

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'जी' मुंबई ।

IN THE INCOME TAX APPELLATE TRIBUNAL " G " BENCH, MUMBAI

सर्वश्री एच.एल. कार्वा ,अध्यक्ष एवं नरेन्द्र कुमार बिल्लैय्या, लेखा सदस्य के समक्ष

BEFORE SHRI H.L. KARWA, PRESIDENT AND SHRI N.K. BILLAIYA, AM

आयकर अपील सं./I.T.A. No.695/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09

The ITO (TDS) 3 (5), 10 th Floor, Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road (W), Mumbai-400 002		M/s. Wadhwa & Associates Realtors Pvt. Ltd., 301, Platina, Plot C-59, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051
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C.O. No. 06/Mum/2013

(Arising out of /I.T.A. No.695/Mum/2012

(निर्धारण वर्ष / Assessment Year : 2008-09

M/s. Wadhwa & Associates Realtors Pvt. Ltd., 301, Platina, Plot C-59, G Block, Bandra Kurla Complex, Bandra (E), Mumbai-400 051		The ITO (TDS) 3 (5), 10 th Floor, Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road (W), Mumbai-400 002
स्थायी लेखा सं./जीआइआर सं./PAN/GIR No. : AAACW 5273G		
(अपीलार्थी /Appellant)	..	(प्रत्यर्थी / Respondent)

अपीलार्थी ओर से/ Appellant by: `	Shri Pavan Ved
प्रत्यर्थी की ओर से/Respondent by :	Shri J.D. Mistry, Shri A.T. Jain & Shri Mahesh Rajora

सुनवाई की तारीख / Date of Hearing :19.06.2013

घोषणा की तारीख /Date of Pronouncement : 03.07.2013

आदेश / ORDER

PER N.K. BILLAIYA, AM:

This appeal by the Revenue and the cross objection by the assessee are directed against the very same order of the Ld. CIT(A)-14, Mumbai dt.21.11.2011 pertaining to A.Y. 2008-09.

2. The Revenue has raised as many as 12 grounds. The sum and substance of the grievance of the Revenue is that the Ld. CIT(A) erred in law as well as on facts in holding that the provisions of Sec. 194-I are not applicable on the facts of the case.

3. The impugned assessment order is dt. 29.3.2011 passed u/s. 201(1) and 201(1A) of the Act. The facts of the case show that the assessee has made payment of lease premium to M/s. MMRD Ltd. amounting to Rs. 949.92 crores approximately during the year under consideration. This lease premium was paid for allotment of a plot of land namely C-59 in 'G' Block of Bandra Kurla Complex, Bandra (E), Mumbai as per lease deed dt. 22.11.2004 and also for additional FSI in respect of the said plot. The AO was of the firm belief that the assessee was liable to deduct tax as per provisions of Sec. 194-I of the Act in respect of the aforesaid payment to MMRD Ltd and as the assessee has failed to deduct tax at source, the AO issued show cause notice dt. 21.2.2011 to the assessee. The assessee explained that it has entered into a lease agreement with M/s. MMRD on 22.11.2004. The land under question has been given by the lesser i.e. MMRD to the assessee on lease and for which the assessee has paid the premium amounting to Rs. 949.91 crores approximately.

3.1. After considering the submissions made by the assessee in the light of certain judicial decisions, the AO arrived at the conclusion that the

assessee was required to deduct tax u/s. 194-I and pay it to the Government treasury within the stipulated time as required by provisions of Chapter XVII-B of the I.T. Act and as the assessee has not complied with the provisions of Sec. 194-I, it has committed default within the meaning of Sec. 201(1) of the Act and therefore, the assessee is treated as assessee in default and accordingly directed the assessee to make payment of interest alongwith TDS totaling to Rs. 314.26 crores.

4. The assessee carried the matter before the Ld. CIT(A). The assessee explained that the payment referred by the AO does not bear the character of rent mentioned in Sec. 194-I and therefore there is no requirement of deduction of tax from such payment made to MMRD. It was further explained that the assessee has made payment to MMRD for

- a) For additional built-up area
- b) For granting free of FSI area of Rs. 4 crores.

5. After considering the facts and the submissions and the nature of transaction, the Ld. CIT(A) observed that the amount charged by MMRD as lease premium is equal to the rate prevalent as per Stamp Duty recovery for acquisition of the commercial premises. These rates are prescribed for transfer of property and not for the use as let out tenanted property. The Ld. CIT(A) further observed that even the additional FSI given for additional charges as per Ready Reckoner rates only. It is the finding of the Ld. CIT(A) that the whole transaction towards grant of leasehold transaction rights to the assessee is nothing but a transaction of transfer of property and the lease premium is the consideration for the purchase of the said leasehold rights. The Ld. CIT(A) went on to discuss the judicial decisions relied upon by the AO of Hon'ble Calcutta and

Karnataka High Court and observed that both the decisions pertain to the same issue i.e. whether lease premium was a revenue or a capital expenditure. The Id. CIT(A) also discussed the decision in the case of Raja Bahadur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax 11 ITR 513 PC wherein it has been held that the payment which under the lease is exigible by the lesser may be classed under 3 categories (1) Premium or salary (2) the minimum royalty and (3) the royalty per ton . The salamy have been rightly treated as capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted both by the lease. The Ld. CIT(A) has also considered the decision of the Hon'ble Supreme Court in the case of Member for the Board of Agricultural Income Tax, Assam Vs Sindhurani Chaudhrani & Ors 32 ITR 169 wherein it has been held that Salami is in the form of a lump sum non recurring payment made by a prospective tenant to the landlord as a consideration and is paid anterior to the constitution of relationship of landlord and tenant, it is not "rent" within the meaning of the word used in the definition of "agricultural income" in section 291(a) of the I.T. Act. It has all the characteristics of a capital payment and it is not revenue. The Ld. CIT(A) further discussed certain other judicial decisions and in particular the decision of the Hon'ble Jurisdictional High Court in the case of CIT Vs Khimline Pumps Ltd., 258 ITR 459 wherein the Hon'ble Jurisdictional High Court has held that an amount of Rs. 45 lakhs paid by the assessee to M/s. APVE Ltd., for acquisition of leasehold land was a capital expenditure and hence the same was not deductible. The Ld. CIT(A) has further considered the decision of the Special Bench of Mumbai Tribunal in the case of JCIT Vs Mukund Ltd. 106 ITD 231 wherein the issue was whether the premium paid for acquiring leasehold right in land is revenue or capital . The Special Bench has held that the same is capital expenditure.

5.2. The Ld. CIT(A) has distinguished the facts of the cases relied upon by the AO at page-53 para 5.39 of his order and after distinguishing the cases came to the conclusion that in none of these cases, the issue of 'lease premium as in the case of the assessee vis-à-vis 'rent' has been considered. At para 5.41 of his order at page-54, the Ld. CIT(A) says that *"I have also considered the other cases relied upon the AO. These cases lay down general principles of interpretation of Law. I find that none of the above cases the court has held that the lease premium in similar circumstances is in the nature of advance rent and hence liable for deduction of TDS u/s. 1941 of the Act. The cases relied upon by the AO are thus distinguishable on facts and in law and the same cannot be made applicable to the facts of the present case where the issue raised is completely different."*

5.3. The Ld. CIT(A) finally considered the decision of the Tribunal in the case of M/s. National Stock Exchange of India Ltd. in ITA Nos. 1955/M/99, 2181/M/99, 4853/M/04, 4485/M/04, 4854/M/04, 356/M/01 and 5850/M/00. At para 5.45 of his order on page 57, the Ld. CIT(A) has given a comparative chart of the facts in the case of the assessee and that in the case of NSE and after comparing the facts finally concluded that the facts of the case of the NSE are identical to the facts of the case of the assessee and observed that in the case of NSE, the stand of the department as well as the decision of the Tribunal was that the consideration paid for acquiring leasehold rights in land is a capital expenditure and not 'rent'.

5.4. The Ld. CIT(A) finally concluded that the amount paid by the assessee is lease premium for acquiring leasehold rights and additional

FSI in respect of the leased plot and the same is not in the nature of rent as contemplated u/s. 194-1 of the Act. Accordingly, the assessee was not required to deduct tax at source u/s. 194-1 of the Act and deleted the demand raised by the assessee.

6. Aggrieved by this finding of the Ld. CIT(A), Revenue is before us.

7. The Ld. Departmental Representative strongly supported the findings of the AO.

8. The Ld. Senior Ld. Counsel for the assessee reiterated what has been stated before the lower authorities.

9. We have considered the rival submissions, perused the order of the lower authorities and the material evidence brought on record in the form of paper Book and the judicial decisions relied upon by the rival parties. The entire grievance revolves around the premium paid by the assessee to M/s. MMRDA Ltd. for the leasehold rights acquired by the assessee through the lease deed dt. 22nd November, 2004. It is the say of the Revenue that this lease premium was liable for deduction of tax at source failing which the assessee is to be treated as assessee in default. It is the say of the assessee that such lease premium is in the nature of capital expenditure and therefore there is no question of deduction of tax at source. Further, the said lease premium does not come within the purview of the definition of rent as provided u/s. 194-1 of the Act.

10. We have carefully perused the lease deed as exhibited from page-1 to 42 of the Paper Book. A careful reading of the said lease deed transpires that the premium is not paid under a lease but is paid as a price for obtaining the lease, hence it precedes the grant of lease. Therefore, by

any stretch of imagination, it cannot be equated with the rent which is paid periodically. A perusal of the records further show that the payment to MMRD is also for additional built up area and also for granting free of FSI area, such payment cannot be equated to rent. It is also seen that the MMRD in exercise of power u/s. 43 r.w. Sec. 37(1) of the Maharashtra Town Planning Act 1966, MRTP Act and other powers enabling the same has approved the proposal to modify regulation 4A(ii) and thereby increased the FSI of the entire 'G' Block of BKC. The Development Control Regulations for BKC specify the permissible FSI. Pursuant to such provisions, the assessee became entitled for additional FSI and has further acquired/purchased the additional built up area for construction of additional area on the aforesaid plot. Thus the assessee has made payment to MMRD under Development Control for acquiring leasehold land and additional built up area. The decisions of the Tribunal in the case of M/s. National Stock Exchange (supra) and Mukund Ltd (supra) have been well discussed by the Ld. CIT(A) in his order. The decision of the Hon'ble Jurisdictional High Court in the case of Khimline Pumps Ltd. (supra) squarely and directly apply on the facts of the case wherein the Hon'ble Jurisdictional High Court has held that payment for acquiring leasehold land is a capital expenditure. Considering the entire facts in totality in the light of the judicial decisions vis-à-vis provisions of Sec. 194-1, definition of rent as provided under the said provision, we do not find any reason to tamper or interfere with the findings of the Ld. CIT(A) which we confirm.

11. In the result, the appeal filed by the Revenue is dismissed.

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13. As we have decided that the assessee is not liable to deduct tax at source in Revenue's appeal in ITA No. 695/M/2012, the cross objection raised by the assessee become otiose.

14. In the result, the appeal filed by the Revenue and the cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 03.07.2013

आदेश की धोषणा खुले न्यायालय में दिनांक: 3.7.2013 को की गई ।

Sd/-
(H.L. KARWA)

Sd/-
(N.K. BILLAIYA)

अध्यक्ष/ PRESIDENT लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 03.07.2013

व.नि.स./ RJ , Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई
/ DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार

(Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai