidator was working as an agent of the assessee and hence the assessee ought to have deducted TDS on amount paid to the consolidator u/s 194C or 194H of the Income-tax Act, 1961.

3. That on the facts and circumstances of the case, the learned Commissioner of Income-tax(Appeals)XVII has erred in law in not appreciating that the disallowance of said sum' of RS.37,22,734/- which is included in purchases during the year has no impact on appellant's profit liable to tax as the entire purchases form part of closing stock of the appellant at the year end.

3.1 That the order of learned CIT(Appeals) is erroneous and self contradictory, The learned CIT(Appeals) has erred in confirming the addition after holding that closing stock also needs to be reduced. The learned CIT(Appeals) ought to have held that the transaction of RS.37,22,734/- does not result into any taxable income as same is neither includible in purchases or closing stock. "

2. Briefly stated the facts giving rise to the appeal are that the appellant company is in the business of acquiring and developing land which filed its return of income declaring a loss of Rs. 12,852/-. During the assessment proceedings the AO noticed that as per the details filed in respect of land acquired it reveals that the assessee company has booked an amount of Rs. 37,22,734/- to the purchases over and above to the amount paid to the land owners and stamp duty. The AO also observed that the assesee company has paid an amount of Rs. 11,98,10,938/- to two land owners and stamp duty of Rs. 71,86,690/-. The AO further noticed that in addition to these two amounts the assessee company

also claimed a sum of Rs. 37,22,734/- as an amount payable to the consolidator. After seeking explanation from the assessee the AO made addition of said amount by observing that no TDS has been deducted on the said payment. Thus it would not be allowed as deduction in view of the existing provision of section 40(a)(ia) of the Income Tax Act 1961 (for short the Act). Aggrieved the assessee preferred an appeal before the Ld. CIT(A) but remained empty handed as appeal of the assessee was dismissed. Further, the empty handed assessee has filed this appeal before the Tribunal with the grounds as reproduced hereinabove.

3. We have heard arguments of both the sides and carefully perused the relevant material placed on record. Ld. Assessee's representative (AR) contended that on the identical set of facts and circumstances similar issue has been decided in favour of the assessee by the ITAT "F" Bench in ITA No. 1949/Del/2011 in the similar asstt. year 2007-08 in the case of Philana Builders & Developers P. Ltd. vs. ITO order dated 11.2.2016. The Ld. AR further contended that the assessee and Philana Builders & Developers P. Ltd. belong to a same group company and in the similar facts and circumstances ITAT "H" Bench Delhi 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 the Tribunal has followed the order dated 5th October,2011 passed in the case of M/s. Finian Estate

Developers P Ltd. vs. ITO reported in 142 TTJ 545 (Del) which is also a group company of the assessee group.

4. Ld. AR contended that except amount of addition all facts and circumstances of the present case are similar to the case of Philana Builders & Developers P Ltd. vs ITO (supra). Therefore the issue is squarely covered in favour of the assessee by the order of the coordinate bench of the Tribunal.

5. Replying to the above Ld. DR strongly supported the action of the AO as well as the first appellate order but he could not show us any other order of the Tribunal or any other higher forum to show us the order of the ITAT Delhi Bench "F" in the case of Philana Builders & Developers P Ltd. vs. ITO (supra) have either been modified or set aside by any competent authority. Ld. AR contended that the consolidator was not working as an agent of the assessee . Therefore the assessee ought to have deducted TDS on the amount paid to the consolidator either u/s 194c or u/s 194H of the Act.

6. On careful consideration of above submissions from the order of the Tribunal in the case of Philana Builders & Developers P. Ltd. dated 11.2.2016 (supra) we observe that the Tribunal has granted relief to the assessee with following observations and conclusion :-

"*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.*

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. 5 th 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 purchasing 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 fvour 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."

7. In view of the above it is amply clear that the amounts paid to the consolidator i.e. M/s. Vikram Electric Co. (P) Ltd. was duly accounted by the assessee in the purchases and closing stock. Undisputedly no sales have been made by the assesee during the period under consideration. In view of above scenario and facts we concur with the conclusion of the coordinate bench of the Tribunal in the case of the Philana Builders & Developers P. Ltd. (supra) and hold that the provisions of section 40(i)(ia) of the Act do not apply to the present case on the payments made by the assessee to the consolidator as the assessee has not claimed any deduction for payment as amounted to the consolidator i.e payment made to M/s. Vikram Electric Co. (P) Ltd. either in the profit and loss account or in the computation of the taxable income filed alongwith the return of income. Thus, we decline to accept contention of the Ld. DR that the payment made by the assessee to the consolidator on purchase of land attracts the TDS provision of section 194C or section 194H of the Act. Hence, respectfully following the decision of the Tribunal dated 11.2.2016 (supra) the contention of the assessee are found to be correct and acceptable as per provisions of the Act

and we conclude that the payment to the consolidator does not attract TDS provisions and thus sole issue, in the present appeal, of the assessee is allowed.

8. In the result appeal of the assessee is allowed.

9. The order was pronounced on conclusion of the hearing on 28th April, 2016.

sd/-	sd/-
(L.P. SAHU) ACCOUNTANT MEMBER	(CHANDRA MOHAN GARG) JUDICIAL MEMBER

Dated 28th April, 2016
*Veena"
Copy of order forwarded to:

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

By Order
Asstt Registrar, ITAT