# IN THE INCOME TAX APPELLATE TRIBUNAL
# CHANDIGARH BENCHES, CHANDIGARH

**BEFORE SHRI H.L.KARWA, HON'BLE VICE PRESIDENT &**
**MS. ANNAPURNA MEHROTRA, ACCOUNTANT MEMBER**

**ITA No. 774/Chd/2013**
Assessment Year: 2009-10

| | | |
|---|---|---|
| The DCIT (TDS), Chandigarh | Vs. | M/s Punjab Infrastructure Development Board, Chandigarh |
| | | PAN No. AAALP0048F / PTLP10093G |

**ITA No. 882/Chd/2013**
Assessment Year: 2009-10

| | | |
|---|---|---|
| The DCIT (TDS), Chandigarh | Vs. | M/s Punjab Infrastructure Development Board, Chandigarh |
| | | PAN No. AAALP0048F |

**ITA No. 880/Chd/2013**
Assessment Year: 2009-10

| | | |
|---|---|---|
| M/s Punjab Infrastructure Development Board, Chandigarh | Vs. | The ACIT(TDS), Chandigarh |
| PAN No. AAALP0048F | | |

**ITA No. 1354/Chd/2012**
Assessment Year: 2007-08

| | | |
|---|---|---|
| The DCIT (TDS), Chandigarh | Vs. | M/s Punjab Infrastructure Development Board, Chandigarh |
| | | PAN No. AAALP0048F |

**ITA No. 1355/Chd/2012**
Assessment Year: 2008-09

| | | |
|---|---|---|
| The DCIT (TDS), Chandigarh | Vs. | M/s Punjab Infrastructure Development Board, Chandigarh |
| | | PAN No. AAALP0048F |

**ITA No. 09/Chd/2013**
Assessment Year: 2008-09

M/s Punjab Infrastructure Development Board, Chandigarh — Vs. — The ACIT(TDS), Chandigarh

PAN No. AAALP0048F

**ITA No. 775/Chd/2013**
Assessment Year: 2010-11

The DCIT (TDS), Chandigarh — Vs. — M/s Punjab Infrastructure Development Board, Chandigarh

PAN No. AAALP0048F

**ITA No. 883/Chd/2013**
Assessment Year: 2010-11

The DCIT (TDS), Chandigarh — Vs. — M/s Punjab Infrastructure Development Board, Chandigarh

PAN No. AAALP0048F

**ITA No. 881/Chd/2013**
Assessment Year: 2010-11

M/s Punjab Infrastructure Development Board, Chandigarh — Vs. — The ACIT(TDS), Chandigarh

PAN No. AAALP0048F

**ITA No. 776/Chd/2013**
Assessment Year: 2011-12

The DCIT (TDS), Chandigarh — Vs. — M/s Punjab Infrastructure Development Board, Chandigarh

PAN No. AAALP0048F

**ITA No. 884/Chd/2013**
Assessment Year: 2011-12

The DCIT (TDS), Chandigarh — Vs. — M/s Punjab Infrastructure Development Board, Chandigarh

PAN No. AAALP0048F

Appellant By : S/Sh. Deepak Aggarwal, Rajesh Malhotra
Ms. Arshdeep Khanna & Sh. Satbir Singh

Respondent By : Sh. S.K.Mittal

&

**ITA Nos. 788 to 791/Chd/2014**
Assessment Years: 2008-09 to 2011-12

M/s Punjab Infrastructure Development Board, Chandigarh Vs. The JCIT(TDS), Chandigarh

PAN No. AAALP0048F

(Appellant) (Respondent)

Appellant By : Sh. Satish Jain
Respondent by : Shri S.K. Mittal

Date of hearing : 10.09.2015
Date of Pronouncement : 30.09.2015

**ORDER**

**PER H.L.KARWA, VP**

These 15 appeals by the Revenue and assessee involving certain common issues were heard together and are being disposed off by this common order for the sake of convenience. We will refer to the facts from ITA No. 774 / 880 / 882Chd/2013, which pertain to assessment year 2009-10.

**ITA No. 774/Chd/2013 – Revenue's appeal**

2. The only effective ground raised by the Revenue in this appeal reads as under:-

*"The Ld. Commissioner of Income Tax{A), Chandigarh has erred in law in holding that the following payments was*

*made to the parties detail below or not liable to IDS u/ s 194C of the I.T. Act, 1961:-*

| *S.No.* | *Name of the Party* | *Amount of contractual payment made during the year.* |
|---|---|---|
| *1* | *M/s Patiala Malerkotla Tollways Ltd.* | *Rs. 1,29,00,000/-* |
| *2* | *M/s Rohan & Rajdeep Tollways Ltd.,* | *Rs. 9,08,00,000/-* |
| *3* | *M/s Chetak Enterprises (P) Ltd.* | *Rs. 8,26,000/-* |
| *4* | *M/s Telecommunications Consultant India Ltd.,* | *Rs. 1,16,80,000* |
| | *Total* | *Rs. 19,79,80,000/-* |

3. Briefly stated, the facts of the case are that during the course of TDS inspection and assessment proceedings u/s 201(1) and 201(1A) of the Income-tax Act, 1961, the Assessing officer noticed that assessee in its receipt and expenditure account for the year ending 31.3.2009 had made expenditure of Rs. 492,68,37,890/- under the head 'project related expenditure' to different parties but the assessee had not deducted tax on these payments. The Assessing officer also observed that during financial year 2008-09, the Person Responsible ('PR') has received an amount of Rs. 7,36,10,000/- on account of toll fee for which no TDS was collected by the PR. Therefore, show cause notice was issued to the PR on 2.3.2012. In response to the said notice, the assessee furnished written submissions on 12.3.2012 which is reproduced by the Assessing officer at para 2.1 of the order. The Assessing officer did not accept the assessee's submissions that it was not liable to deduct tax at source. According to Assessing officer, if the payment made to builder / contractors as per the agreement are grants / loans then these amounts should have been reflected as capital expenditure whereas the assessee had shown these as Revenue expenditure. The Assessing officer also observed that after the expiry of the period mentioned in the above agreements,

the assets are to be transferred to Government of Punjab and the assessee had signed all these agreements on behalf of the Government of Punjab. With these observations, the Assessing officer held that PR was required to deduct tax on the payments made to the contractor / builder u/s 194C of the Act but it was not done and so he treated the PR as 'assessee in default' and created demand of Rs. 60,85,112/-.

4. Aggrieved by the order of the Assessing officer the assessee carried the matter in appeal before the CIT(A). During the course of appellate proceedings before CIT(A), the assessee filed an application under Rule 46A for placing on record the balance sheet, certificate of Chartered Accountants and a copy of the Income-tax return of the Payee M/s Rohan Rajdeep Tollways Ltd. The CIT(A) forwarded the aforesaid evidence to the Assessing officer for his comments and after receiving the remand report, the CIT(A) admitted the additional evidence produced by the assessee.

5. The ld. CIT(A) deleted the demand created u/s 201 /201(1A) following his own order passed in the assessee's case for assessment year 2007-08. The findings given by the CIT(A) in assessee's case for assessment year 2007-08 are as under:-

> *"5. I have considered the submission of the Ld. Counsels. The only issue in this case is about the nature of contribution made by the appellant to the concessionaires towards the project and whether the provisions of section 194C are applicable on said payments or not. As per the Assessing Officer, provisions of section 194C were applicable, as it amounts to payments made to contractor. The Ld. Counsels have argued that due to peculiar nature*

*of terms and conditions of the agreement, the same do not fall under the category of work contract, mainly because the concessionaires also have ownership rights. The appellant Board is not the owner of the roads and there was no contract of carrying out any work under work contract, since assets built were owned, operated, repaired and maintained by the concessionaires. The appellant has also clarified that the it was merely a facilitator and a nodal agency of the State Government, being confirming party and the obligation are inter-se between the authority i.e. PIA and the concessionaires. The impugned projects are, in fact, in the nature of joint venture of public and private participation and the contribution/payments made by the appellant on behalf of the Government of Punjab are actually equity participation towards the cost of project. In view of this discussion, it is held that the Assessing Officer was not right in holding that the appellant was required to deduct tax u/s 194C on the impugned payments and in treating the PR as 'assessee in default' u/s 201(1) and 201(1A) of the Act. The demand created u/s 201/201(1A) is accordingly deleted and all the grounds taken the appellant are allowed"*

6. We have heard the rival submissions and have also perused the materials available on record. Shri Deepak Aggarwal, Ld. Counsel for the assessee submitted that in the instant case the Concessionaire / Payee included the amount of grant made by the assessee in his return of income and had already paid taxes on the returned income as per the regularly followed accounting policy and, therefore, present case is squarely covered by the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd Vs. CIT in [2007] 293 ITR 226 (SC), wherein the Hon'ble Supreme Court held that where the Payee has already paid tax on the income on which there was a short deduction of

tax at source, recovery of tax cannot be made once again from the tax deductor. Shri Deepak Aggarwal, Ld. Counsel for the assessee stated at the Bar that the Payee (M/s Rohan Rajdeep Tollways Ltd.) - i) has furnished his return of income under section 139; (ii) has taken into account such sum for computing income in such return of income; and (iii) has paid the tax due on the income declared by him in such return of income; and he has furnished a certificate to this effect from an accountant as per the first proviso to section 201(1) of the Act. It is true that in the case of Hindustan Coca Cola Beverage (P) Ltd v CIT (supra), the Hon'ble Supreme Court held that where the assessee has already paid tax on the income on which there was a short deduction of at source, recovery of tax cannot be made once again from the tax deductor. The relevant observations of the Hon'ble Supreme Court are as under:-

> *i) that since the Department did not challenge the order of the Tribunal recalling its earlier order, that order attained finality and the High Court could not interfere with the final order ;*
>
> *(ii) without deciding the question whether the Appellate Tribunal could have reopened the appeal for rectifying an error apparent on the record, that, in view of Circular No. 275/201/95-IT(B) dated January 29, 1997, and since the assessee had paid the interest under section 201(1A) and there was no dispute that the tax due had been paid by the deductee (Pradeep Oil), the Appellate Tribunal came to the right conclusion that the tax could not be recovered once again from the assessee.*

7. We also observe here that the issue involved is squarely covered by the decision of Hon'ble Delhi High Court dated 26.8.2015 in the case of CIT Vs. Ansal Land Mark Township (P) Ltd in ITA No. 162 of 2015. The issue raised by

the Revenue before the Hon'ble Delhi High Court pertain to the retrospectivity of the second proviso to Section 40(a)(ia) of the Act which reads as under:-

> *"Provided further that where an assessee fails to deduct the whole or any part of the tax in accordance with the provisions of Chapter XVII-B on any such sum but is not deemed to be an assessee in default under the first proviso to sub-section (1) of Section 201, then, for the purpose of this sub-clause, it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso"*

The Hon'ble Delhi High Court has held that what is common to both the provisos to Section 40(a)(ia) and Section 201 (1) of the Act is that as long as the Payee / resident has filed its return of income disclosing the payment received by and in which the income earned by it is embedded and has also paid tax on such income, the assessee would not be treated as a person in default. The relevant observations of the Hon'ble Delhi High Court are as under:-

> *"8. It is seen that the issue in these AYs arises in the context of the disallowance by the Assessing Officer of the payment made by the Respondent Assessee to Ansal Properties and Infrastructure Ltd. ("APIL") which payment, according to the Revenue, ought to have been made only after deducting tax at source under Section 194J of the Act. Before the ITAT, it was urged by the Assessee that in view of the insertion of the second proviso to Section 40(a) (ia) of the Act, the payment made could not have been disallowed. Reliance was placed on the decision of the Agra Bench of ITAT in ITA No. 337/Agra/2013 (Rajiv Kumar Agarwal v. ACIT) in which it was held that the second proviso to Section 40 (a) (ia) of the Act is declaratory and curative in nature and should be given retrospective effect from 1st April 2005.*

*9. It is seen that the second proviso to Section 40(a) (ia) was inserted by the Finance Act 2012 with effect from 1st April 2013. The effect of the said proviso is to introduce a legal fiction where an Assessee fails to deduct tax in accordance with the provisions of Chapter XVII B. Where such Assessee is deemed not to be an assessee in default in terms of the first proviso to sub-Section (1) of Section 201 of the Act, ITA No. 160 & 161/2015 Page 5 of 10 then, in such event, "it shall be deemed that the assessee has deducted and paid the tax on such sum on the date of furnishing of return of income by the resident payee referred to in the said proviso".*

*10. It is pointed out by learned counsel for the Revenue that the first proviso to Section 201 (1) of the Act was inserted with effect from 1 st July 2012. The said proviso reads as under:*

> *"Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-*
>
> *(i) has furnished his return of income under section 139;*
>
> *(ii) has taken into account such sum for computing income in such return of income; and*
>
> *(iii) has paid the tax due on the income declared by him in such return of income;*
>
> *And the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.*

*11. The first proviso to Section 201 (1) of the Act has been inserted to benefit the Assessee. It also states that where a person fails to deduct tax at source on the sum paid to a resident or on the sum credited to the account of a resident such person shall not be deemed to be an assessee in default in respect of such tax if such resident has furnished his return of income*

*under Section 139 of the Act. No doubt, there is a mandatory requirement under Section 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfillment of the conditions as stipulated in the first proviso to Section 201(1). The insertion of the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. This again is a proviso intended to benefit the Assessee. The effect of the legal fiction created thereby is to treat the Assessee as a person not in default of deducting tax at source under certain contingencies.*

*12. Relevant to the case in hand, what is common to both the provisos to Section 40 (a) (ia) and Section 201 (1) of the Act is that the as long as the payee/resident (which in this case is ALIP) has filed its return of income disclosing the payment received by and in which the income ITA No. 160 & 161/2015 Page 7 of 10 earned by it is embedded and has also paid tax on such income, the Assessee would not be treated as a person in default. As far as the present case is concerned, it is not disputed by the Revenue that the payee has filed returns and offered the sum received to tax."*

8. The Hon'ble Delhi High Court has held insertion of second proviso to Section 40(a)(ia) is declaratory and curative in nature and it has retrospective effect from 1st April, 2005, being the date from which sub clause (ia) of section 40(a) was inserted by the Finance (No. 2) Act, 2004. In the above decision, the Hon'ble High Court has categorically held that no doubt there is a mandatory requirement u/s 201 to deduct tax at source under certain contingencies, but the intention of the legislature is not to treat the Assessee as a person in default subject to the fulfillment of the conditions as stipulated in the first proviso to Section 201(1). The first proviso to section 201(1) of the Act was inserted w.e.f. 1.7.2012. The Hon'ble Delhi High Court has categorically held that insertion of

the second proviso to Section 40(a) (ia) also requires to be viewed in the same manner. According to Hon'ble High Court this again is a proviso intended to benefit the Assessee. The Hon'ble High Court ruled that the second proviso to Section 40 (a) (ia) of the Act is declaratory and curative in nature and should be given retrospective effect from Ist April 2005. Respectfully following the judgement of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage P. Ltd Vs. CIT (SC) and also the recent decision of the Hon'ble Delhi High Court in the case CIT Vs. Ansal Land Mark Township (P) Ltd (supra), we do not find any merits in the appeal of the Revenue and hence the same is dismissed.

9. As regards the interest u/s 201(1) (1A) of the Act, Shri Deepak Aggarwal, Ld. Counsel for the assessee submitted that recipient / payee (M/s Rohan Rajdeep Tollways Ltd has suffered loss in the impugned assessment year. It was claimed before us that the recipient / payee had filed the return for the year under consideration declaring loss, therefore, no interest u/s 201(1A) is required to be charged from the assessee (Payer) for not deducing tax at sources. Even if the assessee herein deducts / remit the TDS amount on the income paid to recipient / payee, the same is liable to be refunded to the said recipient / payee and there is no tax liability in their hands. In our view, there is no loss to the Revenue. While taking such a view we are supported by the decision of ITAT, Lucknow Bench in the case of DCIT v Sahara India Commercial Corporation Ltd (2015) 117 DTR (Lucknow)(Trib) 59. In view of the above, we do not find any merit in the appeal preferred by the Revenue.

10. In the result, the appeal is dismissed.

**ITA No. 882/Chd/2013 – Revenue's appeal**

11. In this appeal the only ground raised by the Revenue is as under:-

> *"That the Ld. CIT(A), Chandigarh has erred in law treating M/s Rohan Rajdeep Tollways Ltd., is concessionaire and the project-Kiratpur Sahib-Una Road was awarded to M/s Rohan Rajdeep Tollways Ltd$_v$ on BOT basis thus the amount received by the PIDB was concession fee and not the Toll Fee, does not hold ground as the similar argument was rejected by the Ld.CIT(A), Chandigarh in the F.Y.2007-08 (A.Y.2008-09) (as mentioned by the Ld.CIT(A) in his order dated 13-10-2-2012 in appeal No.131/11-12). Further, even if this argument of the assessee is taken into consideration, then even in the light of decision of the Hon'ble Supreme Court in the case of M/s Hindustan Coca Cola Beverages (P) Ltd., vs. CIT 293 ITR 226 (SC) and amendment inserted by the Finance Act, 2012 w.e.f. 01.07.2012, the collector/deductor is not exempt from the chargeability of interest u/s 206C(7) of the Act and penalty provisions u/s 271CA and 221 of the Act."*

12. During the course of TDS inspection and assessment proceedings u/s 206C (IC) / 206 C(7) of the Act it was noted that the assessee has received an amount of Rs. 47,50,000/- from Jagraon –Nakodar, Rs. 6,88,60,000/- from Ropar-Phagwara Road, Rs. 2,32,81,319/- from Kiratpursahib-Una Road (total amounting to Rs. 9,68,91,319/-. On this amount, the PR was required to collect tax at source u/s 206C of the Income-tax Act, 1961, which he has failed to do in this case. A show cause notice was issued to the Person Responsible (PR) to the effect as to why the PR may not be held responsible u/s 206C(IC) / 206C(7) of the Act for not collecting the tax at source. In response to the said show cause notice, the assessee submitted a detailed reply dated 12.3.2012, stating that assessee cannot be treated in default u/s 206C and 206C(7) of the Act, as no

liability on this account falls on it. The assessee had also explained that M/s Rohan Rajdeep Tollways Ltd had paid the due taxes well before 31.3.2009. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverage (P) Ltd Vs. CIT in [2007] 293 ITR 226 (SC).

13. On appeal, the CIT(A) deleted the liability created on the amount of Rs. 2,32,81,319/- as concession fee in respect of Kiratpursahib-Una Road project observing as under:-

> *"3.1 The appellant had received an amount of Rs. 2,32,81,319/- as concession fee in respect of Kiratpur Sahib - Una Road project, which has been treated as toll fee by the Assessing Officer and liability u/s 206C(7) has been created in respect of this amount. During the course of appellate proceedings, the appellant had filed a certificate from M/s Ghaisas & Associates, Chartered Accountants of M/s Rohan Rajdeep Tollways Ltd, certifying that the project - Kiratpur Sahib-Una Road was awarded on BOT basis. The additional evidence was forwarded to the Assessing Officer for his comments vide letter No. 457 dated 05.06.2013 in view of Rule 46A(3) of the Income Tax Rules, 1962, to be replied by 17.06.2013, but no reply was received from him. The additional evidence filed by the appellant is accepted. In view of the fact that this project was awarded on BOT basis and the amount was received as concession fee and not as toll fee, the provisions of section 206C(7) cannot be applied to the amount received. The liability created on the amount received in respect of this project is accordingly deleted. Ground of appeal No.3 is allowed."*

14. The main contention of the assessee is that the project namely Kiratpursahib-Una Road project was awarded on Built – Operate - Transfer (BOT) basis. Shri Deepak Agagrwal, Ld. Counsel for the assessee pointed out that the aforesaid project was awarded on BOT basis and the amount was received as commission fee and not as toll fee, therefore, the provisions of section 206C(7) cannot be applied to the amount received. The provisions of section 206C (IC) reads as under:-

> *"[1C) Every person, who grants a lease or a licence or enters into a contract or otherwise transfers any right or interest either in whole or in part in any parking lot or toll plaza or mine or quarry, to another person, other than a public sector company (hereafter in this section referred to as "licensee or lessee" ) for the use of such parking lot or toll plaza or mine or quarry for the purpose of business shall, at the time of debiting of the amount payable by the licensee or lessee to the account of the licensee or lessee or at the time of receipt of such amount from the licensee or lessee in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, collect from the licensee or lessee of any such licence, contract or lease of the nature specified in column (2) of the Table below, a sum equal to the percentage, specified in the corresponding entry in column (3) of the said Table, of such amount as income-tax:*
>
> *Table*
>
> | *Sl. No.* | *Nature of contract or licence or lease, etc.* | *percentage* |
> |---|---|---|
> | *(1)* | *(2)* | *(3)* |
> | *(i)* | *Parking lot* | *Two per cent* |
> | *(ii)* | *Toll plaza* | *Two Percent* |
> | *(iii)* | *Mining and quarrying* | *Two percent* |
>
> *[Explanation 1.—For the purposes of this sub-section, "mining and quarrying" shall not include mining and quarrying of mineral oil.*
>
> *Explanation 2.—For the purposes of Explanation 1, "mineral oil" includes petroleum and natural gas.]"*

Section 206C (7) of the Act, reads as under:-

> *7) Without prejudice to the provisions of sub-section (6), if the seller does not collect the tax or after collecting the*

> *tax fails to pay it as required under this section, he shall be liable to pay simple interest at the rate of one per cent. per month or part thereof on the amount of such tax from the date on which such tax was collectible to the date on which the tax was actually paid [and such interest shall be paid before furnishing the quarterly statement for each quarter in accordance with the provisions of sub-section (3)]"*

The above provisions are not attracted in the facts and circumstances of the present case as the assessee had received the payment as commission fee and not as toll fee. In our opinion, the CIT(A) has taken a correct view, therefore, we uphold his view and dismiss the appeal of the Revenue.

15. In the result the appeal is dismissed.

**ITA No. 880/Chd/2013 – Assessee's appeal**

16. This appeal filed by the assessee is directed against the order of CIT(A) Chandigarh dated 28.6.2013 relating to assessment year 2009-10. The only ground raised by the assessee in this appeal reads as under:-

> *"1. (a) That the Id. CIT(A) was not justified in confirming the demand created under section 206C of the Income Tax Act, 1961 by treating the appellant as assessee in default under Section 206C(7) on the ground that the appellant was required to collect TCS on toll fee whereas as per the Appellant the concessionaire is responsible for overall operation and maintenance of the project facility and not merely granted the usance of the toll plaza therefore the demand created on this ground needs to be deleted and finding given as assessee in default may kindly be reversed.*

*(b) That alternatively and without prejudice to the aforesaid the Appellant disputes the distinguishing factor raised by the Ld. CIT(A) in distinguishing the judgment passed by the Hon'ble Apex Court in the case of Hindustan Coca Cola Beverages (P) Ltd. Vs. Commissioner of income Tax 293 ITR 226, by holding that the said judgment was delivered in context of TDS provisions therefore not applicable on TCS. Further, the transaction is revenue neutral and there is no loss to revenue."*

17. The Assessing officer passed an order u/s 206C(IC) / 206C(7) on 23.3.2012 wherein he has observed that during the course of TDS inspection and assessment proceedings u/s 206C (IC) / 206C(7) of the Act it was noticed that the assessee has received an amount of Rs. 47,50,000/- from Jagraon-Nakodar Road project and Rs. 6,88,60,000/- from Ropar-Phagwara road project. On this amount, the PR was required to collect tax at source u/s 206C of the Income-tax Act, 1961, which it failed to do so in this case. Therefore, show cause notice was issued to the PR, requiring him to show cause as to why he may not be held responsible u/s 206C(1C) / 206C(7) of the Act for collecting tax at source. In response to the said notice, the PR filed a detailed reply on 12.3.2012. The Assessing officer did not agree with the reply submitted by the assessee and held that the decision cited by the assessee in the case of Hindustan Coca Cola Beverage (P) Ltd Vs. CIT in [2007] 293 ITR 226 (SC) and Circular No. 275/201/95-IT(B) dated January 29, 1997 issued by CBDT are not applicable to the facts of the present case because the matter involved was in respect of tax deduction at source and the proceeding were u/s 201(1) / 201(IA) of the Act, but in the present case the matter is related to collection of tax at source and the proceedings are u/s 206C(1C) / 206C(7) of the Act. The Assessing officer observed that since the PR has failed to collect tax and deposit tax u/s 206C of the Act, therefore, he was treated as 'assessee in default' u/s 206C of the Act and demand of Rs.

15,53,171/- was created relating to assessment year under consideration. The Assessing officer has also treated as 'assessee in default' u/s 206C(7) of the Act, and charged interest at Rs. 5,59,141/-.

18. On appeal, the CIT(A) upheld the order of the Assessing officer stating that the PR was required to collect and deposit tax u/s 206C of the Act in respect of the impugned amount of Rs. 7,36,10,000/- pertaining to toll fee received on Jagraon – Nakodar and Ropar-Phargarwa Road projects and the Assessing officer was right in treating the PR as 'assessee in default' u/s 206C(7) of the Act and creating demand under TCS provisions..

19. We have heard the rival submissions. Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that the first proviso to section 201(1) of the Act was inserted w.e.f. 1.7.2012. The said proviso reads as under:-

> *"**Provided** that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—*
>
> *(i) has furnished his return of income under section 139;*
>
> *(ii) has taken into account such sum for computing income in such return of income; and*
>
> *(iii) has paid the tax due on the income declared by him in such return of income,*
>
> *and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed"*

Shri Deepak Aggarwal Ld. Counsel for the assessee pointed out that the above proviso has been inserted to benefit the assessee. He further submitted that the amendment on similar lines have been made in the provisions to section 206C

relating to TCS for clarifying the deemed date of charging of tax by the licensee or lessee lesses. Shr Deepak Aggarwal, Ld. Counsel for the assessee submitted that proviso to section 206C(6A) of the Act was inserted w.e.f. 1.7.2012. The proviso to section 206C(6A) reads as under:-

> ***"Provided** that any person, other than a person referred to in sub-section (1D), responsible for collecting tax in accordance with the provisions of this section, who fails to collect the whole or any part of the tax on the amount received from a buyer or licensee or lessee or on the amount debited to the account of the buyer or licensee or lessee shall not be deemed to be an assessee in default in respect of such tax if such buyer or licensee or lessee—*
>
> *(i) has furnished his return of income under section 139;*
>
> *(ii) has taken into account such amount for computing income in such return of income; and*
>
> *(iii) has paid the tax due on the income declared by him in such return of income and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:]*

The above proviso has also been inserted to benefit the assessee. In our view, the provisions of section 206C are mandatory to collect tax under certain contingencies, but the intention of the legislature is not to treat the assessee as a person in default subject to fulfillment of the conditions stipulated in the proviso to section 206C(6A) of the Act. In our considered view, the insertion of second proviso to section 40(a) (ia) of the Act also requires to be viewed in the same manner. This again is a proviso intended to benefit the assessee. The effect of the legal fiction created thereby is to treat the assessee as a person not in default to deduct or collect tax at source under certain contingencies. The first proviso to section 201(1) of the Act and proviso section 206C(6A) were brought on statute on 1.7.2012 for rationalization of tax deduction at source (TDS) and Tax Collection at Source (TCS) provisions. These provisions are declaratory and curative in nature and have retrospective effect from 1st April, 2005 being

the date from which sub section (ia) to section 40(a) was inserted by Finance (No.2). Act, 2004. Therefore, the findings given in ITA No. 774/Chd/2013 relating to assessment year 2009-10 shall apply to the issue in hand with equal force. Therefore, the impugned demand created under section 206C(1C) / 206C(7) of the Act are, hereby deleted. The appeal of the assessee stands allowed.

20 In the result appeal of the assessee is allowed

**ITA No. 1354/Chd/2012 – Revenue's appeal**

21. This appeal filed by the Revenue is directed against the order dated 13.10.2012 of CIT(A), Chandigarh relating to assessment year 2007-08.

22. The only ground raised by the Revenue in this appeal reads as under:-

> *"The Ld. Commissioner of Income Tax{A), Chandigarh has erred in law in holding that the following payments was made to the parties detail below or not liable to TDS u/ s 194C of the I.T. Act, 1961:-*

| *S.No.* | *Name of the Party* | *Amount of contractual payment made during the year.* |
|---|---|---|
| *1* | *M/s Rohan & Rajdeep Tollways Ltd.* | *Rs. 684900000/-* |
| *2* | *M/s P.D. Aggrwal Infrastructure Ltd.* | *Rs. 123060000/-* |
| *3* | *M/s Patiala Malaerkotla Tollways Ltd* | *Rs. 132100,000/-* |
| | *Total* | *Rs. 940060000* |

*(2). The Ld. CIT(A), Chandigarh has not appreciated the facts that above expenditure has been booked as Revenue expenditure in the P&L account by the deductor.*

23. Brief facts of the case are that assessee has received following payments on account of Toll fee and the tax liability is as under;-

| S.No. | Name of the Contractor / builders | Amount of payment (Rs.) | Tax to be deducted u/s 194C | Tax deducted | Interest u/s 201(1A) | Total liability |
|---|---|---|---|---|---|---|
| 1 | Rohan & Rajdeep Tollways Ltd | 684900000 | 15341760 | NIL | 7364045 | 22705805 |
| 2 | P.D. Agarwal Infrastructure Ltd. | 123060000 | 2756544 | Nil | 1323141 | 4079685 |
| 3 | Patiala Malerkotla Tollways Ltd | 132100000 | 2959040 | Nil | 14203040 | 4379380 |
| | Total | 940060000 | 21057344 | Nil | 10107526 | 31164870 |

24. On appeal, the CIT(A) deleted the demand created u/s 201(1) 201(1A) of the Act holding that the Assessing officer was not right in treating the Person Responsible (PR) as 'assessee in default' u/s 201(1) / 201(1A) of the Act.

25. We have heard the rival submissions. Shri Deepak Aggarwal Ld. Counsel for the assessee pointed out that the facts of the present case are similar to that of assessment year 2009-10. The rival contentions raised by the representatives are also same. For the detailed reasons given in ITA No. 774/Chd/2013 for assessment year 2009-10, we have rejected the appeal of the Revenue. The order passed in ITA No. 774/Chd/2013 shall apply to this appeal also with equal force. Consequently, we dismiss the appeal of the Revenue.

26. In the result appeal of the Revenue is dismissed.

**ITA No. 1355/Chd/2012 – Revenue's appeal**

27. This appeal filed by the Revenue is directed against the order dated 13.10.2012 of CIT(A), Chandigarh relating to assessment year 2008-09.

28. The only ground raised by the Revenue in this appeal reads as under:-

*"The Ld. Commissioner of Income Tax{A), Chandigarh has erred in law in holding that the following payments was made to the parties detail below or not liable to TDS u/ s 194C of the I.T. Act, 1961:-*

| *S.No.* | *Name of the Party* | *Amount of contractual payment made during the year.* |
|---|---|---|
| *1* | *M/s Rohan & Rajdeep Tollways Ltd.* | *Rs. 22,57,00,000/-* |
| *2* | *M/s P.D. Aggrwal Infrastructure Ltd.* | *Rs. 18,18,40,000/-* |
| *3* | *M/s Patiala Malaerkotla Tollways Ltd* | *Rs. 10,63,00,000/-* |
| *4* | *M/s Chetak Enterprises (P) Ltd* | *Rs. 33,89,00,000/-* |
| *5* | *M/s Telecommunications Consultant India Ltd.,* | *Rs. 5,13,60,000/-* |
| | *Total* | *Rs. 90,41,30,000/-* |

*(2). The Ld. CIT(A), Chandigarh has not appreciated the facts that above expenditure has been booked as Revenue expenditure in the P&L account by the deductor.*

29. Brief facts of the case are that assessee has received following payments on account of Toll fee and the tax liability is as under;-

| S.No. | Name of the projects from where the toll was received | Amount of Toll fee received (Rs.) | Tax to be collected u/s 206C | Tax collected | Interest u/s 206(7) upto March, 2011 | Total liability |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| 1 | Jagraon-Nakodra Road | 5940000 | 132444 | Nil | 48328 | 182572 |
| 2 | Ropar-Phagwar Road | 63360000 | 1431936 | Nil | 515497 | 1947433 |
| | Total | 69300000 | 1566180 | Nil | 563825 | 2130005 |

30. On appeal, the CIT(A) deleted the demand created u/s 201(1) and 201(1A) of the Act holding that the Assessing officer was not right in treating the Person Responsible (PR) as 'assessee in default' u/s 201(1) / 201(1A) of the Act.

31. We have heard the rival submissions. Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that the facts of the present case are similar to that of assessment year 2009-10. The rival contentions raised by the representatives are also same. For the detailed reasons given in ITA No. 774/Chd/2013 for assessment year 2009-10, we have rejected the appeal of the Revenue. The order passed in ITA No. 774/Chd/2013 shall apply to this appeal also with equal force. Consequently, we dismiss the appeal of the Revenue.

32. In the result appeal of the Revenue is dismissed.

**ITA No. 9/Chd/2013 – assessee's appeal**

33. This appeal filed by the assessee is directed against the order dated 13.10.2012 of CIT(A), Chandigarh relating to assessment year 2008-09.

34. The issue involved in this appeal relates to TCS. During the year under consideration the assessee had received an amount of Rs. 6,93,00,000/- on account of toll fee. As per the Assessing officer the assessee was required to collect tax at source u/s 206C of the Act on toll fee receipt, but no tax was

collected. The assessee explained that M/s Rohan Rajdeep Tollways Ltd. had paid due taxes. The Assessing officer held that the 'assessee in default' u/s 206C / 206C(7) of the Income-tax Act, 1961. On appeal, the CIT(A) upheld the order of the Assessing officer and, hence, the assessee in appeal before the Tribunal.

35. It is observed that while deciding a similar issue in the case of assessee for assessment year 2009-10 in ITA No. 880/Chd/2013, we have held that assessee cannot be treated as 'assessee in default' u/s 206C/ 206C(7) of the Act. Shri Deepak Aggarwal, Ld. Counsel for the assessee submitted that facts of the present year and submissions are similar to that of assessment year 2009-10. In that view of the matter, the decision given in ITA No. 880/Chd/2013 for assessment year 2009-10 shall apply to this appeal also with equal force. Hence, we allow the appeal of the assessee.

36. In the result, appeal of the assessee is allowed.

**ITA No. 775/Chd/2013 – Revenue's appeal**

37. In this appeal the Revenue has raised the following ground:-

> *"The Ld. Commissioner of Income Tax{A), Chandigarh has erred in law in holding that the following payments was made to the parties detail below or not liable to TDS u/ s 194C of the I.T. Act, 1961:-*

| *S.No.* | *Name of the Party* | *Amount of contractual payment made during the year.* |
|---|---|---|
| *1* | *Bhawanigarh-Nabha-Gobindgarh* | *Rs. 3,89,10,000/-* |
| | *Total* | *Rs. 3,89,10,000/-* |

*(2). The Ld. CIT(A), Chandigarh has not appreciated the facts that above expenditure has been booked as Revenue expenditure in the P&L account by the deductor.*

38. At the very outset Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that the facts of the present year are similar to that of assessment years 2008-09 and 2009-10 in ITA Nos. 1355/Chd/2012 and 774/Chd/2013 respectively. For the detailed reasons given in the order for the above years, we do not find any merit in the appeal of the Revenue and accordingly the same is dismissed.

39. In the result, the appeal of the Revenue dismissed.

**ITA No. 883/Chd/2013 – Revenue's appeal**

40. The only ground raised by the Revenue in this appeal reads as under:-

*"That the Ld. CIT(A), Chandigarh has erred in law treating M/s Rohan Rajdeep Tollways Ltd., is concessionaire and the project-Kiratpur Sahib-Una Road was awarded to M/s Rohan Rajdeep Tollways Ltd$_v$ on BOT basis thus the amount received by the PIDB was concession fee and not the Toll Fee, does not hold ground as the similar argument was rejected by the Ld.CIT(A), Chandigarh in the F.Y.2007-08 (A.Y.2008-09) (as mentioned by the Ld.CIT(A) in his order dated 13-10-2-2012 in appeal No.131/11-12). Further, even if this argument of the assessee is taken into consideration, then even in the light of decision of the Hon'ble Supreme Court in the case of M/s Hindustan Coca Cola Beverages (P) Ltd., vs. CIT 293 ITR 226 (SC) and amendment inserted by the Finance Act, 2012 w.e.f. 01.07.2012, the collector/deductor is not exempt from the chargeability of*

*interest u/s 206C(7) of the Act and penalty provisions u/s 271CA and 221 of the Act."*

41. Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that facts of the present year are similar to that of assessment year 2009-10 in ITA No. 882/Chd/2013. For the detailed reasons given in the order for assessment year 2009-10, we do not find any merit in this appeal. Accordingly, we dismiss the appeal of the Revenue.

42. In the result, appeal of the Revenue is dismissed.

**ITA No. 881/Chd/2013 – assessee's appeal**

43. In this appeal the assessee has raised the following ground:-

*"1. (a) That the Id. CIT(A) was not justified in confirming the demand created under section 206C of the Income Tax Act, 1961 by treating the appellant as assessee in default under Section 206C(7) on the ground that the appellant was required to collect TCS on toll fee whereas as per the Appellant the concessionaire is responsible for overall operation and maintenance of the project facility and not merely granted the usance of the toll plaza therefore the demand created on this ground needs to be deleted and finding given as assessee in default may kindly be reversed.*

*(b) That alternatively and without prejudice to the aforesaid the Appellant disputes the distinguishing factor raised by the Ld. CIT(A) in distinguishing the judgment passed by the Hon'ble Apex Court in the case of Hindustan Coca Cola Beverages (P) Ltd. Vs. Commissioner of income Tax 293 ITR 226, by holding that the said judgment was delivered in context of TDS provisions therefore not applicable on TCS. Further, the transaction is revenue neutral and there is no loss to revenue."*

44. At the very outset, Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that the facts of the present year are similar to the facts of assessment year 2009-10. We have already decided a similar issue in ITA No. 882/Chd/2013 in assessee's case for assessment year 2009-10. The findings given therein shall apply to this appeal also with equal force. For the detailed reasons given therein, we allow the appeal of the assessee.

45. In the result, appeal of the assessee is allowed.

**ITA No. 776/Chd/2013 – Revenue's appeal**

46. The only ground raised by the Revenue reads as under:-

*"The Ld. Commissioner of Income Tax{A), Chandigarh has erred in law in holding that the following payments was made to the parties detail below or not liable to TDS u/ s 194C of the I.T. Act, 1961:-*

| *S.No.* | *Name of the Party* | *Amount of contractual payment made during the year.* |
|---|---|---|
| *1* | *Bhawanigarh-Nabha-Gobindgarh* | *Rs. 2,57,90,000/-* |
| | *Total* | *Rs. 2,57,90,000/-* |

*(2). The Ld. CIT(A), Chandigarh has not appreciated the facts that above expenditure has been booked as Revenue expenditure in the P&L account by the deductor."*

47. At the very outset, Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that facts of the present year are similar to that of assessment year 2009-10 in ITA No. 774/Chd/2013. For the detailed reasons given in the order

passed in ITA No. 774/Chd/2013, we do not find any merit in the appeal of the Revenue. Accordingly, we dismiss the same.

48. In the result, appeal of the Revenue is dismissed.

**ITA No. 884/Chd/2013 – Revenue's appeal**

49. The only ground raised by the Revenue reads as under:-

> *"That the Ld. CIT(A), Chandigarh has erred in law treating M/s Rohan Rajdeep Tollways Ltd., is concessionaire and the project-Kiratpur Sahib-Una Road was awarded to M/s Rohan Rajdeep Tollways Ltd$_v$ on BOT basis thus the amount received by the PIDB was concession fee and not the Toll Fee, does not hold ground as the similar argument was rejected by the Ld.CIT(A), Chandigarh in the F.Y.2007-08 (A.Y.2008-09) (as mentioned by the Ld.CIT(A) in his order dated 13-10-2-2012 in appeal No.131/11-12). Further, even if this argument of the assessee is taken into consideration, then even in the light of decision of the Hon'ble Supreme Court in the case of M/s Hindustan Coca Cola Beverages (P) Ltd., vs. CIT 293 ITR 226 (SC) and amendment inserted by the Finance Act, 2012 w.e.f. 01.07.2012, the collector/deductor is not exempt from the chargeability of interest u/s 206C(7) of the Act and penalty provisions u/s 271CA and 221 of the Act."*

50. During the course of hearing, Shri Deepak Aggarwal, Ld. Counsel for the assessee pointed out that the facts of the present year are similar to the facts of the case for assessment year 2009-10 in ITA No. 882/Chd/2013. For the detailed reasons given in the order passed in ITA No. 882/Chd/2013, we do not find any merit in this appeal. Accordingly, we dismiss the same.

51. In the result, appeal of the Revenue is dismissed

**ITA Nos. 788 to 791/Chd/2014 – assessee's appeals.**

52. These four appeals by the assessee are directed against the consolidated order of CIT(A), Chandigarh dated 13.6.2014 in confirming the penalty of Rs. 15,66,180/-, Rs. 20,44,460, Rs. 38,83,265/- and Rs. 4,77,255/- for assessment years 2007-08, 2008-09, 2009-10, 2010-11 respectively imposed u/s 271CA of the Income-tax Act, 1961

53. The Assessing officer observed that during the course of TDS inspection, it was noticed that deductor / collector has received payment of toll fee from different projects. On this amount, the Person Responsible ('PR' ) was required to collect tax at source u/s 206C of the Income-tax Act, which he has failed to do so. Therefore, penalty proceedings u/s 271CA of the Act were initiated against the assessee, and after affording an opportunity of being heard to the assessee, the Assessing officer imposed penalty u/s 271CA of the Act as under:-

| *Financial Year* | *Amount of Toll fee Receipt* | *Tax to be collected u/s 206C* | *Penalty imposable u/s 271CA* |
|---|---|---|---|
| *2007-08* | *69300000* | *15,66,180* | *15,66,180* |
| *200809* | *96891319* | *20,44,460* | *20,44,460* |
| *2009-10* | *184041000* | *38,83,265* | *38,83,265* |
| *2010-11* | *142050000* | *4,77,255* | *4,77,255* |
| Total | | 79,71,160 | 79,71,160 |

54. On appeal the CIT(A) upheld the order of the Assessing officer and, hence, the assessee is in appeal before the Tribunal.

55. It is observed that while deciding the assessee's appeal in ITA Nos. 9/Chd/2013, 880/Chd/2013, 881/Chd/2013, 884/Chd/2013 (referred to above) for assessment years 2008-09, 2009-10, 2010-11 and 2011-12 respectively held that the assessee was not required to collect tax at source and it had not committed any default under the provisions of Chapter XVII-BB of the Income-tax Act, 1961. Under section 271CA, the penalty is imposed for failure to collect tax at source. Since, we have held that there was no failure on the part of the assessee to collect tax at source, therefore, no penalty can be validly levied u/s 271CA of the Act. It is well settled law that the very basis on which penalty was levied, are deleted, there remains no basis at all for levying the penalty. Since, there was no failure on the part of the assessee to collect tax at source; therefore, there remains no basis at all for levying the penalty u/s 271CA of the Act. Accordingly, we allow the appeals and cancel the impugned penalty levied by the Assessing officer and confirmed by CIT(A) for all the assessment years under consideration.

56. In the result, all the appeals of the assessee are allowed.

57. Order pronounced in the open court on 30/09/2015.

*Sd/-*
**(ANNAPURNA MEHROTRA)**
**ACCOUNTANT MEMBER**

*Sd/-*
**(H.L.KARWA)**
**VICE PRESIDENT**

Dated : 30th September, 2015
Rkk

*Copy to:*

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