IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES, BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA No.2931/Bang/2018 & C.O. No. 42/Bang/2019
(Assessment Year : 2011-12)

Deputy Commissioner of Income-tax,
Intl. Taxn., Circle-1(1), Bengaluru
PAN AAACT 5435F ….Appellant

Vs.

M/s. Coffeeday Enterprises Ltd.,
No.23/2, Coffeeday Square, Vittal Mallya Road,
Bangalore-560 001.
PAN:

……Respondent.

Assessee By:	Shri C. Ramesh, CA
Revenue By:	Shri Muzzaffar Hussain, CIT (D.R)

Date of Hearing :	24.11.2020
Date of Pronouncement :	16.12.2020.

O R D E R

PER SHRI CHANDRA POOJARI, AM :

The appeal filed by the Revenue is directed against the order of the CIT(A) dated 12/04/2018. The assessee has filed Cross Objection in C.O. No.42/Bang/2019. The relevant assessment year is 2011-12.

2. The Revenue has raised the following grounds of appeal:

1. The Ld. CIT(A) erred in holding that the interest was due on 30/01/2011and the liability of interest payment arose in FY 2011-12and not in FY 2010-11. The CIT(A) should have appreciated the facts that as per the agreement entered by the assessee company with M/s. Arduino Holdings Limited on 27/03/2010, the assessee company was required to pay interest at 7% per annum for 2 years from the date of issue and allotment of CCDs i.e. from 27.03.2010. Hence, as per the agreement, it was clear that interest accrued for the period 27.03.2010 to 27.03.2011(i.e. for FY 2010-11), was to be payable on 30.04.2011which means the interest accrued for FY 2010-11 was payable in FY 2011-12. This was wrongly construed by the CIT(A) as interest accrued for and payable in FY 2011-12.

2. The Ld. CIT(A) erred in not appreciating that as per the provisions of section 195 of the I.T. Act, the liability to withhold tax arises at the time of credit of interest income to the account of the payee or at the time of payment whichever is earlier. In the present case, the assessee company was required to pay interest for the FY 2010-11and hence the expenditure has accrued for the assessee (as per the agreement) and hence the liability to deduct also has accrued in FY 2010-11. Just because the payment/credit was not paid till 31.03.2011, this does not absolve the assessee's responsibility of deducting the taxes on interest accrued which was to be paid.

3. The Ld. CIT(A) erred in considering that the assessee has not claimed any such interest expenditure for the FY 2010-11. Whether the assessee claims the expenditure or not, the interest to be paid has accrued and TDS should have been deducted. In fact, the assessee has discharged the interest liability which has accrued in an indirect way by entering into an arrangement which also resulted in evasion of taxes.

4. The Ld. CIT(A) erred in considering that the assessee company indirectly discharged the interest liability to the investors by giving them the equity share at discounted price of Rs.43/- per share less than as agreed in the original subscription agreement and this differential price was comparable with the actual interest. This means though the assessee company did not outrightly pay the interest to the investors, the interest was indirectly paid by discounting the equity share price. That means, interest which was accrued, was paid in the form of discounting of equity shares. This was an

arrangement for evasion of taxes. Hence, though the assessee has not claimed any interest in the books, the interest was accrued (which was indirectly paid by the assessee) and TDS should have been with held which the assessee failed to do so.

5. The Ld. CIT(A) erred in not considering that M/s. Arduino Holdings Limited, a Cyprus based company which had acquired the CCDs of the assessee company has transferred the same to M/s. NLS Mauritius LLC, a Mauritius based company for a total consideration of equivalent Indian Rupees of Rs.812,88,74,787/-. Under this circumstance, it is underlined that for having such high value of appreciation of the value of CCDs, it shall also include the interest otherwise should have been received by M/s. Arduino Holdings Limited. Also, the arrangement of transfer is between two foreign entities and the basis of valuation is not known.

6. The Ld. CIT(A) erred in considering that since the assessee has voluntarily agreed to offer the benefit accrued (i.e. 7% of the amount of the investment) this implies that the amount has not been treated as chargeable to tax in the hands of the non resident entity. It is to be noted that the assessee agreed to offer the notional benefit only due to search proceedings. If there were no search proceedings, the assessee would not have offered the benefit and would have escaped the liability to deduct tax. Moreover, the fact that the assessee has offered an income would not absolve him from the responsibility of and withholding taxes on the interest payment.

7. Similarly, the observation of the Ld. CIT(A) that the assessee has voluntarily agreed to offer the benefit accrued (i.e. 7% of the amount of the investment equivalent to Rs.25.20 cr. for A.Y. 2011-12) implies that the benefit has accrued for the FY 2010-11. If that is so, then the liability to deduct had also arisen in FY 2010-11contrary to the observations of the CIT(A).

8. For these and such other grounds that may be urged at the time of hearing, it is prayed that the order of the Assessing Officer be restored and that of the CIT(A) be cancelled.

3. The assessee has raised the following grounds in its Cross objection:

1. The order of the learned Commissioner of Income Tax(Appeals) is opposed to the facts of the case and applicability of provision of section 201(1) of the Act for the A.Y. 2011-12 for non residents.

2. The CIT(A) has erred in ignoring the position of law that, the order passed by the Assessing Officer under the provisions of section 201(1) and 201(1A) of the Act for the F.Y. 2010-11 relevant to A.Y. 2011-12 on 31.03.2018 is barred by limitation and hence deserves to be annulled.

3. The CIT(A) after having given a finding that the time limit for passing the order under the provisions of section 201(1) of the Act from 01.10.2014 is not applicable to non residents, should have considered ratios laid down in various decisions wherein the High Courts/Supreme Court have held certain time limits as reasonable and should have held that the order passed by the Assessing Officer is barred by limitation and hence, deserves to be annulled.

4. The CIT(A) has erred in ignoring the ratio laid down by the Supreme Court in the case of State of Punjab vs. Bhatinda Co-op Milk Producers' Union Ltd. (2007) 11SCC 363 wherein it is held that action must be initiated by the competent authority under the Act where no limitation is prescribed, as in section 201 within a period of four years and not later.

5. The CIT(A) has erred in ignoring the ratio laid down by the High Court of Delhi in the case of Commissioner of Income Tax vs. Hutchison Essar Telecom Ltd. (2010) 323 ITR 230 (Del), wherein it is held that, the proceedings u/s. 201 and 201(1A) of the Act can be initiated within a period of four years from the end of the financial year and hence, proceedings initiated after that period were barred by limitation.

6. The CIT(A) has erred in ignoring the ratio laid down by the High Court of Delhi in the case of CIT, Delhi XVII vs. NHK Japan Broadcasting Corpn. (2008) 172 Taxman 230 (Delhi), a decision in the context of non deduction of tax at source on global salary wherein it is held that where no limitation is prescribed under the provisions of the Act as in the provisions of section 201(1) of the Act, action must be initiated by the competent authority within a period of four years and in the light of this ratio the proceedings initiated in the case of the appellant is barred by limitation.

7. The CIT(A) has erred in ignoring the ratio laid down in the case of the resident by the Jurisdictional High Court of Karnataka in the case of CIT(TDS) vs. Bharat Hotels Ltd. (2015) 64 taxmann.com 325 wherein it is held that a period of four years from the end of the relevant financial year would be reasonable period for initiating action u/s. 201 of the Act, a decision during the period when no time limit was prescribed under the Act, and under the circumstances, no action could have been initiated for an alleged transaction, presumed to have been accrued in F.Y. 2010-11, since the period of four years has elapsed.

8. The respondent craves permission to add, delete or alter any of the grounds at the time of hearing.

The respondent requests that the Tribunal to kindly hold that the proceedings initiated under hte provisions of section 201(1) and consequently order passed u/s. 201(1) and 201(1A) of the Act on 31.03.2018 is barred by limitation, bad in law and deserves to be annulled.

4. The facts of the case are that an order u/s. 201(1) and 201(1A) of the I.T. Act was passed in the case of the assessee for interest accrued/paid to the non resident entity subsequent to the search and seizure u/s. 132 of the I.T. Act on 21/09/2017 in the case of M/s. Coffee Day Enterprises Limited, M/s. Coffee Day Global Limited and Shri V.G. Siddhartha. It was noticed that M/s. Coffee Day Enterprises Ltd. (earlier Coffee Day Resort Pvt. Ltd.) had entered into subscription agreement with a Cyprus based company, M/s. Arduino Holding Limited with another Mauritius LLC on 27th March, 2010. As per the provisions of the agreement, the Cyprus company M/s. Arduino Holdings Limited had invested an amount of Rs.359,98,23,200/- in the form of Compulsorily Convertible Debentures (CCDs) in M/s. Coffee Day Enterprises Ltd. Further, M/s. NSR PE,

Mauritius LLC had invested Rs.1,76,800/- being the investments in equity shares. Thus. the total investment amounted to Rs.360,00,00,000/-. The investor, M/s. Arduino Holdings Limited was entitled to receive coupon on an annual basis at the rate of 7% per annum for a period of 2 years from the date of issue and 3 months LIBOR plus 600 basis points per annum for a period of 3 years from the completion of the 2 year period. Further, it was noticed that the agreement also mentioned that the coupon will be payable on 30th April of each year.

4.1 Further, as per the agreement, it was seen that the interest is accrued on 30th April of every year and also, the agreement is written agreement executed on 27th March, 2010. Thus, the occurrence of the event of payment of interest is certain. In view of the payability of the interest, the Assessing Officer stated that it shall be incumbent on the assessee company to pay the interest and deduct the applicable withholding taxes or in the case of non payment, the same shall be treated as liability in the Balance Sheet. The Assessing Officer was of the view that both these treatment for the transaction of interest was not done. When confronted with this issue, Shri V.G. Siddhartha, M.D., M/s. Coffee Day Enterprises Ltd. in answer to Q.No. 67 of the statement recorded during the course of search and seizure u/s. 132 of the I.T. Act stated that the assessee company ought to have accounted for the interest payable.

4.2 Further, the Assessing Officer observed that on 05/05/2015, M/s.Arduino Holdings Limited, which is a Cyprus based company had transferred the CCDs to M/s. NLS Mauritius LLC, a Mauritius based company for a total consideration of equivalent Indian Rupees of Rs.812,88,74,787/-. Under these circumstances, the Assessing Officer found that for having such high value of appreciation of the value of the CCDs, it shall also include the interest otherwise should have been received by M/s. Arduino Holdings Limited and also, the arrangement of transfer is between two foreign entities and the basis of valuation is not known. According to the Assessing Officer, the old DTAA between India and Cyprus, as in paragraph 2 of Article 11 of the agreement, the withholding tax for the payment of interest be deducted by the source country. In view of all the above, it was observed by AO that in order to avoid the deduction of withholding taxes in the form of TDS on the payment of interest, the assessee company claimed having received a waiver agreement. However, it was noticed that no waiver agreement copy was submitted to the company, M/s. Arduino Holdings Limited. According to the Assessing Officer ,the assessee company ought to have deducted the TDS u/s. 195 of the I.T. Act for this transaction as the income was accrued in the hands of M/s. Arduino Holdings Limited also. For the non deduction of TDS, the Assessing Officer held the assessee is in default and an order u/s. 201 & 201(1A) of the I.T. Act dated 31/03/2018 was passed.

4.3 According to the Assessing Officer, the assessee had submitted the following additional evidences before CIT(A):

(i) first amendment agreement dated 01.07.2011: The agreement was entered into on 01.07.2011, wherein the following clause was introduced in place of the earlier clause in regard to coupon payment:

"The coupon will be payable on an yearly basis on April 30th of each year and paid on or before 7th May of each year(the coupon payment date). The first coupon payment date shall be April, 30th, 2013. "

The assessee submitted that for FY 2010-11 initially it was agreed that, interest would be paid on 30/04/2011, however with the amendment agreement which was entered into on 01.07.2011, the interest payment was on 30.04.2013 thereby the interests for FY 2010-11 and FY 2011-12 were waived.

(ii) Addedum to subscription agreement dated 08/05/2015: in this agreement it is stated that, the clauses in regard to the coupon payment are cancelled. The relevant clause 1 reads as follows:

"The parties agree that the coupon is payable on the investor 3 CCDs for the term which shall be deemed to be effective and operative as of the completion dated as defined in the 55A and thereby sub clauses 3.1, 3.2 & 3.2 of Schedule V of the 55A shall be deleted."

(iii) Letter dated 17.01.2018 from M/s. Arduino Holdings Ltd. stating that the interest is waived.

(iv) Letter dated 25.06.2018 filed by Shri V.G. Siddhartha before DCIT, Central Circle, with respect to the declaration on statement recorded during the course of search and seizure.

4.4 The Assessing Officer stated that the above mentioned details were never furnished during the course of 201 proceedings and neither was there any refusal to admit any evidences nor was the assessee prevented by sufficient cause from producing any evidences. The Assessing Officer stated that the assessee was given sufficient opportunity and the order was passed only on the last day of March, 2018. Hence, the Assessing Officer held that the details now submitted by the assessee are part of the tax evasion scheme of the assessee and a misrepresentation of the actual facts of the case.

4.5 The assessee mentioned that first amendment agreement dated 01.07.2011, the interest payment for FY 2010-11 and 2011-12 were waived. But from the agreement, the Assessing Officer found that there was no waiver of interest for any Financial Year. According to the Assessing Officer, the relevant clause 3.2.1 only says about the date of payment of interest for any financial year. Further, clause 2.2.5 of first amendment agreement also states that the investor has an option to invest the entire coupon (interest) each year for acquiring additional equity shares.

> "Clause 3.3.1 of Schedule V shall stand amended to read as follows:
>
> *"Investor 3 has an option to invest the entire coupon (excluding gross-ups)each year for acquiring by way of subscription, additional Equity shares (Collectively called the investor 3 subsequent Subscription Shares)."*

Schedule 5 reads as follows:

TERMS AND CONDITIONS OF INVESTOR 3 CCDs

The compulsorily convertible debentures to be issued and allotted to the investor pursuant to the Agreement by the Company shall be called Investor 3 CCD shall be subject to the terms and conditions contained herein. The terms and conditions set out in this Schedule shall be (i) endorsed on the reverse of the certificate representing the Investor 3 CCDs along with a reference to this Schedule and the Transaction Documents:

1. DEFINITIONS

Capitalized terms used but not defined in this Schedule V shall have the same meaning as ascribed to such terms in the Transaction Documents.

2. INVESTOR 3 CCDs

2.1 Face Value: The face value of each Investor 3 CCD shall be INR 100/- (Indian Rupees One Hundred).

2.2 Investor 3 CCDs shall be Indian Rupee denominated compulsorily convertible debentures issued by the Company.

2.3 Rank: The Investor 3 CCDs will rank pari passu among themselves and on liquidation will rank pari passu with any Securities issued as part of the Current Financing Round, without any preference of one over the other by reason of priority of the date of issue or currency of payment or otherwise. The Equity Shares allotted on conversion of Investor 3 CCDs in terms hereof shall be subject to the provisions of the Amended Company Charter Documents and shall rank pari passu in all respects with the then existing Equity Shares of the Company.

2.4 Term: Investor 3 CCDs shall have a term of 7 (seven)years, commencing from the date on which the Investor 3 CCDs are issued and allotted to Investor 3, unless mutually extended for a term of upto 10 (ten) years.

3. RIGHTS OF INVESTOR 3 CCDs

3.1 Coupon

The Investor 3 CCDs shall, for a period five years from issuance or conversion, whichever is earlier, entitle the holder to receive a coupon("Coupon") on an annual basis in Rupees at the rate of;

(a) 7% per annum for a period of 2 years from the date of issue and allotment of the Investor 3 CCDs ('Fixed Coupon'); and

(b) 3month LIBOR plus 600 basis points per annum for a period of 3 years from the completion of the two year period mentioned in 3.1 (a) above ('Floating Coupon').

3.2 Coupon Payments

3.2.1 The coupon will be payable on a yearly basis on April 30th of each year and paid on or before 7th may of each year(the "Coupon Payment Date"). The first Coupon Payment Date shall be April 30, 2011.

3.2.2 The Coupon will be grossed up for withholding tax, if any (limited to a maximum of 10% of Fixed Coupon or Floating Coupon).

3.2.3 The Coupon along with the gross up shall at no point exceed the maximum rate under Law (which currently is State Bank of India prime lending ("SBI PLR") rate plus a maximum of 300 bonus points as on the date of the issuance of the Investor 3 CCDs.

3.3 Reinvestment of Fixed Coupon and Floating Coupon:

3.3.1 Investor 3 shall compulsorily invest in the Company the entire Fixed Coupon (excluding gross-ups) and has an option to invest the entire Floating Coupon (excluding gross-ups) each year for acquiring by way of subscription, additional Equity Shares (collectively called the "Investor 3 Subsequent Subscription Shares") as below:

3.3.1.1 Reinvestment of Fixed Coupon: Each holder of Investor 3 CCDs shall reinvest in the Company the entire Fixed Coupon in the manner set out below:

(a) After the first Coupon Payment Date but before May 15th 2011 for the first year at pre money equity value equal to investor 3 Post-Money Company Equity Valuation.

(b) After the Coupon Payment Date but before May 15th 2012 for the second year at pre money equity value equal to investor 3 Post-Money Company Equity Valuation plus Coupon paid as per 3.3.1.1(a) above.

3,3.1.2 Reinvestment of Floating Coupon: After each Coupon Payment Date and within 15 days of the Coupon Payment Date, Investor 3 shall have the right to acquire, by way of subscription, every year such number of additional Investor 3 Subsequent Subscription Shares at a pre-money equity value equal to the equity valuation of the Company determined for external placement of minimum of USD 50 Million which has been completed successfully within 6 months prior to Coupon Payments.

Date: Provided however, if no such placement has occurred, then the Investor 3 shall invest at a pre-money equity value which is the higher of –

(j) the fair market value of such Equity Shares as determined by an independent reputed and internationally recognized merchant banker

4.6 Thus, the Assessing Officer found that the amendment agreement does not actually deal with the waiver of interest in any of the clauses. Hence, the Assessing Officer found that the assessee's claim that vide first amendment agreement, the interest for FYs 2010-11 and 2011-12 was waived off was wrong on facts itself. Therefore, the Assessing Officer held that even though the assessee did not make any payment during the A.Y. 2011-12, the interest income accrued in the hands of the foreign entity for which the assessee company was liable to deduct TDS u/s. 195 on accrual basis.

4.7 Further, according to the Assessing Officer, the assessee submitted that an addendum to subscription agreement dated 08.05.2015 was entered, which states that the clauses in regard to coupon payment were cancelled. For this, the assessee submitted letter from M/s. Arduino Holding Ltd. stating about the interest being waived and letter filed by Shri V.G. Siddhartha to the Assessing Officer which showed clearly that though the addendum was named as "Interest Waiver Agreement", the investor was given 2,24,12,192 equity shares at more discounted rate as mentioned in subscription agreement. According to the Assessing Officer, the whole arrangement was made only to evade the deduction of tax. The investors were compensated by giving the equity share at discounted price of Rs.43/- per share less than as agreed in the original subscription agreement and discussions in paras 17 and 18 of the order which reads as follows:

" 17. However, from the perusal of the terms of the agreement, the company M/s. NLS Mauritius LLC shall be allotted the equity shares at the rate of 38% of discount price of Value of liquidity event which is Rs.328 Per share. Thus, the actual allotment price should have been Rs.203.36 Per share (which is 62% of Rs.328). However, in this case the value of price allotted is Rs.160.36 Crore. The differential value per share if Rs.43. Accordingly, the total differential value of 2,24,12,192 share is Rs.96,37,24,256/-. It may be observed that this differential price is comparable with the actual interest, as per the abovementioned table, that should have been paid over the previous years.

18. From the above analysis and from the perusal of the terms and conditions of the subscription agreement , it may be opined that the company M/s Coffee Day Enterprises Limited should have deducted TDS u/s 195 of the Income Tax Act, 1961 for the payment of interest to M/s. Arduino Holdings Limited. However, the company has not deducted the TDS even though the interest payment is accrued in the hands of M/s. Arduino Holdings Ltd as per the provisions of the agreement. Instead it claims to have received a waiver of interest from M/s. Arduino Holdings Limited even though no such agreements have been produced during the course of proceedings. On the other hand interest accrued on the CCDs is compensated by way of reduction in the rate of price of equity shares allotted to M/s NLS Mauritius LLC on conversion of CCDs."

4.8 In view of the above, the Assessing Officer concluded that the additional details furnished by the assessee before the CIT(A) is clearly an imitation of its tax evasion arrangement. The assessee had failed to produce any of the relevant details during the course of the proceedings under section 201, even after giving sufficient opportunity in contention of its claim.

5. On appeal, with regard to limitation, the CIT(A) observed that for the year under consideration, as the law stood then, no period of limitation, was prescribed under section 201 for exercise of power thereunder. According to the CIT(A), the assessee also does not dispute the fact that there was no other provision, wherein limitation for exercise of power under section 201was expressly provided till sub-section 3 to section 201 was inserted vide Finance Act (No. 2) Act, 2009 w.e.f. 1.4.2010, applicable from A.Y. 2011-12. It has only relied on various judicial pronouncements for the proposition that if no period of time is prescribed for exercise of such power, then it can only be exercised within a reasonable time and not beyond that. The CIT(A) observed that a search action u/s. 132 was initiated on the Coffee Day Group on 21.09.2017. According to the CIT(A), thereafter, information was received with respect to the agreement dated 27.03.2010 between the assessee and non resident entities. The Assessing Officer issued notice for A.Y. 2011-12 u/s. 201(1) and 201(1A) on 19/03/2018 i.e. within six months from the date of search. In view of these facts, the CIT(A) held that the delay in exercise of power was for valid and bona fide reasons. The CIT(A) held that limitation is not applicable in the present case for the following reasons:

(i) Memorandum to Finance Bill, 2009 makes it abundantly clear that the limitation prescribed under section 201(3) is not applicable.

(ii) The decision cited by the assessee either have not fixed any limitation or have observed that limitation would depend upon several factors, not

relevant to the present case as there was no reference to decisions of the Supreme Court wherein it has been held otherwise.

(iii) There are several decisions including those of Supreme Court, Calcutta High Court and Allahabad High Court wherein it has been held that if limitation has not been prescribed in the Act, the order can be passed anytime.

(iv) In the assessee's case in particular, the delay in exercise of power is for valid and bonafide reasons.

Therefore, the CIT(A) rejected the contention of the assessee that the present proceedings are barred by limitation and dismissed the appeal of the assessee on this issue.

5.1 On merits, the CIT(A) observed that in terms of section 195, the liability to withhold taxes arrears at the time of payment/credit of any interest (or any other sum) which is chargeable under the provisions of the Act. The CIT(A) observed that the payment/credit was not made till 31.03.2010 and also in terms of the Agreement, interest was due on 30.04.2011, i.e., in F.Y 2011-12 relevant to A.Y.2012-13. No such interest expenditure was claimed by the assessee. The CIT(A) examined the financials of the assessee company for F.Y. 2010-11and found that the total finance charges claimed were to the tune of Rs.16,05,86,054/- which comprise of interest and finance charges on term loans(Rs.15,99,576,468/-) and other bank charges (Rs.6,28,586/-). Thus, the CIT(A) observed that the assessee had not claimed interest expenditure pertaining to the transaction with M/s. Arduino Holdings Limited. Further, the CIT(A) observed that in view of the

waiver of the interest and the benefit having accrued to the assessee company, the assessee voluntarily agreed to offer the benefit accrued (i.e. 7% of the amount of investment) which implied that the amount was not treated as chargeable to tax in the hands of the non-resident entity. For the aforesaid reasons, the CIT(A) held that the liability to deduct tax did not arise in the year under consideration.

6. On merits, the Department is in appeal before us and on the issue of limitation, the assessee has filed Cross Objection.

7. The Ld. DR submitted that an order u/s. 201(1) and 201(1A) of the I.T. Act was passed in the case of the assessee for interest accrued/paid to the non resident entity subsequent to the search and seizure u/s. 132 of the I.T. Act on 21/09/2017 in the case of M/s. Coffee Day Enterprises Limited, M/s. Coffee Day Global Limited and Shri V.G. Siddhartha. The Ld. DR submitted that M/s. Coffee Day Enterprises Ltd. (earlier Coffee Day Resort Pvt. Ltd.) had entered into subscription agreement with a Cyprus based company, M/s. Arduino Holding Limited with another Mauritius LLC on 27th March, 2010. It was submitted that as per the provisions of the agreement, the Cyprus company M/s. Arduino Holdings Limited had invested an amount of Rs.359,98,23,200/- in the form of Compulsorily Convertible Debentures (CCDs) in M/s. Coffee Day Enterprises Ltd. Further, M/s. NSL PE, Mauritius LLC had invested Rs.1,76,800/- being the investments in

equity shares. Thus. the total investment amounted to Rs.360,00,00,000/-. According to the Ld. DR, the investor, M/s. Arduino Holdings Limited was entitled to receive coupon on an annual basis at the rate of 7% per annum for a period of 2 years from the date of issue and 3 months LIBOR plus 600 basis points per annum for a period of 3 years from the completion of the 2 year period. Further, the Ld. DR submitted that the agreement also mentioned that the coupon will be payable on 30th April of each year.

7.1 Further, the Ld. DR submitted that as per the agreement, it was seen that the interest is accrued on 30th April of every year and also, the agreement is written agreement executed on 27th March, 2010. Thus, according to the Ld. DR, the occurrence of the event of payment of interest is certain. In view of the payability of the interest, the Ld. DR stated that it shall be incumbent on the assessee company to pay the interest and deduct the applicable withholding taxes or in the case of non payment, the same shall be treated as liability in the Balance Sheet. The Ld. DR was of the view that both these treatment for the transaction of interest was not done. The Ld. DR submitted that when confronted with this issue, Shri V.G. Siddhartha, M.D., M/s. Coffee Day Enterprises Ltd. in answer to Q.No. 67 of the statement recorded during the course of search and seizure u/s. 132 of the I.T.

Act stated that the assessee company ought to have accounted for the interest payable.

7.2 Further, the Ld. DR submitted that on 05/05/2015, M/s.Arduino Holdings Limited, which is a Cyprus based company had transferred the CCDs to M/s. NLS Mauritius LLC, a Mauritius based company for a total consideration of equivalent Indian Rupees of Rs.812,88,74,787/-. Under these circumstances, the Ld. DR submitted that for having such high value of appreciation of the value of the CCDs, it shall also include the interest otherwise should have been received by M/s. Arduino Holdings Limited and also, the arrangement of transfer is between two foreign entities and the basis of valuation is not known. According to the Ld. DR the old DTAA between India and Cyprus, as in paragraph 2 of Article 11 of the agreement, the withholding tax for the payment of interest be deducted by the source country. In view of all the above, the Ld. DR submitted that it was evident that in order to avoid the deduction of withholding taxes in the form of TDS on the payment of interest, the assessee company claimed having received a waiver agreement. However, it was noticed that no waiver agreement copy was submitted to the company, M/s. Arduino Holdings Limited. According to the Ld. DR, the assessee company ought to have deducted the TDS u/s. 195 of the I.T. Act for this transaction as the income was accrued in the hands of M/s. Arduino Holdings

Limited also. For the non deduction of TDS, the Ld. DR submitted that the assessee is in default and thus, the order u/s. 201 & 201(1A) of the I.T. Act dated 31/03/2018 was passed.

7.3 The Ld. DR stated that assessee had submitted the following additional evidences before CIT(A):

(i) first amendment agreement dated 01.07.2011: The agreement was entered into on 01.07.2011, wherein the following clause was introduced in place of the earlier clause in regard to coupon payment:

"The coupon will be payable on an yearly basis on April 30th of each year and paid on or before 7th May of each year(the coupon payment date). The first coupon payment date shall be April, 30th, 2013. "

The assessee submitted that for FY 2010-11 initially it was agreed that, interest would be paid on 30/04/2011, however with the amendment agreement which was entered into on 01.07.2011, the interest payment was on 30.04.2013 thereby the interests for FY 2010-11 and FY 2011-12 were waived.

(ii) Addedum to subscription agreement dated 08/05/2015: in this agreement it is stated that, the clauses in regard to the coupon payment are cancelled. The relevant clause 1 reads as follows:

"The parties agree that the coupon is payable on the investor 3 CCDs for the term which shall be deemed to be effective and operative as of the completion dated as defined in the 55A and thereby sub clauses 3.1, 3.2 & 3.2 of Schedule V of the 55A shall be deleted."

(iii) Letter dated 17.01.2018 from M/s. Arduino Holdings Ltd. stating that the interest is waived.

(iv) Letter dated 25.06.2018 filed by Shri V.G. Siddhartha before DCIT, Central Circle, with respect to the declaration on statement recorded during the course of search and seizure.

7.4 The Ld. DR submitted that the above mentioned details were never furnished during the course of 201 proceedings and neither was there any refusal to admit any evidences nor was the assessee prevented by sufficient cause from producing any evidences. The Ld. DR submitted that the assessee was given sufficient opportunity and the order was passed only on the last day of March, 2018. Hence, the Ld. DR submitted that the details now submitted by the assessee are part of the tax evasion scheme of the assessee and a misrepresentation of the actual facts of the case.

7.5 According to the Ld. DR, the assessee mentioned that first amendment agreement dated 01.07.2011, the interest payment for FY 2010-11 and 2011-12 were waived. But from the agreement, the Ld. DR submitted that there was no waiver of interest for any Financial Year. According to the Ld. DR, the relevant clause 3.2.1 only talks about the date of payment of interest for any financial year. Further, clause 2.2.5 of first amendment agreement also states that the investor has an option to invest the entire coupon (interest) each year for acquiring additional equity shares.

"Clause 3.3.1 of Schedule V shall stand amended to read as follows:

"Investor 3 has an option to invest the entire coupon (excluding gross-ups)each year for acquiring by way of subscription, additional Equity shares (Collectively called the investor 3 subsequent Subscription Shares)."

Schedule 5 reads as follows:

TERMS AND CONDITIONS OF INVESTOR 3 CCDs

The compulsorily convertible debentures to be issued and allotted to the investor pursuant to the Agreement by the Company shall be called Investor 3 CCD shall be subject to the terms and conditions contained herein. The terms and conditions set out in this Schedule shall be (i) endorsed on the reverse of the certificate representing the Investor 3 CCDs along with a reference to this Schedule and the Transaction Documents:

1. DEFINITIONS

Capitalized terms used but not defined in this Schedule V shall have the same meaning as ascribed to such terms in the Transaction Documents.

2. INVESTOR 3 CCDs

2.1 Face Value: The face value of each Investor 3 CCD shall be INR 100/- (Indian Rupees One Hundred).

2.2 Investor 3 CCDs shall be Indian Rupee denominated compulsorily convertible debentures issued by the Company.

2.3 Rank: The Investor 3 CCDs will rank pari passu among themselves and on liquidation will rank pari passu with any Securities issued as part of the Current Financing Round, without any preference of one over the other by reason of priority of the date of issue or currency of payment or otherwise. The Equity Shares allotted on conversion of Investor 3 CCDs in terms hereof shall be subject to the provisions of the Amended Company Charter Documents and shall rank pari passu in all respects with the then existing Equity Shares of the Company.

2.4 Term: Investor 3 CCDs shall have a term of 7 (seven)years, commencing from the date on which the Investor 3 CCDs are issued and allotted to Investor 3, unless mutually extended for a term of upto 10 (ten) years.

3. RIGHTS OF INVESTOR 3 CCDs

3.1 Coupon

The Investor 3 CCDs shall, for a period five years from issuance or conversion, whichever is earlier, entitle the holder to receive a coupon("Coupon") on an annual basis in Rupees at the rate of;

(a) 7% per annum for a period of 2 years from the date of issue and allotment of the Investor 3 CCDs ('Fixed Coupon'); and

(b) 3month LIBOR plus 600 basis points per annum for a period of 3 years from the completion of the two year period mentioned in 3.1 (a) above ('Floating Coupon').

3.2 Coupon Payments

3.2.1 The coupon will be payable on a yearly basis on April 30th of each year and paid on or before 7th may of each year(the "Coupon Payment Date"). The first Coupon Payment Date shall be April 30, 2011.

3.2.2 The Coupon will be grossed up for withholding tax, if any (limited to a maximum of 10% of Fixed Coupon or Floating Coupon).

3.2.3 The Coupon along with the gross up shall at no point exceed the maximum rate under Law (which currently is State Bank of India prime lending ("SBI PLR") rate plus a maximum of 300 bonus points as on the date of the issuance of the Investor 3 CCDs.

3.3 Reinvestment of Fixed Coupon and Floating Coupon:

3.3.1 Investor 3 shall compulsorily invest in the Company the entire Fixed Coupon (excluding gross-ups) and has an option to invest the entire Floating Coupon (excluding gross-ups) each year for acquiring by way of subscription, additional Equity Shares (collectively called the "Investor 3 Subsequent Subscription Shares") as below:

3.3.1.1 Reinvestment of Fixed Coupon: Each holder of Investor 3 CCDs shall reinvest in the Company the entire Fixed Coupon in the manner set out below:

(a) After the first Coupon Payment Date but before May 15th 2011 for the first year at pre money equity value equal to investor 3 Post-Money Company Equity Valuation.

(b) After the Coupon Payment Date but before May 15th 2012 for the second year at pre money equity value equal to investor 3 Post-Money Company Equity Valuation plus Coupon paid as per 3.3.1.1(a) above.

3,3.1.2 Reinvestment of Floating Coupon: After each Coupon Payment Date and within 15 days of the Coupon Payment Date, Investor 3 shall have the right to acquire, by way of subscription, every year such number of additional Investor 3 Subsequent Subscription Shares at a pre-money equity value equal to the equity valuation of the Company determined for external placement of minimum of USD 50 Million which has been completed successfully within 6 months prior to Coupon Payments.

Date: Provided however, if no such placement has occurred, then the Investor 3 shall invest at a pre-money equity value which is the higher of –

(j) the fair market value of such Equity Shares as determined by an independent reputed and internationally recognized merchant banker

7.6 Thus, the Ld. DR submitted that the amendment agreement does not actually deal with the waiver of interest in any of the clauses. Hence, the Ld. DR submitted that the assessee's claim that vide first amendment agreement, the interest for FYs 2010-11 and 2011-12 was waived off was wrong on facts itself. Therefore, the Ld. DR submitted that even though the assessee did not make any payment during the A.Y. 2011-12, the interest income accrued in the hands of the foreign entity for which the assessee company was liable to deduct TDS u/s. 195 on accrual basis.

7.7 Further, according to the Ld. DR, the assessee submitted that an addendum to subscription agreement dated 08.05.2015 was entered, which states that the clauses in regard to coupon payment were cancelled. For this, according to the Ld. DR, the assessee submitted letter from M/s. Arduino Holding Ltd. stating about the interest being waived and letter filed by Shri V.G. Siddhartha to the Assessing Officer which showed clearly that though the addendum was named as "Interest Waiver Agreement", the investor was given 2,24,12,192 equity shares at more discounted rate as mentioned in subscription agreement. According to the Ld. DR, the whole arrangement was made only to evade the deduction of tax. The investors were compensated by giving the equity share at discounted price of Rs.43/- per

share less than as agreed in the original subscription agreement and discussions in paras 17 and 18 of the order which reads as follows:

> *" 17. However, from the perusal of the terms of the agreement, the company M/s. NLS Mauritius LLC shall be allotted the equity shares at the rate of 38% of discount price of Value of liquidity event which is Rs.328 Per share. Thus, the actual allotment price should have been Rs.203.36 Per share (which is 62% of Rs.328). However, in this case the value of price allotted is Rs.160.36 Crore. The differential value per share if Rs.43. Accordingly, the total differential value of 2,24,12,192 share is Rs.96,37,24,256/-. It may be observed that this differential price is comparable with the actual interest, as per the abovementioned table, that should have been paid over the previous years.*
>
> *18. From the above analysis and from the perusal of the terms and conditions of the subscription agreement , it may be opined that the company M/s Coffee Day Enterprises Limited should have deducted TDS u/s 195 of the Income Tax Act, 1961 for the payment of interest to M/s. Arduino Holdings Limited. However, the company has not deducted the TDS even though the interest payment is accrued in the hands of M/s. Arduino Holdings Ltd as per the provisions of the agreement. Instead it claims to have received a waiver of interest from M/s. Arduino Holdings Limited even though no such agreements have been produced during the course of proceedings. On the other hand interest accrued on the CCDs is compensated by way of reduction in the rate of price of equity shares allotted to M/s NLS Mauritius LLC on conversion of CCDs."*

7.8 In view of the above, the Ld. DR concluded that the additional details furnished by the assessee before the CIT(A) is clearly an imitation of its tax evasion arrangement and the assessee had failed to produce any of the relevant details during the course of the 201 proceedings, even after giving sufficient opportunity in contention of its claim.

8. On the other hand, the Ld. AR submitted that while issuing debentures to the non resident company, M/s. Arduino Holdings Ltd., the assessee had agreed to pay interest. It was submitted that the debentures were issued on 31.03.2010 and the assessee was required to pay interest from FY 2010-11 (first year). However, the Ld. AR submitted that even before the payment of interest for the first year became due, the debenture holder waived the interest. In these circumstances, the Ld. AR submitted that there was no requirement of interest payable to debenture holder and there was no interest provided for in the books. It was submitted that the assessee also did not claim any interest expenditure in the financial statements and also in its statement of total assessable income. Further, since no interest was paid/provided for in the books claimed as expenditure, there was no liability to deduct taxat source u/s. 195 of the Act for the A.Y. 2011-12 and hence, there could not have been any demand u/s. 201(1) and 201(1A) of the Act, in the absence of any default. This aspect was considered by the CIT(A) and allowed the claim.

8.1 The Ld. AR submitted that the Assessing Officer passed the order u/s. 201(1) and 201(1A) of the Act solely on the basis of a report sent by the Investigation Wing consequent to action u/s. 132 of the Act in the case of the assessee's group of companies. It was submitted that in the said report, the search party had quantified the interest payable for different years as under:

Asst Year	Amount of investment (in Rs.)	Coupon Rate	Alleged interest
2011-12	360,00,00,000	7%	25,20,00,000/-
2012-13	360,00,00,000	7%	25,20,00,000/-
2013-14	360,00,00,000	6.28%	22,61,00,000/-
2014-15	360,00,00,000	6.27%	22,44,00,000/-
2015-16	360,00,00,000	6.27%	22,57,00,000/-
	Total		118,02,00,000/-

8.2 Thus, the Ld. AR submitted that the Assessing Officer considered the alleged interest payable at Rs.25,20,00,000/- for the A.Y. 2011-12 which was deleted by the CIT(A). However, it was submitted that the Department had not initiated any action u/s. 201(1) & 201(1A) of the I.T. Act or passed any order or raised any demand for the A.Ys. 2012-13 to 2015-16 after considering the order of the CIT(A) for the A.Y. 2011-12. It was submitted that since the Department refrained itself from raising demand for the A.Ys. 2012-13 to 2015-16, the question of any demand for A.Y. 2011-12 does not arise and hence, the appeal cannot sustain.

8.3 The Ld. AR submitted that during the course of search proceedings, the search party had taken a declaration of the interest waiver as income of the assessee as per the statement recorded u/s. 132(4) of the I.T. Act from Shri V.G. Siddhartha, M.D. of the assessee company. It was submitted that since the interest was not claimed as expenditure in the books, the event of waiver of such interest

does not result in any income and hence, the assessee retracted on the statement recorded and the assessee company did not offer any such income. According to the Ld. AR this issue was referred for special audit under the provisions of section 142(2A) of the I.T. Act and the auditor had given a report confirming the position that no such income accrued to the assessee consequent to the transaction of waiver of interest. Accordingly, it was submitted that the Department completed the assessment proceedings from A.Y. 2011-12 to A.Y. 2015-16 without any addition as income towards waiver of interest by M/s. Aduino Holdings Limited and NLS Mauritius LLC. The Ld. AR submitted that the Department agreed that there was no interest payable in the books of accounts and hence, no TDS was warranted u/s. 195 of the I.T. Act for the A.Ys. 2012-13 to 2015-16, at the same time, the Department had also not taxed any income consequent to the findings of the search on the issue for the A.Ys. 2011-12 to 2015-16.

8.4 The Ld. AR submitted that the above order of the DCIT was passed before the issue was examined by the Assessing Officer in the assessment proceedings u/s. 142 and 143 of the Act and report was received by the auditor u/s. 142(2A) of the Act. The Ld. AR submitted that the order was passed on 31.03.2018 since the proceedings for A.Y. 2011-12 were getting time barred by limitation. The CIT(A) justified the deletion of demand u/s. 201(1) and 201(1A) of the Act.

8.5 Regarding Ground Nos. 4 & 5 of the Revenue relating to allotment of shares at a discounted price to the debenture holder and thereby indirectly discharged the interest liability and transfer of compulsorily convertible debenture for a total consideration of Rs.812,88,74,787/- by M/s. Arduino Holdings Ltd. to M/s. NLS Mauritius LLC, the Ld. AR submitted that during the FY 2015-16 relevant to A.Y. 2016-17 the CCDs were transferred by the debenture holder to Mauritius company i.e., by a foreign company to another foreign company on 06.05.2015 which is subsequent and not relevant to A.Y. 2011-12. It was submitted that the assessee company was not a party to this transfer and hence, the value at which the debentures were transferred is of no consequence to the issue on hand. Further, it was submitted that equity shares were allotted to the debenture holder in lieu of debentures held by the assessee company at a mutually agreed price during the F.Y. 2015-16 relevant to assessment year 2016-17 and hence, this event cannot have a bearing on the transaction for the A.Y. 2011-12.

8.6 Regarding non deduction of tax at source on interest paid during the F.Y. 2010-11 relevant to A.Y. 2011-12, the Ld. AR submitted that there was no interest claimed in the books for the FY 2010-11 since the said interest was waived by debenture holder and once the interest is waived and no provision made in the books and also in the absence of any such claim as expenditure, the provisions of section 195 of the Act are not attracted and hence, there was no tax deductible at

source. Hence, it was submitted that in the absence of any default as contemplated u/s. 195 of the Act, there could not have been any demand u/s. 201(1) and 201(1A) of the Act for A.Y. 2011-12.

8.7 The Ld. AR submitted that the compulsorily convertible debentures were converted to equity shares during the F.Y. 2015-16 relevant to A.Y. 2016-17. Regarding the issue of interest payable for A.Ys. 2011-12 to 2015-16 that they were compensated by allotting equity shares at a discounted price, it was submitted that this issue was considered by the auditor appointed u/s. 142(2A) of the Act by the Department and the Assessing Officer during the assessment proceedings u/s. 148 of the Act for A.Y. 2011-12 and u/s. 153A of the Act for the later years in the said audit report in paragraph C(13)(j) the following observation was given:

> *"Hence in our opinion, the non-claiming of interest component on CCDs by the Investor 3 for the period from the date of investment till the date of conversion of CCDs into Equity Shares in the Company, has not been subsumed in the Valuation of Equity Shares on conversion to recognize any benefit ignored on the same."*

Thus, the Ld. AR submitted that the finding of the auditor that non claiming interest component has no bearing on valuation of equity shares on conversion which was accepted by the Department and no addition was made in the assessment. The Ld. AR submitted that there was no proceedings initiated u/s. 201(1) and 201(1A) of the Act for the A.Ys. 2012-13 to 2015-16 and no demand

raised. It was also submitted that there was no addition made on the issue of waiver of interest for the A.Ys. 2011-12 to 2015-16 in the assessment u/s. 153A of the Act. In view of the above facts and circumstances, the Ld. AR prayed that the appeal of the revenue may be dismissed.

8.8 Further, the Ld. AR referred to section 195 which specifies that taxes will have to be deducted either at the time of credit of such income in the account of the payee or at the time of payment thereof in cash or any other mode. It was submitted that in the case of the assessee there is no interest credited to the payee's account and there was no payment made as per books of account. Further, it was submitted that no expenditure was claimed towards interest payable. In the light of these facts, the Ld. AR submitted that the provisions of section 195 of the Act is not applicable. The Ld. AR submitted that as per the terms of agreement, the interest for the F.Y. 2010-11 was required to be credited on 30.04.2011 and during this period, there was no interest required to be credited also. The Ld. AR submitted that there was no expenditure accrued during the previous year and also claimed and hence, the provisions of section 195 of the Act has no application. The Ld. AR submitted that the interest payable was eventually waived, therefore, the assessee had not paid any interest. It was submitted that since no interest was paid or claimed as expenditure, the provisions of section 195 of the Act cannot be applied.

8.9 The Ld. AR relied on the judgment of the Karnataka High Court in the case of Karnataka Power Corporation Ltd. vs. DCIT(TDS) (ITA No.750 & 758-759/2009 wherein it was held that even if a provision is made in the books, no taxes would be deductible at source, if the provision is reversed and no payment made. It was submitted that in the case of the assessee even the provision itself was not made. Thus, it was submitted that in view of the above judgment of the Karnataka High Court, the issue of tax deduction does not arise.

8.9.1 The Ld. AR relied on the decision of the ITAT, Mumbai in the case of National Organic Chemical Industry vs. DCIT 5 SOT 317 (Mum) wherein it was held that the expressed "paid" used in DTAA is to be interpreted as intended to be taxed on "paid" basis and not on accrual basis and on the same analogy since the transaction which is subject matter of the present appeal is covered by India Cyprus Double Taxation Avoidance Agreement, the issue of deduction of tax at source on accrual basis does not arise for the reason that interest was not paid and not provided in the books also.

8.9.2 The Ld. AR also relied on the decision of the High Court of Karnataka in the case of CIT vs. Kalyani Steels Ltd. 91 taxmann.com 359 wherein it was held that if there is no income embedded in a payment there is no tax deductible at source. In the case of the assessee neither any interest is paid nor provided for in

the books as payable. Thus, the Ld. AR submitted that the appeal of the revenue is to be rejected.

9. We have heard the rival submissions and perused the record. In terms of section 195, the liability to withhold taxes arrears at the time of payment/credit of any interest (or any other sum) which is chargeable under the provisions of the Act. The payment/credit was not made till 31.03.2010 and also in terms of the Agreement, interest was due on 30.04.2011, i.e., in F.Y 2011-12 relevant to A.Y.2012-13. No such interest expenditure was claimed by the assessee. After perusal of the financials of the assessee company for F.Y. 2010-11, we find that the total finance charges claimed were to the tune of Rs.16,05,86,054/- which comprise of interest and finance charges on term loans(Rs.15,99,576,468/-) and other bank charges (Rs.6,28,586/-). Thus, the assessee had not claimed interest expenditure pertaining to the transaction with M/s. Arduino Holdings Limited. Further, in view of the waiver of the interest and the benefit having accrued to the assessee company, the assessee voluntarily agreed to offer the benefit accrued (i.e. 7% of the amount of investment) which implied that the amount was not treated as chargeable to tax in the hands of the non-resident entity.

9.1 Section 195 specifies that taxes will have to be deducted either at the time of credit of such income in the account of the payee or at the time of payment thereof

in cash or any other mode. In the case of the assessee there is no interest credited to the payee's account and there was no payment made as per books of account. No expenditure was claimed towards interest payable. In the light of these facts, we find that the provisions of section 195 of the Act is not applicable. As per the terms of agreement, the interest for the F.Y. 2010-11 was required to be credited on 30.04.2011 and during this period, there was no interest required to be credited also. There was no expenditure accrued during the previous year and also claimed and hence, the provisions of section 195 of the Act has no application. The interest payable was eventually waived, therefore, the assessee had not paid any interest. Since no interest was paid or claimed as expenditure, the provisions of section 195 of the Act cannot be applied.

9.2 Reliance is placed on the judgment of the Karnataka High Court in the case of Karnataka Power Transmission Corporation Ltd. vs. DCIT(TDS) (ITA No.750 & 758-759/2009 wherein it was held that when interest has not been paid to the payee and the provision of the same has been reversed in the books of accounts, there would be no liability to deduct tax as no income has accrued in the hands of the payee. Since interest is not considered to be an income of the payee, Section 194A(1) of the Income-tax Act, 1961 (the Act) is not applicable. Thus, .even if a provision is made in the books, no taxes would be deductible at source, if the provision is reversed and no payment made. The Karnataka High Court referred to

the Delhi High Court's decision where it was held that mere passing of book entries, which have subsequently been reversed, would not give rise to an obligation to deduct tax at source, since there is no debt acknowledged by the taxpayer. No income had accrued, arisen or deemed to have accrued or arisen, which is chargeable to tax in the hands of a payee. Imposition of an obligation to deduct tax at source in such circumstances could amount to enforcing payments from one person towards the tax liability of another, even where the person does not acknowledge that any sum is payable. In the case of the assessee even the provision itself was not made. Thus, in view of the above judgment of the Karnataka High Court (supra), the issue of tax deduction does not arise.

9.3 Reliance is placed on the decision of the ITAT, Mumbai in the case of National Organic Chemical Industry vs. DCIT 5 SOT 317 (Mum) wherein it was held that the expressed "paid" used in DTAA is to be interpreted as intended to be taxed on "paid" basis and not on accrual basis and on the same analogy since the transaction which is subject matter of the present appeal is covered by India Cyprus Double Taxation Avoidance Agreement, the issue of deduction of tax at source on accrual basis does not arise for the reason that interest was not paid and not provided in the books also.

9.4 Reliance is also placed on the decision of the High Court of Karnataka in the case of CIT vs. Kalyani Steels Ltd. 91 taxmann.com 359 wherein it was held that if there is no income embedded in a payment there is no tax deductible at source. In the case of the assessee neither any interest is paid nor provided for in the books as payable. Futher, an amount which will not be included in the total income of a person cannot be considered as "income" for the purpose of deduction of tax at source at all. The purpose of deduction of tax at source is not to collect a sum which is not a tax levied under the Act, it is to facilitate the collection of tax lawfully leviable under the Act. For the aforesaid reasons, we hold that the liability to deduct tax did not arise in the year under consideration. The appeal of the Revenue in ITA No. 2931/Bang/2018 is dismissed.

C.O. No.42/Bang/2019

10. The assessee has filed cross objection against the Revenue appeal. The facts of the case is that CIT(A) held that the time limit for passing the order by the Assessing Officer under the provisions of section 201(1) and 201(1A) of the Act for the F.Y. 2010-11 relevant to A.Y. 2011-12 from 01.10.2014 is not applicable to non residents.

10.1 Against this, the assessee has filed Cross Objection. The Ld. AR submitted that various High Courts/Supreme Court have held that certain time limits as reasonable and should have held that the order passed by the Assessing Officer is barred by limitation and hence, deserves to be annulled. The Ld. AR relied on the judgment of the Supreme Court in the case of State of Punjab vs. Bhatinda Co-op Milk Producers' Union Ltd. (2007) 11SCC 363 wherein it is held that action must be initiated by the competent authority under the Act where no limitation is prescribed, as in section 201 within a period of four years and not later. The Ld. AR relied on the judgment of the High Court of Delhi in the case of Commissioner of Income Tax vs. Hutchison Essar Telecom Ltd. (2010) 323 ITR 230 (Del), wherein it is held that, the proceedings u/s. 201 and 201(1A) of the Act can be initiated within a period of four years from the end of the financial year and hence, proceedings initiated after that period were barred by limitation. Further, the Ld. AR relied on the judgment of the High Court of Delhi in the case of CIT, Delhi XVII vs. NHK Japan Broadcasting Corpn. (2008) 172 Taxman 230 (Delhi), a decision in the context of non deduction of tax at source on global salary wherein it is held that where no limitation is prescribed under the provisions of the Act as in the provisions of section 201(1) of the Act, action must be initiated by the competent authority within a period of four years and in the light of this ratio the proceedings initiated in the case of the appellant is barred by limitation. The Ld.

AR also relied on the judgment of the Jurisdictional High Court of Karnataka in the case of CIT(TDS) vs. Bharat Hotels Ltd. (2015) 64 taxmann.com 325 wherein it is held that a period of four years from the end of the relevant financial year would be reasonable period for initiating action u/s. 201 of the Act, a decision during the period when no time limit was prescribed under the Act, and under the circumstances, no action could have been initiated for an alleged transaction, presumed to have been accrued in F.Y. 2010-11, since the period of four years has elapsed.

10.2 The learned Departmental Representative placed reliance on the order of the lower authorities.

10.3 We have heard the rival submissions and perused the record. With regard to limitation for initiating action u/s 201 of the I.T. Act, upto assessment year 2009-10, there was no limitation provided u/s. 201(1) of the Act for initiating proceedings for failure to deduct tax at source. In the present case, the assessment year involved is 2011-12. It was only by the Finance Act, 2009 that sub-section (3) was inserted, initially providing for a period of limitation of two years from the end of the financial year in which the statement is filed; and four years from the end of the financial year in which the statement is filed; and four years from the end of the financial year in which the payment is made or credit is given. The

provisions of section 201(3) amended by Finance Act, 2012 with retrospective effect from 01.04.2010 is applicable which reads as follows:

> (3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of
>
> (i) two years from the end of the financial year in which the statement is filed in a case where the statement referred to in section 200 has been filed.
>
> **(ii) six years from the end of the financial year in which payment is made or credit is given, in any other case Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011.**

10.4 The question whether the order passed u/s. 201(1) and 201(1A) of the Act for the assessment year 2011-12, was barred by limitation was decided against the assessee by the CIT(A), on the reason that it is observed from the provisions of section 201(3) that the time limit period of six years is applicable for the failure to deduct whole or any part of the tax from the person resident in India and in the appellant's case the deductee is not an Indian resident company and therefore the time limit period of six years prescribed u/s. 201(3) will not apply to the present case. In view of the above, it is held that the order passed by the Assessing Officer is legally valid.

10.5 The learned DR submitted that the order passed u/s 201(1) and 201(1A) was not barred by limitation u/s 201(3) of the I.T. Act for the reason that the payee in

the instant case is a non-resident, whereas, the limitation prescribed u/s 201(3) of the I.T.Act would apply only to payments made to Indian resident company. Section 201(3) and (4) was inserted by the Finance (No.2) Act, 2009 with effect from 01.04.2010 and it was later substituted by the Finance (No.2) Act, 2014 with effect from 01.10.2014. Prior to the time limit being prescribed by virtue of insertion of section 201(3), the Courts have held that when the statute does not prescribe the time limit for passing an order u/s 201(1) / 201(1A) of the I.T.Act, then reasonable time limit ought to be read into the provisions. The Special Bench of the Tribunal in the case of Mahindra & Mahindra Ltd. v. DCIT reported in [(2010) 122 ITD 216 (Mum.)] had held that order passed u/s 201(1) is akin to an order of assessment and the reasonable time limit for passing an order u/s 201(1) / 201(1A) would be same as the time limit prescribed for initiating and completion of reassessment u/s 147 of the I.T.Act. The Special Bench of the Tribunal was confirmed by the Hon'ble Bombay High Court in the case of Director of Income-tax (International Taxation) v. Mahindra & Mahindra Ltd. reported in [(2014) 48 taxmann.com 150 (Bombay)]. The Special Bench order was considering payments made to non-residents. In our case also the payees are non-resident and that was the reason for the CIT(A) to hold that the time limit mentioned u/s 201(3) of the I.T.Act does not have application to this case.

10.6 When no time limit is prescribed under the statute for initiating and completion of a proceedings, the Hon'ble Kerala High Court in the case of Iswara Bhat v. Commissioner of Agricultural Income-tax [(1993) 200 ITR 238 (Ker.)] had held that the powers should be exercised within the reasonable time. The Hon'ble High Court was considering the powers of the Commissioner to exercise the revisionary jurisdiction. The Kerala Agricultural Income-tax Act, 1950 did not prescribe a time limit for initiating a suo moto revisional proceedings. However, the Hon'ble Kerala High Court held that the Commissioner has to pass an order within a reasonable time and what is a reasonable time limit depends on the facts of that particular case.

10.7 The Hon'ble Delhi High Court in the case of CIT v. NHK Japan Broadcasting Corporation reported in [(2008) 305 ITR 137 (Delhi)] had held that the order passed u/s 201 of the I.T.Act beyond four years was not reasonable and had quashed the same as barred by limitation. Similar view was taken by the Hon'ble Himachal Pradesh High Court in the case of CIT v. Satluj Jal Vidyut Nigam Ltd. reported in [(2012) 345 ITR 552 (HP)]. As mentioned earlier, the learned DR submitted that the time limit prescribed in sub-section (3) of section 201 does not have application since the payee is a non-resident. The Hon'ble Bombay High Court in the case of Director of Income-tax (International Taxation) v. Mahindra & Mahindra Ltd. (supra) had held even if there is no time limit

prescribed under the statute for passing an order u/s 201(1) / 201(1A) of the I.T. Act, a reasonable time limit should be read into the provision. The Hon'ble Bombay High Court had confirmed the Special Bench order of the Tribunal, wherein the time limit prescribed for initiating and completion of reassessment u/s 147 of the I.T. Act was upheld to be correct. The Hon'ble High Court was considering the following substantial question of law:-

> *"(1) Whether the Tribunal was justified in prescribing the time limit for initiation and completion of proceedings under sub-sections (1) and (1A) of Section 201 of the Income-tax Act, 1961 in the absence of any time-limit provided under the said Act?*
>
> *(2) Whether the Tribunal was justified in prescribing the time limit statutorily provided for initiation and completion of reassessment proceedings under Section 147 of the Income-tax Act, 1961 for the purposes of sub-sections (1) and (1A) of Section 201 of the said Act?"*

In deciding the above question, the Hon'ble High Court confirmed the Special Bench order of the Tribunal by following the judgment of the Hon'ble Delhi High Court in the case of CIT v. NHK Japan Broadcasting Corporation (supra).

10.8 In the instant case, the financial year concerned is 2010-11 and notice for initiating proceedings u/s 201(1) / 201(1A) was issued on 19.03.2018. The orders u/s 201(1) / 201(1A) of the I.T. Act was finally passed on 31.03.2018, which is seven years from the end of the financial year. Therefore, it cannot be stated in

facts of this case, the order u/s 201(1) / 201(1A) was passed within a reasonable time, going by the dictum laid down by the judicial pronouncement mentioned supra and the prescription of limitation mentioned u/s 201(3) and (4) of the I.T.Act. Similar view was taken by the Co-ordinate Bench, Cochin, vide order dated 10.04.2018 in ITA No.122/Coch/2017 for assessment year 2007-2008 in the case of M/s.U.S. Technology Resources (P) Ltd., wherein the present Accountant Member was the co-author of the said order. In view of the aforesaid reasoning, we hold that the order passed u/s 201(1)/ 201(1A) of the I.T. Act was barred by limitation in the facts and circumstances of the case. It is ordered accordingly.

11. In the result, the appeal of the Revenue is dismissed and the Cross Objection of the assessee is allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-	**Sd/-**
(N.V. VASUDEVAN)	**(CHANDRA POOJARI)**
VICE PRESIDENT	**ACCOUNTANT MEMBER**

Dated: 16th December, 2020.

GJ

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore