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IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' A ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

ITA No.143/Hyd/2017
(Assessment Year: 2010-11)

Shri Bhagwandas Nagla Hyderabad PAN: ABJPN 2919 H	Vs	ITO (International Taxation)-2 Hyderabad
(Appellant)		*(Respondent)*

For Assessee :	Shri K.C. Devdas
For Revenue :	Smt. Anjala Sahu, DR

Date of Hearing:	13.11.2017
Date of Pronouncement:	25.01.2018

O R D E R

Per Smt. P. Madhavi Devi, J.M.

This is assessee's appeal for the A.Y 2010-11 against the order of the CIT (A)-10, Hyderabad, dated 31.08.2016 confirming the order of the AO passed u/s 201(1) and 201(1A) of the Act. The assessee has raised the following grounds of appeal:

> *"1. The order of the Ld. CIT(A) is wholly unsustainable both in law and in facts of the case.*
>
> *2. The Ld. CIT(A) erred in holding the appellant as an "assessee-in-default" by levying a tax of Rs. 10,55,677/- u/s 201(1) & 201(1A) of the Income Tax Act ,1961.*
>
> *3. The Ld. CIT(A) failed to consider that the Ld. AO had applied the provisions of Sec.50C of the*

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Income Tax Act, 1961 ('Act') which is a deeming provision and hence cannot be considered for the application of provisions of Section 201(1) and Section 201(1A) of the Act.

4. In view of the Article 26 of Indo-US Double Taxation Avoidance Agreement, the appellant cannot be treated as an 'assessee-in-default'.

5. Without prejudice to the aforesaid facts, the learned CIT(A) erred in adopting the sale consideration u/s 50C of the IT Act, 1961 which is subject to conditions laid down therein and is not applicable to the provisions of sec.195 of the IT Act, 1961 as the deemed consideration is never paid by the appellant.

6. The Appellant denies to the tax liability u/s 201(1) & 201(1A) of the IT Act, 1961 and prays that the tax liability for Rs. 10,55,677/- kindly be deleted.

7. Any other ground/grounds that may be urged at the time of hearing of appeal".

2. In addition to the above, vide letter dated 11.3.2017, the assessee filed the following additional grounds of appeal:

"1. The entire order passed u/s 201 is a device or scheme adopted by the Assessing officer (' A.O') to tax the income of the Non-Resident in the hands of an Appellant and therefore the order u/s 201 not being in accordance with the statutory provisions must be quashed.

2. The order passed u/s 201 is nothing but an assessment made on the Non-Resident to tax their income in hands of Appellant without giving notice to the Appellant as an agent u/s 163 of the Income Tax Act 1961".

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3. Brief facts of the case are that the assessee, an individual, purchased a residential flat bearing flat No.414 with Municipal Property Assessment No.8-3-833/K/1 to 8/214 admeasuring 2750 sft on 31.12.2009 vide document No.38/2010 of SRO, Banjara Hills, from two persons i.e. Mrs. Aarthi S. Gadasalli and Mr. Suresh N. Gadasalli, who are both non-residents residing at No.21, Santa Fe Place, Odessa, Texas 79765, USA, the consideration was Rs.48.00 lakhs.

4. Since the assessee had made payment to a Non-Resident, but had not deducted tax at source before making the payment, the AO initiated proceedings u/s 201(1) by issuing a letter dated 19.6.2013 asking for the details of the TDS made by the assessee u/s 195 of the Act. In reply to the same, the assessee furnished a letter on 12.07.2013 requesting for some time. But, even on subsequent date i.e. on 29.12.2014, no details were furnished. However, on 16.1.2015, the assessee filed a copy of the sale deed along with the power of attorney of the vendors and again on 27.1.2015, a letter along with the computation of the capital gain and the copies of the sale deeds of the vendors were filed. In the said letter, it was stated that it was his maiden transaction for acquisition of a property and thus he was not aware of the legal provisions of Income Tax Act, more particularly about the provisions relating to TDS u/s 195 of the Act, due to which, he had not deducted tax at source before making the payment to the vendors. Further, he also submitted the

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computation of the Long Term Capital Gain (LTCG) in the hands of the vendors and offered to pay tax thereon.

5. The AO verified the record and found that the vendors Shri Suresh Gadasalli and Smt. Aarati S. Gadasalli have neither filed their returns of income for the A.Y 2010-11 admitting LTCG nor have they paid the tax. He also observed that notices u/s 148 dated 14.2.2014 were also issued to them, but they were returned unserved by the postal department. The AO observed that the vendors are liable to pay tax on the capital gain arising on account of the sale of the above mentioned property. Since the assesse, by himself had arrived at the taxable LTCG at Rs.7,93,205 after claiming the indexed cost of acquisition of the property, the AO held that the assessee is liable to pay the tax on LTCG. He, thereafter, observed that the sale consideration should be taken u/s 50C of the Act at Rs.58,11,100. He also proceeded to consider the cost of acquisition and observed that there is a mistake in the computation of LTCG as per the Instruction No.2/2014 dated 26.02.2014 and therefore, asked the assessee to state his objections, if any, to adopt the LTCG at Rs.30,33,556. But the assessee did not make any submission. Therefore, the AO computed the LTCG at Rs.30,33,556 and treated the assessee as an "assessee in default" for a sum of Rs.6,06,711 which is the tax deductible at source at 20% of Rs.30,33,556. Thereafter, he computed the interest payable u/s 201(1A) of the Act at Rs.4,48,966. Thus, the total tax liability was computed at Rs.10,55,677.

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6. Aggrieved, the assessee preferred an appeal before the CIT (A) raising a ground that by virtue of Article 26 of the Indo-US Taxation Avoidance Agreement, the provisions of section 195 are not attracted to this transaction. He also raised grounds of appeal against treating the assessee as an assessee in default u/s 201(1) and levying the interest u/s 201(1A) of the Act. The CIT (A) dismissed the ground of applicability of Article 26 of Indo-US DTAA to the facts of the case before him and also the computation of tax on LTCG and upheld the orders u/s 201(1) and 201(1A) of the Act. Thus, the CIT (A) dismissed the appeal of the assessee and the assessee is in second appeal before us.

7. The learned Counsel for the assessee, submitted that though the order is mentioned as an order passed u/s 201(1) of the I.T. Act, the AO has treated the assessee as an "assessee in default" only because the assessee's vendors have not filed their returns of income and have not offered the capital gains to tax. Therefore, according to him, the assessee should have been first treated as 'a representative assessee' of the vendors u/s 163 of the Act before passing an order u/s 201(1) of the Act and due to this deficiency, the order u/s 201(1) is not sustainable. He thus prayed that the additional grounds of appeal be admitted and adjudicated. With regard to the original grounds of appeal filed along with Form No.36, he reiterated the submissions made by the assessee before the authorities below.

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8. The learned DR, however, opposed the admission of additional grounds and relied upon the orders of the authorities below to submit that the order of the CIT (A) should be sustained.

9. Having regard to the rival contentions and the material on record, we find that though the assessee has raised the additional grounds of appeal, the assessee has not filed any application seeking their admission and giving reasons for not raising these grounds before the authorities below and as to why these grounds of appeal are being filed or raised at this stage of hearing. In the absence of the same, we cannot admit the additional grounds of appeal raised by the assessee and adjudicate the same at this stage. Even otherwise, we find that the liability of the assessee u/s 195 of the Act is different from the liability of the vendors to admit the capital gains in their hands. Both the sections are independent and are mutually exclusive. U/s 195, the assessee who is making payment to a non-resident is required to deduct tax at source at the time of payment or crediting the A/c whichever is earlier. There is no dispute that the Vendors are the non-residents and therefore, the provisions of section 195 are clearly attracted and the liability of the assessee u/s 195 is clearly established as the vendors are required to file their returns of income and offer the capital gains to tax. Thus, the liability of the assessee precedes the liability of the vendors. Though the AO has brought on record that the vendors have not paid the tax on the LTCG arising out of the sale of the property, we find that the order under appeal before us is an order u/s 201(1) and it is not consequent to or to bring to tax the income of

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the vendors. Therefore, on this ground also, the additional grounds of appeal raised by the assessee are not admissible.

10. As regards the merits of the case is concerned, the learned Counsel for the assessee submitted that the sale deed has been executed in favour of the assessee by the GPA holder of the vendors who is a resident of India and since, the assessee has made the payment to the said GPA holder, the assessee was not required to make any TDS u/s 195 of the Act. The 2nd objection taken by the assessee is that under Article 26 of the DTAA between India and the USA, the non-residents are not liable to tax in India and therefore, there was no requirement of the assessee to make TDS. The 3rd objection of the assessee is that even if the assessee is required to make the TDS, it can only be on the sum of Rs.48.00 lakhs paid as sale consideration and not on the sale consideration to be adopted u/s 50C of the Act. Further, he also raised an objection that the assessee is required to make TDS on the gross sum paid, whereas the AO has treated the assessee as an assessee in default after computing the LTCG which is not permissible under law.

11. The learned DR, on the other hand, supported the orders of the authorities below and submitted that the assessee was required to make TDS since the recipients of the consideration are NRIs and the GPA holder is only authorized to execute the sale deed but cannot step into the shoes of the vendors. Further, she submitted that under the Instruction No.2 of 2014 of the CBDT, where an assessee is to be treated as an

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"assessee in default", the AO is required to compute the LTCG and treat the "assessee in default" only in respect of the income component which is taxable in India and therefore, the AO was required to consider the sale consideration u/s 50C of the Act and after allowing the cost of acquisition, he was required to arrive at the taxable income and in respect of such taxable capital gains only, the assessee can be treated as an "assessee in default". Therefore, she submitted that the AO has correctly calculated the liability both u/s 201(1) and also u/s 201(1A) of the Act.

12. In rebuttal, the learned Counsel for the assessee has placed reliance on the decision of the Tribunal at Delhi in the case of ITO vs. Santur Developers Pvt. Ltd, in ITA No.1532/Del/2011 for the A.Y 2006-07, where under similar circumstances, the Tribunal held that in the said case reference to Article 26 of DTAA between India and USA is fully justified since, there is no provision under the I.T. Act requiring the resident to deduct the tax at source from the sale proceedings of land payable to any other resident and therefore, the assessee could not be burdened with the requirement of TDS in case of payment to non-resident.

13. Having regard to the rival contentions and the material on record, we find that the assessee, being a resident, has purchased an immovable property from the NRIs and the sale deed has been executed by the GPA holder of the non-residents. The assessee's claim that he has paid the sale consideration to the GPA holder in India and therefore, is not required to make TDS is not acceptable because, at best, the GPA holder can be

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considered as only a conduit between the assessee and the owners of the property and therefore, in the true sense, the assessee has made the payment to the non-residents only. In such circumstances, the assessee is required to deduct the tax at source u/s 195 of the Act before making the payment. The assessee has clearly failed to do so and therefore, the AO has initiated the proceedings u/s 201(1) of the Act by issuance of a notice dated 19.6.2013. The contention that section 201(1) proceedings have been initiated only because the vendors have not paid the tax also is incorrect as in the case of the vendors, notices u/s 148 were issued on 14.2.2014 i.e. after initiation of the proceedings u/s 201(1) of the Act in the case of the assessee on 19.06.2013. Further, it is noticed that the order u/s 201(1) is dated 27.1.2016 i.e. after introduction of the proviso to section 201(1) of the Act, wherein it has been provided that an assessee shall not be treated as 'an assessee in default' if the recipient has filed the return of income and has offered the receipt to tax. Therefore, we are of the opinion that the AO's recitals about the non-filing of the return and non-offering of the income by the vendors is only to demonstrate that the income of the vendors has escaped assessment.

14. The second objection the assessee is that Article 26 of Indo-US DTAA is applicable to the facts of the case before us. Article 26 of Indo-US DTAA, is a non-discrimination article to protect the non-residents from tax discrimination on the basis of (1) Nationality, (2) Location (PE), (3) Deductions of expenses payments made to Non-residents & (4) Ownership.

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15. U/s 90(2) of the Act, the DTAA provisions would apply to the non-resident assessee's to the extent they are more beneficial to such assessee. In India, the taxation is based on residence or source in India. The vendors are not residents of India, but the source of their income is in India. Therefore, they are liable to pay tax in India. Since, they are non-residents, u/s 195 of the Act, any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest, or any other sum chargeable under the provisions of the Act (not being income chargeable under the head 'salaries') shall at the time of credit of such income *to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income- tax thereon at the rates in force.*

16. In the case on hand, the income in the hands of the NRI's is taxable under the head capital gains and the provisions of section 195 are attracted also because they are non-residents.

17. Section 40(a)(ia) provides that a deduction in computing the income chargeable under the head "profits and gains of business or profession" is not allowable if the tax is not deducted or after deduction has not been paid on or before the due date specified in sub-section (1) of section 139, but there is no such provision of TDS in case of payment of sale consideration for transfer of a capital asset.

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18. We find that the Tribunal has considered that the recipients have offered the income to tax and there is no revenue loss and that is the main reason for allowing the appeal. As regards Article 26 of Indo-US DTAA, we find that it is against discrimination of non-residents vis-à-vis the residents of the contracting States under similar circumstances. The underlying principle of Article 26 is that the non-resident shall not be treated less favourably than the residents of the contracting state and the requirements connected with taxation shall not be more burdensome than they are for residents. But in the case before us, there is no discrimination against the NRI's. We are dealing with the liability of the assessee to deduct TDS and not about the liability of the non-residents. Therefore, clearly, the above decision is not applicable to the facts of the case before us.

19. Further, the assessee has already paid tax on the Long Term Capital Gain computed on the actual payment made by the assessee that has arisen to the vendors and there is no escapement of tax due to the Revenue to that extent. But, the AO has invoked the provision of section 50C to compute the LTCG. We are not dealing with the liability of the vendors to pay the taxes, but, we are dealing with the liability of the assessee to deduct taxes at sources. As rightly argued by the learned Counsel for the assessee, the assessee is required to make the TDS from credit or payments made by it and not on what the vendors are deemed to have received from the sale of their property. Therefore, as far as the liability of the assessee is concerned, we have no hesitation to hold that it shall only be on the actual consideration

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credited or paid by the assessee, whichever is earlier. Further, as seen from the assessment order, the assessee has already paid taxes on the LTCG accruing to the vendors on the actual payment made by him. Therefore, we are of the opinion that the assessee cannot be treated as an "assessee in default" u/s 201(1) of the Act, but is only liable for interest u/s 201(1A) of the Act till the date of payment of taxes by him.

20 In the result, assessee's grounds of appeal No. 2, 3 & 5 raised in Form 36 are allowed and ground 4 is rejected and the additional grounds of appeal are also rejected.

21. In the result, the assessee's appeal is partly allowed. Order pronounced in the Open Court on 25th January, 2018.

Sd/-	Sd/-
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 25th January, 2018.
Vinodan/sps

Copy to:

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2 ITO, International Transaction-II Hyderabad
3 CIT (A)-10 Hyderabad
4 CIT – (IT & TP) Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

By Order