IN THE INCOME TAX APPELLATE TRIBUNAL DELHI 'G' BENCH
BEFORE SHRI A.N. PAHUJA, AM & SHRI C.M.GARG, JM

ITA No.5003/Del/2012 Assessment Year: 2009-10		
Assistant C.I.T. (TDS),Circle, Gurgaon	**V/s.**	Serco BPO Pvt. Ltd. Bldg. No.8, 6th Floor, Cyber City, DLF, Ph-II, Gurgaon
[PAN : AABCV 2572 L]		

(Appellant)		(Respondent)

Assessee by	Shri Manoneet Dalal, AR
Revenue by	Dr. Deepak Sehgal, DR

Date of hearing	22-11-2012
Date of pronouncement	07-12-2012

O R D E R

A.N.Pahuja:- This appeal filed on 21.09.2012 by the Revenue against an order dated 11.07.2012 of the learned CIT(A)-Faridabad, raises the following grounds:-

> *"1. The Ld. CIT(Appeal) has acted in violation of rule 46A of I.T. Rules in accepting the material and evidences produced by assessee claiming that due taxes relatable to the payment of rent was paid by the deductee i.e. M/s Infovision Information Services Pvt. Ltd., (IISPL) without giving due opportunity of being heard to the AO with regard to such material evidence.*
>
> *2. Ld. CiT(A) has ignored the provision of Exp. (i) to section 1941 which clearly provides that rent means any payment whatever name called, under any lease sub lease, tenancy or any other agreement or arrangement for the use of land or building which holding that payment made by assessee to IISPL for use of premises was not payment of rent so not liable for TDS u/s 1941 but only reimbursement*

of rental expenses liable for TDS u/s 194C as there was facility arrangement between assessee and IISPL.

3. Ld. CIT(A) has erred in law & on facts in allowing relief to the assessee relying on decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Ltd. Vs. CIT (93 ITR 226) in ignoring that the ratio of this decision is not applicable in this case as M/s IISPL was only a mediator for and not the ultimate recipient of rent and discharging of tax liability by the ultimate recipient of rent has not been examined by the Ld. CIT(Appeal)."

2. At the outset, considering the nature of issue and findings of the ld. CIT(A),the Bench rejected the request for adjournment filed on behalf of the assessee & proceeded to dispose of the appeal after hearing the parties.

3. Facts, in brief, as per relevant orders are that a survey/TDS inspection was conducted in the premises of the assessee on 28.01.2010 for verification of tax deducted at source from payments for contractual work u/s 194C, rental payments u/s 194-I, interest on loan u/s 194 A and professional payments u/s 194 J of the Income-tax Act, 1961 (hereinafter referred to as the Act). The Assessing Officer [AO in short] noticed during the inspection and subsequent proceedings that in the financial year 2008-09, the assessee deducted tax on payments made under facility agreement in terms of provisions of sec.194 C of the Act instead of u/s 194-I applicable in the case . Moreover, there was delay in deducting of tax at source from payments as detailed on page 2 to 9 of the order of the Assessing Officer. Consequently, the AO raised the demand of TDS u/s 201 of the Act beside interest u/s 201(1A) of the Act, as detailed hereunder:

Financial Year	Demand raised u/s 201(1) [In₹]	Demand raised u/s 201(1A) [In₹]	Total demand raised [In₹]
2008-09	40,38,830	6,15,260	46,54,090

4. On appeal, the ld. CIT(A) while condoning the delay of five days in filing the appeal and reducing interest charged for late payment of TDS by `₹43,012/-, cancelled the demand of `₹40,38,830/- on account of short deduction and interest of ₹`5,39,229/- on payments made to Infovision Information Service Pvt. Ltd. in terms of the facility agreement, holding as under:-

> *"6.2. The AO has worked out the short deduction of ₹`40,38,830/- and interest chargeable u/s 201(lA) of ₹.5,39,229/- on the payments made to Infovision Information Services Pvt. Ltd. under the facility agreement executed between the assessee and the above payee company. From the submissions of the appellant in para 2.1.5, it is revealed that the appellant had paid facility charges mainly rent in respect of 13 premises as per copy of agreement filed before the AO, which were taken in the name of Infovision information Service Pvt. Ltd. As per the certificate of incorporation dated 31.03.2009 (page 36 of the paper book), the name of Infovision Information Service Pvt. Ltd. has been changed to Adma Solutions Pvt. Ltd. Adma Solutions Pvt. Ltd. has filed its return of income for A.Y. 2009-10 on 27.02.2010 declaring total income of ₹44.36 crores and has paid taxes by way of TDS of ₹.3,57,03,657/- and self assessment tax of ₹.7,84,61,315/- as per copy of acknowledgement filed at page 35 of the paper book. The assessment order u/s 143(3) of the Act has been passed by the DCIT Circle-I(l), New Delhi, in this case for A.Y. 2009-10, a copy of which has also been filed in the paper book. It has been held by the Hon'ble Superne Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. (293 ITR 226) that the Circular No.275/201/95-IT(B) dated January 29,1997, issued by the Central Board of Direct Taxes, should put an end to the controversy. The Circular declares that "no demand visualized under section 201 (1) of the Income-tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under section 201 (lA) of the Act till the date of payment of taxes by the deductee assessee or the liability for penalty under section 271C of the Income-tax Act. Similar view has been taken by the Hon'ble Supreme Court in the case of CIT vs. Eli Lilly and Co. India Pvt. Ltd. (312 ITR 225) holding that once the deductees have paid taxes on their salary income by way of self assessment tax, tax could not be recovered from the employers under section 201(1) of the Act. I have gone through the other judicial rulings relied upon by the learned counsel which support the case of appellant on this issue. Since Adma Solutions Pvt. Ltd. has discharged its entire tax liability*

by way of TDS and self assessment tax, no demand on account of non deduction of TDS can be further enforced. Therefore, the AO was not justified in raising the TDS demand of ₹.40,38,830/- for non deduction of Tax in respect of amount of rent reimbursed to Adma Solutions Pvt. Ltd. Consequently, the demand of TDS of ₹.40,38,830/ - is cancelled and appellant gets a relief of ₹.40,38,830/-. The only dispute remains regarding charging of interest. In the paper book, the appellant ahs filed copies of TDS certificates issued by Infovision Information Services Pvt. Ltd. establishing the fact that the premises which were utilized by the appellant under facility agreement were taken on rent by Infovision Information Services Pvt. Ltd. and the due tax was deducted at source by Infovision Information Services Pvt. Ltd. from the rent payments. The appellant is neither tenant nor sub tenant in respect of the said premises but the actual amount of rent paid by Infovision Information Services Pvt. Ltd. has been reimbursed. The appellant has relied upon the decision of Hon'ble ITAT Ahmedabad in the case of Karnavati Co-op Bank Ltd. Vs. DCIT (134 ITD 486) wherein the decision of Hon'ble ITAT Delhi "F" Bench in the case of Expeditors International India Pvt. Ltd. vs. Addl. CP' [(2010) (2 ITR (Trib.) 153 (Delhi)] has been referred to. It has been held that where certain charges were reimbursed by the assessee and the charges being in the nature of reimbursement, the same were not liable to deduction of tax at source as it would tantamount to double deduction of tax at source on the same payment. Since the TDS was originally deducted by Infovision Information Services Pvt. Ltd. from the payment of rent made to the owners of the premises and the appellant has actually reimbursed the rental expenses, the appellant was under no legal obligation to deduct tax at source in view of the rationale laid down in the decisions cited supra. Consequently, no interest is chargeable for non deduction of tax at source and the interest of ₹.5,39,229/- charged by the AO is cancelled."

5. The Revenue is now in appeal before us against the aforesaid findings of the ld. CIT(A).In ground no.1 raised by the Revenue in their appeal, violation of Rule 46A of the Income-tax Rules, 1962 has been alleged. However, to a specific query by the Bench, the ld. DR appearing before us did not point out any additional evidence or document, which was admitted by the ld. CIT(A) in contravention of Rule 46A of Income-tax Rules, 1962. The ld. DR merely relied upon the order of the AO. On the other hand, the ld. AR relied upon the findings in the impugned order.

6. We have heard both the parties and gone through the facts of the case. Indisputably, the assessee company took over the running business of Infovision Information Services Pvt. Ltd.[IISPL][now known as Adma Solutions Pvt. Ltd.] running BPO business at its various locations. In terms of the agreement dated 1.12.2008, it was agreed that the infrastructure such as tenanted premises, electricity, water & telephone charges shall continue to be used by the assessee company although these facilities were registered in the name of IISPL, for a period of six months from 1.12.2008 to enable the company to carry on the business.. Thus ,the assessee was allowed use of 13 tenanted premises in terms of the aforesaid agreement dated 01.12.2008 on actual payment basis for a period of six months. The consideration for use of facilities was mentioned in clause 3.1 of the agreement, which reads as under:-

> *"3.1 Subject to article 3.2 below, in consideration of IISPL permitting SERCO BPO· the use of SERCO BPO facilities, SERCO BPO shall pay to IISPL for each Premise, the sum as stated in Schedule A (Less applicable tax deductions of charges for the SERCO BPO facilities)(the "Consideration"). In addition IISPL will make a monthly lump sum reimbursement claim on SERCO BPO for electricity water Datacomm and Internet connectivity and other variable charges based on actual. It is agreed between the parties that dedicated links (IPLC, Local Loop & Internet links) which are in the name of IISPL/SERCO BPO will be used and IISP would make payment to respective Internet Service Provider (ISP) and shall claim reimbursement as above. Any applicable service tax on the consideration amount shall be extra."*

6.1 Thus, in terms of the aforesaid agreement, on taking over business of IISPL , the latter allowed the use of various facilities registered in its name including the tenanted premises taken by it, on actual payment basis . In nutshell, all the payments in terms of the agreement were remitted to the various parties by IISPL on behalf of the assessee company on actual payment basis. The

assessee deducted tax at source in terms of provisions of section 194 C of the Act even on the amount of reimbursement on actual basis to IISPL, by way of abundant caution and not u/s 194I of the Act, there being no sub tenancy agreement between assessee and IISPL in respect of any of the premises. The AO was of the opinion that tax was required to deducted at source in terms of provisions of sec. 194I of the Act from payments made by assesse to IISPLwhile the assessee claimed that it did not occupy the premises as a tenant or sub-tenant and reimbursed the actual amount paid by IISPL to its landlords. On appeal, since the IISPL had paid tax in pursuance to return filed on 27th February, 2010 for the year under consideration, the ld. CIT(A) relying upon decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages Pvt. Ltd. Vs. CIT,293 ITR 226(SC);Karnavati Co-op. Bank Ltd. vs. DCIT,134 ITD 486(Ahmedabad),Expeditors International India Pvt. Ltd. vs. Addl. CIT,2 ITR(Trib.)153(Del.) and Circular No.275/201/95-IT(B) dated January 29, 1997, cancelled the demand for TDS as also interest u/s 201(1A) of the Act, the assessee being not a tenant or sub-tenant of the aforesaid 13 premises. The ld. CIT(A) found that the IISPL i.e. Adma Solutions Pvt. Ltd. discharged its entire tax liability and there was no such tenancy or sub-tenancy agreement between them. It was also noticed that the premises which were utilized by the assessee in terms of the facility agreement dated 1.12.2008 were actually taken on rent by Infovision Information Services Pvt. Ltd. and the due tax was deducted at source by Infovision Information Services Pvt. Ltd. from the rent payments. The assessee being not a tenant or sub tenant in respect of the said premises, actual amount of rent paid by Infovision Information Services Pvt. Ltd. alone was reimbursed for use of facility. Accordingly, the ld. CIT(A) concluded that the assessee was under no legal obligation to deduct tax at source & therefore, no interest was chargeable for non deduction of tax at source. The Revenue have not placed before us any material, suggesting that the assessee had any interest either as a lessee or sub-lessee or a tenant in any of the aforesaid 13 premises. The fact that the assessee was allowed use of premises by IISPL in terms of agreement dated 1.12.2008, cannot lead to the conclusion that the assessee had

any interest as a lessee, sub-lessee or tenant over the various premises. The right to use any land or building necessarily implies that the assessee must have some interest in the immovable property as a tenant. The existence of a landlord-tenant relationship or a licensor-licensee is a must before a payment in question can be termed as a rent. In the instant case, no such material is evident from the order of the AO nor the ld. DR brought to our notice any such material ,evidencing existence of a landlord-tenant relationship or a licensor-licensee. Even otherwise, it may be pointed out that Circular No. 275/201/95-IT(B) dated January 29, 1997, issued by the CBDT and referred to in the aforesaid decision in Hindustan Coca Cola Beverages Pvt. Ltd. (supra) envisages that no demand visualized under section 201(1) of the Income- tax Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee- assessee. The ld. CIT(A) succinctly concluded that there was no such tenancy or sub-tenancy agreement between the assessee and IISPL, and therefore, provisions of sec. 194I of the Act of the Act were not applicable nor the assessee was liable to deduct tax at source on the amount reimbursed to IISPL in terms of agreement dated 1.12.2008. In view of the foregoing, especially when the Revenue have not placed before us any material, controverting the aforesaid findings recorded by the ld. CIT(A) so as to enable us to take a different view in the matter nor brought to our notice any material, evidencing admission of any additional evidence or any tenancy or sub-tenancy agreement between the assessee & IISPL or even any contrary decision, we are not inclined to interfere. Therefore, ground nos. 1 to 3 in the appeals are dismissed.

7. No other plea or argument have been made.

8. In the result, appeal is dismissed.

Order pronounced in open Court

Sd/-	Sd/-
(C.M.GARG)	(A.N. PAHUJA)
(Judicial Member)	(Accountant Member)

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Copy of the Order forwarded to:-

1. Assessee
2. Assistant C.I.T.(TDS),Circle, Gurgaon
3. CIT concerned
4. CIT(A), Faridabad.
5. DR, ITAT, 'G' Bench, New Delhi
6. Guard File.

By Order,

Deputy/Asstt.Registrar
ITAT, Delhi