IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH: 'G': NEW DELHI)
(THROUGH VIDEO CONFERENCING)

BEFORE SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA No:- 116/Del/2017
(Assessment Year: 2012-13)

ACIT, Circle-76(1), New Delhi.	Vs.	M/s The Indian News Paper Society, INS Building, Rafi Marg, New Delhi-110001.
APPELLANT		**RESPONDENT**
PAN No: AAATI0416Q		

C.O. No.- 86/Del/2017
Arising from ITA No:- 116/Del/2017
(Assessment Year: 2012-13)

M/s The Indian News Paper Society, INS Building, Rafi Marg, New Delhi-110001. **PAN No: AAATI0416Q**	Vs.	ACIT, Circle-76(1), New Delhi.
APPELLANT		**RESPONDENT**

Revenue By : Ms. Parul Garg, Sr. DR
Assessee By : Shri Ranjan Chopra, CA

Per Anadee Nath Misshra, AM

(A) The aforementioned appeal by Revenue and Cross Objection ("C.O.", for short) by Assessee are hereby disposed off through this Consolidated Order. Grounds taken in the Appeal and Cross Objection are as under:

ITA No.- 116/Del/2017

"1. Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in holding that the assessee's case is squarely covered by the CBVDT's Circular No. 35/2016 dated 13/10/2016 without demonstrating that the assessee has fulfilled all the conditions mentioned in para 6 of the Circular No. 35/2016?

2. Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in allowing relief following the order dated 10/12/2015 of the Hon'ble Bombay High Court in the case of assessee (ITA No. 918/2015 and ITA No. 920/2015) without demonstarating the factual similarity in these cases?

2.1 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in allowing relief following the order dated 10/12/2015 of the Hon'ble Bombay High Court in the case of assessee (ITA No. 918/2015 and ITA No. 920/2015) without holding that the sum of Rs 13,81,17,243/- had been treated as capital receipt by MMRDS as done by the Hon'ble Bombay High Court?

2.2 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in allowing relief following the order dated 10/12/2015 of the Hon'ble Bombay High Court in the case of assessee (ITA No. 918/2015 and ITA No. 920/2015) without demonstarating the factual similarity in the cases particularly when the payments made by the assessee in the Assessment years (AYs) 2008-09 and 2010-11 mentioned in the order of the Hon'ble Bombay High Court were for acquisition of land as per the agreement dated 09/04/2008 with MMRDA whereas the sum of Rs 13,81,17,243/- of the relevant A.Y. was for acquiring right for additional built up area/FSI as per the agreement dated 11/08/2009 connected with the agreement dated 09/04/2008 with MMRDA?

2.3 Whether on the facts and in the circumstances of the case and in law, the CIT(A) was justified in not confirming the order of the Assessing officer treating

the assessee as an assessee in default u/s 201(1) in respect of the amount of tax which has not been deducted under section 1941 of the Income Tax Act and levying interest thereon under section 201(1A) of the I.T. Act?

3. That the order of the CIT(A) being erroneous in law and on facts needs to be vacated and the order of the AO be restored.

4. That the appellant craves leave to add or amend any one or more of the ground of the appeal as stated above as and when need for doing so may arise."

Cross Objection No.- 86/Del/2017

"1. The Learned Commissioner of Income Tax [Appeals], New Delhi [CIT(A)] rightly reversed order dated 27.03.2014 of AO, Ward 50(1), New Delhi passed under Section 201(1)/201(1A) of Income tax Act, 1961 [Act] and consequently, CIT(A) correctly decided in favour of Respondent-Assessee holding that Respondent-Assessee is not liable to deduct at source under Section 194-1 on payments made to MMRDA inasmuch as:-

a) decision dated 10.12.2015 of jurisdictional Delhi High Court in Respondent-Assessee's own case dismissing departmental appeal nos. ITA 918 and 920 of 2015 for earlier assessment years is completely and absolutely on all fours on facts as well as in law with that obtaining in current Assessment Year 2012- 13;

b) above judicial precedent is accepted by Central Board of Direct Taxes (CBDT) vide Circular no 35/2016 dated 13.10.2016 and hence revenue did not prefer Special Leave Petition (SLP) to Apex Court and thus in the light of above, Respondent-Assessee's case is squarely covered by same. Aforesaid Circular is binding on department and with utmost respect, it does not lie in mouth of department to argue against such beneficial circulars much less file an appeal;

c) subsequently once again jurisdictional Delhi High Court in Respondent-Assessee's own case rejected departmental appeal no ITA 575 of 2016 for preceding assessment year adjudicating identical issue in favour of Respondent-Assessee vide judgment dated 08.08.2016 following its own earlier pronouncement dated 10.12.2015 cited in point (a) supra*; and*

d) Honourable Tribunal's detailed orders dated 20,06.2013 and for preceding assessment years totally cover controversies in present appeal whose reasoning, rationale, findings, conclusions and holdings are approved by jurisdictional Delhi Court through aforementioned pronouncements.

2. Respondent-Assessee further submits that issues raised in present departmental appeal are also covered in favour of Respondent- Assessee by several other verdicts

of Supreme Court, High Court and Tribunal which Respondent-Assessee craves leave to refer and rely upon before or at time of hearing.

3. Respondent-Assessee craves leave to make further arguments and file written submissions before Honourable Tribunal before or at time of hearing of appeal.

4. Abovementioned cross objections broadly and fundamentally support CIT(A)'s order and humbly prays that departmental appeal be dismissed.

5. Aforesaid cross objections are independent, alternative and without prejudice to one another.

6. Appellant craves leave to add to and/or alter and/or modify and/or delete and/or amend aforesaid grounds of cross-objection before or at the time of hearing."

(B) The Assessee is a company registered U/s 25 of the Companies Act, 1956. It is a non-profit making company formed with the object of functioning as an apex organization to protect the interest of press in India. The Assessing Officer ("AO", for short) passed order dated 27.03.2014 U/s 201(1)/201(1A) of Income Tax Act ("I.T. Act", for short); wherein the AO held that the assessee company had failed to deduct tax at source u/s 194I of I.T. Act in respect of lease premium amounting to Rs. 13,81,17,243/- paid to Mumbai Metropolitan Regional Development Authority ("MMRDA", for short). The AO treated the assessee to be in default U/s 201(1)/201(1A) of I.T. Act in respect of tax not deducted at source u/s 194I of I.T. Act and raised demand amounting to Rs. 1,74,02,772/- which included Rs. 1,38,11,724/- U/s 201(1) of I.T. Act and Rs. 35,91,048/- U/s 201(1A) of I.T. Act. For this purpose, the AO relied on earlier orders passed U/s 201(1)/201(1A) of I.T. Act in the case of the same assessee for Assessment Years 2008-09, 2010-11 and 2011-12 corresponding respectively to Financial Years ("F.Y.", for short) 2007-08, 2009-10, 2010-11. To quote from para 8 from the aforesaid order dated

27.03.2014 passed U/s 201(1)/201(1A) of I.T. Act, the AO remarked: "*After considering the submissions made by the assessee company and the earlier order passed u/s 201(1)/201(1A) of I.Tax Act, 1961 in the F.Y. 2007-08 and F.Y. 2009-10 and F. Yr 2010-11 in which the TDS liability was raised as the contentions of the deductor assessee were not found satisfactory by the then A.O. and was treated as an assessee in default. As the same ground is raised by the assessee company in the year under consideration i.e. F.Y. 2011-12, therefore, following the reasoning given for the F.Y. 2007-08, 2009-10 and 2010-11 the ground of the assessee for the F.Y. 2011-12 is also rejected it is held that TDS was required to be deducted by the assessee company u/s 1941 of I.Tax Act on the lease premium of Rs. 13,81,17,243/- paid to MMRDA towards additional Premium for additional built up area.*"

(B.1) Aggrieved, the Assessee filed appeal before the Ld. CIT(A). In the impugned appellate order dated 28.10.2016, Ld. CIT(A) held that the assessee was not liable to deduct tax U/s 194I of I.T. Act in respect of aforesaid Rs. 13,81,17,243/- paid to MMRDA. The relevant portion of the order of Ld. CIT(A) is reproduced as under:

> *" 4. Decision in Appeal;*
> *4.1 I have gone through order u/s 201(1)/201(1A) of the I. T. Act, 1961 dated 27.03.2014 and also carefully considered the submissions, decision relied upon and the CBDT Circular No. 35/2016 dated 13.10.2016 on applicability of TDS provisions of section 194-1 of the Income-tax Act, 1961 on lump sum lease premium paid for acquisition of long term lease.*
>
> *4.2.1 The Appellant Society has been allotted a plot of land admeasuring 10415 sq. meters in Bandra Kurla Complex (BKC) on lease for 80 years by MMRDA vide letter dated 22nd January 2008 for the construction of office complex for a consideration of lease premium of Rs.88,52,75,000/-.*

4.2.2 Subsequently, MMRDA has granted additional Floor Space Index (FSI) on the said Bandra land for further built-up area of 20,830 sq. meters for a total premium of Rs 204.02 crore. Amounts of Rs 65.80 crore and Rs 16.93 crore was paid by the appellant during F.Y, 2009-10 and 2010-11 respectively. During the financial year under reference premium of Rs 13,81,17,243/- was paid by the appellant to MMRDA for its BKC project on 05.02.2012, being further part payment of the total premium of Rs 204.04 crore for the additional built-up area.

4.2.3 The Income tax Officer, TDS -50(1) , New Delhi (AO) has vide order under Section 201(1)/201(1A) of the Act dated 27.03.2014, held that the lease paid to MMRDA is' construed as rent and hence TDS u/s.1941 is required be deducted. The appellant was treated as an assessee-in-default for non deduction of tax on the payment of Rs. 13.81 crore to MMRDA. Demand was used u/s 201(1)/201(1A) of Income Tax Act.

4.3.1 On the other hand, the appellant has claimed that the payment of lease premium was payment of capital nature and did not attract IDS provisions u/s 194,-L It has relied on various judicial decisions including the decision of the Hon'ble Delhi High Court in its own case and CBDT circular dated 13.10.2016 on this issue.

4.3.2 The issue of applicability of TDS on payment of Lease Premium has been examined in detail by the Hon'ble Jurisdictional High Court in ITA No. 918/2015 and 920/2015. The Hon'ble Court have conclusively held that the lease premium paid to MMRDA was in the nature of Capital expenditure.

4.3.3 CBDT has examined the issue of applicability of TDS provisions u/s 1941 on lease premium and has issued a circular on 13.10.2016 clarifying the same. For the sake of clarity the relevant portion is reproduced as under

> *"Section 194-1 of the Income-tax Act, 1961 (the Act) requires that tax be deducted at source at the prescribed rates from payment of any income by way of rent. For the purposes of this section, "rent" has defined as any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or building or machinery or plant or equipment or furniture or fittings.*
>
> *2. The issue of whether or not TDS under section 194-1 of the Act is applicable on 'lump sum lease premium ' or 'one-time upfront lease charges' paid by an assessee for acquiring long-term leashold rights for land or any other property has been examined by CBDT in view of representations received in this regard.*
>
> *3. The Board has taken note of the fact that in the case of The Indian Newspaper Society (ITA No. 918 & 920/2015), the Hon'ble Delhi High Court has ruled that lease premium paid by the assessee for acquiring a plot of land on an 80 years lease was in the nature of capital expense not falling within the ambit of Section 194-1 of the Act. In this case, the court reasoned that since all the rights easements and appurtenances in respect of the said land were in effect transferred to the lessee for 80 years and since there was no*

provision/m lease agreement for adjustment of premium amount paid against annual rent payable, the payment of lease premium was a capital expense not requiring deduction of tax at source under section 194-1 of the Act.

4. Further, in the case Foxconn India Developer Limited (Tax Case Appeal No. 801/2013), the Hon'ble Chennai High Court held that the one- non-refundable upfront charges paid by the assessee for the acquisition of leasehold rights over an immovable property for 99 years could not be taken to constitute rental income in the hands of the lessor, obliging the lessee to deduct tax at source under section 194-1 of the Act and that in such a situation the lease assumes the character of "deemed sale". The Hon'ble Chennai High Court has also in the case of Tril Infopark Limited (Tax Case Appeal No. 882/2015) ruled that TDS was not deductible on payments of lump sum lease premium by the company for acquiring a long-term lease of 99 years.

5. In all the aforesaid cases, the Department has accepted the decisions of the High Courts and has not filed an SLP. Therefore, the issue of whether or not TDS under section 194-1 of the Act is to be made on lump sum lease premium or one-time upfront lease charges paid for allotment of land or any other property on long-term lease basis is now settled in favour of the assessee.

6. In view of the above, it is clarified that lump sum lease premium or one-time upfront lease charges,, which are not adjustable against periodic , rent, paid or payable for acquisition of long-term leasehold rights over land or any other property are not payments in the nature of rent within the meaning of section 194-1 of the Act. Therefore, such payments are not liable for TDS under section 194-1 of the Act. "

4.4 The appellant's case is squarely covered under the above circular, as it involved payment of lease premium. Respectfully following the decision of the Hon'ble jurisdictional High Court in the appellant's case it is held that the appellant was not liable to deduct tax on the payment of lease premium of Rs/ 13,81,17,243 to MMRDA.

5. In result, the appeal is allowed. The AO is directed to take consequential action at the time of giving effect to this order accordingly."

(C) The present appeal before us has been filed by Revenue against the aforesaid impugned appellate order dated 28.10.2016 of the Ld. CIT(A). The Assessee has also filed Cross Objection in support of the aforesaid impugned appellate order dated 28.10.2016 of the Ld. CIT(A).

(C.1) Perusal of the grounds taken in Revenue's appeal and in C.O filed by the Assessee shows that all the grounds are related to whether the assessee was liable to deduct tax at source U/s 194I of I.T. Act in respect of the aforesaid lease premium amounting to Rs. 13,81,17,243/- paid to MMRDA. For the sake of convenience all the grounds raised in the Revenue's appeal as well as in the Assessee's C.O. are disposed off together.

(C.2) At the time of hearing before us, the learned Senior Departmental Representative ("Ld. Sr. DR", for short) strongly relied on the order dated 27.03.2014 of the AO passed U/s 201(1)/201(1A) of I.T. Act. She also read out the relevant portions from the order of the AO to draw our attention. The Ld. Authorized Representative ("Ld. AR", for shot) for the assessee stated that the issue in dispute is squarely covered in favour of the assessee by orders of the Co-ordinate Benches of Income Tax Appellate Tribunal, Delhi ("ITAT", for short) in assessee's own case for Assessment Year 2011-12(vide order dated 27.01.2014 in ITA No. 4660/Del/2013) and for Assessment Years 2007-08 and 2009-10 (vide order dated 20.06.2013 in ITA Nos. 5207 & 5208/Del/2012). The aforesaid order dated 20.06.2013 of Co-ordinate Benches of ITAT, Delhi, in assessee's own case has also been reported in **Income-tax Officer v. Indian Newspapers Society [2013] 37 taxmann.com 401 (Delhi-Trib.)**; the relevant portion of which is reproduced as under:

> *"4. Briefly suited, the facts giving rise to these appeals are that the assessee is a non-profit-making company formed and registered under section 25 of the Companies Act, 1956 with the object of functioning as an apex organization to protect the interest of press in India. The Mumbai Metropolitan Regional Development Authority (MMRDA) offered to the assessee's land situated at Randra Kurt a complex on lease for a period of 80 years to enable construction of office complex by the assessee in order to provide space at subsidised rates to the assessee's members, inter alia, for a*

consideration comprising lease premium of Rs. 88,52,75,000 which was paid on December 27,2005 and February 18, 2008. The assessee entered into a development agreement dated February 14. 2008 with Orbit Enterprises to develop this land on the terms and conditions agreed upon in the agreement. Sub-sequently, the assessee executed a lease deed dated April 9. 2008 with the Mumbai Metropolitan Regional Development Authority commencing from April 1. 2008 postulating payment of annual rent of Re. 1 per sq. metre per annum which was calculated at Rs. 10.415 per year. The Mumbai Metropolitan Regional Development Authority subsequently granted floor space Index (FSF) to the assessee by virtue of which the assessee was enabled to build additional built-up area of 20,830 sq. mtr. on the commercial building already sanctioned for the assessee. The Revenue carried out a survey under section 133A of the Act on the premises of the Mumbai Metropolitan Regional Development Authority to verify tax deduction at source compliance.

5. Subsequently, the Income-tax Officer (TDS)-3(4), Mumbai, wrote a letter dated March 16. 20i I to the assessee addressed to the Mumbai address as to why the TDS has not been deducted on the lease premium payments to the Mumbai Metropolitan Regional Development Authority. In response, the assessee. vide its letter dated March 29, 2011 challenged the jurisdiction of the Mumbai TDS Officer and explained that the lease premium cannot be subjected to tax deduction at source under section 194-1 of the Act. The Mumbai TDS Officer, vide its order dated March 29,2011 for the assessment year 2008-09 held that the assessee is in default under section 20If 1 A) of the Act read with section 194-1 of the Act. Subsequently, this order was quashed by the High Court of Bombay and the issue was left open for the appropriate competent authority to initiate TDS proceedings keeping in view the law of limitation. Later, the Income-tax Officer (TDS)- 50(1), Delhi, issued a notice dated February 9, 2012 in respect of proceedings under section 201/201(1 A) calling for details and documents in relation to the assessment year 2010-11, In reply, it was argued on behalf of the assessee that it was not exigible to deduct tax at source under section 194-1 on the lease premium paid to the Mumbai Metropolitan Regional Development Authority and consequently, the assessee cannot be deemed as assessee-in-default. The TDS Officer vide order dated March 30, 2012 rejected all the contentions of the assessee and proceeded to saddle the demand of Rs. 8,39,81,641 under section 201(1) of the Act. Rs. 6,58,05,970 and under section 201(1 A) of Rs. 81.75,671, respectively.

6. Being aggrieved by the above order of the Assessing Officer, the assessee carried the matter in appeal before the Commissioner of Income-tax {Appeals) which was partly allowed. Now the Revenue is before ibis Tribunal with the grounds as mentioned hereinabove.

*Ground No, I of ITA No. 5207**./**Del/2012*

7. Apropos ground No. 1. the learned Departmental representative submitted that the Commissioner of Income-tax (Appeals) has erred in treating the order passed by the Assessing Officer/TDS Officer under section 201 (1)/201 (1 A| of the Act as barred by limitation by ignoring the fact that the same was passed in order to give effect to the order of the hon'ble High Court of Bombay. Replying to the above, learned counsel for the assesses submitted that the assessee's ease falls within the ambit of section 201(3)(i) of the An which prescribes deadline of two years from the end of

the financial year in which the tax at source return was furnished by the assessee. The return for the last quarter ended on March 31, 2008 was tiled on June 13. 2008 (paper book pages 287 and 291), i.e., the financial year 2008- 09 and if two years are further calculated from March 31, 2009, the same period would end on March 31, 2011. Counsel further submitted that the impugned order of the TDS Officer was passed on March 29,2012, hence it was barred by a period of limitation as per the above provisions of the Act which cannot be extended by the courts. In this regard, counsel for the assesses has placed his reliance on the judgment in the case of Hope Textiles Ltd. v. Union of India [1994] 205 ITR 508/73 Taxman 188 (SC).

8. From the Impugned order we observe that the Commissioner of Income-tax (Appeals) has decided the issue in favour of the assessee which reads as under :

"i have considered the Assessing Officer's impugned order, arguments of tire appellant and the provisions of section 20!. It is undisputed that the statement envisaged in section 200 for the last quarter of the financial year 2007-08, i.e., March 31,2008 was lodged on June 13, 2008 implying the financial year 2008-09 and thus there can be no doubt that clause (i) of section 201(3) would apply to the facts and circumstances of the appellant. In the premises, the period of limitation of two years shall run from April 1, 2009 and end on March 31, 2011. whereas the impugned order has been passed on March 29,2012 well beyond the cut-off date. Therefore, I have no hesitation in holding that the impugned order m burred by the period of limitation as per in section 201(3)(i). I concur with the submission of the appellant that Bombay High Court's order dated November 9,2011 cannot be construed us extending the period of limitation inasmuch as the apex court in the pronouncement quoted supra has categorically laid down that the judiciary is not competent to extend the .statutory prescribed period limitation. The Assessing Office's reliance on clause (ii) of sub-section (3) of section 201 and on clause (ii) of the Explanation to section 1.53 is of no avail of and cannot, assist the Assessing Officer to save the impugned order from the taint of crossing the period of limitation. In the result, I allow the plea of limitation raised by the appellant and therefore, ground Nos. 2 and 3 are allowed'"

9. After careful consideration of the contentions and submissions both parties in this regard, at the outset, we observe that as per facts recorded by the Commissioner of Income-tax (Appeals), the hon'ble High Court of Mumbai quashed the order of the TDS Officer, Mumbai} leaving the issue open for appropriate competent authority to initiate TDS proceedings. The Departmental representative appearing For the Revenue has not disputed the point that the hon'ble High Court of Mumbai left the issue open for the appropriate competent authority to initiate TDS proceedings, keeping in view the law of limitation, meaning thereby that the hon'ble High Court of Mumbai simply quashed the order of the TDS Officer,' Mumbai, perhaps on the ground of jurisdiction and the issue was left to be decided by the competent authority but the period of limitation has to be taken from the relevant provisions of the Act which cannot be extended by judicial pronouncements. On careful perusal of the relevant para of the impugned order, we observe that the Commissioner of Income-tax (Appeals) has dealt with the issue of limitation as per the relevant provisions of the Act and righty held that the order was passed by crossing the period of limitation as prescribed by the Act. Accordingly, ground No 1 of ITA No. 5207/ D/2012 is dismissed.

Ground No. 2 of ITA No. 5207/D/12 and ground No. 1 of ITA No, 5208/ D/12

*10. Apropos these grounds the Departmental representative submitted that the Commissioner of Income-tax (Appeals) erred **in** not appreciating that the payment made by the assessee in the in the respective assessment years to Mumbai Metropolitan Regional Development Authority was covered under the definition of "Rent" as per provisions of Section 194-I of the Act. The DR further submitted that the assessee has acquired land rights from Mumbai Metropolitan Regional Development Authority which provided land to the assessee on lease basis but on payment of lease premium. The Departmental Representative also contended that the assessee company was not holding full rights of land as the agreement entered into between Mumbai Metropolitan Regional Development Authority and the assessee company was bearing some restrictive clauses which show that the Mumbai Metropolitan Regional Development Authority did not transfer all perpetual rights to the assessee in the land. The Departmental Representative finally contended that in the case of CIT Tax vs Reebok Co.[2007] 291 ITR 455/ 163 Taxman 61 (Del), it was held that as per the facts and circumstances of the case, even a security deposit under lease agreement can be tantamount to advance rent, hence TDS deduction is required to be made.*

11. After careful consideration of the above submissions, contentions and legal propositions of both the parties in the light of factual matrix of present case, we observe that it is argued on behalf of the assessee that the Mumbai Metropolitan Regional Development Authority in its computation of income has not included the lease premium received in computing the total income because it was further payable to the Government of Maharashtra. From the impugned order, we observe that the issue involved in this ground has been decided in favour of the assessee with following observations and findings:-

> *"I have considered the written submission of Authorized Representative's and gone through various arguments canvassed by the learned counsel of the appellant as also taken into account the objections of the Assessing Officer as mentioned in the impugned order.*

i) It is well settled that premium and rent have distinct and separate connotations in law as enshrined in Section 105 of the Transfer of Property Act, 1882. The essence of premium lies in that fact it is paid prior to the creation of the landlord and tenant relationship, that is, before the commencement of the tenancy and constitutes the very superstructure of the existence of that relationship. Its another vital characteristic is that it is a onetime non-recurring payment for transferring and purchasing the right to enjoy the benefits granted by the lessor resulting in conveyance of some of the rights, title and interest in the property out of such a bundle of rights.

ii) In the Appellant's case, the premium RS.88,52,75,000/- has been paid in two installments on 27.12.2005 [Rs.22,13,18,750/-] and 18.02.2008 [Rs.66,39,56,250/-] to Mumbai Metropolitan Regional Development Authority in respect of the Bandra land and as per the lease agreement dated 09.04.2008 read with the possession receipt dated 10.04.2008 issued by Mumbai Metropolitan Regional Development Authority the lease starts from 09.04.2008 and hence the payment of Rs.88,52,75,000/- is before the initiation of the tenancy relationship between the

Appellant and Mumbai Metropolitan Regional Development Authority and consequently, a cardinal ingredient of premium as advocated in the case laws cited supra is satisfied. .

iii) Moreover, the payment Rs.88,52,75,000/- is made only once for all by the Appellant since there is no other further payment apart from Rs. 88,52,75,000/- which can be attributed to bringing into existence the foregoing landlord and tenant relationship between the Appellant and Mumbai Metropolitan Regional Development Authority.

iv) Furthermore, the receipts dated 27.12.005 and 18.02.2008 pertaining to the payment of Rs.88,52,75,000/- contain the description that the payment is on account of lease premium and not rent and there is no provision either in lease agreement dated 09.04.2008 or any other document for adjustment of the aforementioned premium amount against the annual rent RS.10,415/- payable by the Appellant to Mumbai Metropolitan Regional Development Authority de hors the premium.

v) The development agreement dated 14.02.2008 entered into by the Appellant with Orbit Enterprises transfers development rights to the latter on terms and conditions set out therein which would not have been possible, but for the substantive rights, interest and title enjoyed by the Appellant in the Bandra land in consideration ofRs.88,52,75,000/- disbursed to Mumbai Metropolitan Regional Development Authority.

vi) In addition, clause 1 of the operative portion of the lease agreement dated 09.04.2008 read with the recitals thereof unequivocally covenants that in consideration of the payment of RS.88,52,75,000/- by the Appellant, Mumbai Metropolitan Regional Development Authority, the lessor, demises the Bandra plot to the Appellant together with all the rights, easements and appurtenances and the like for 80 years commencing from 09.04.2008. In light of the above discussion read with the lease agreement dated 09.04.2008, the conclusion is irresistible that Appellant by tendering the amount Rs.88,52,75,0001- acquired the right, title and interest in the Bandra land demised by Mumbai Metropolitan Regional Development Authority, the lessor.

In the result, I hold that all the yardsticks as judicially held in the foregoing rulings relied upon by the learned counsel for terming the sum of Rs. 88,52,75,000/- as lease premium are fulfilled in the Appellant's case.

Moreover, in A. R. KRISHANAMURTHY v. CIT 176 ITR 417 (SC), the transfer of leasehold rights even for temporary period of 10 years has been held to give rise to chargeable capital gains where the Apex Court followed its earlier decision in R.K. Palshikar (HUF) v. CIT 172 ITR 311 (SC) where the lease for 99 years was concluded to be of an enduring nature. Similar view has been upheld in JCIT v. MUKUND LTD. [2007] 291 ITR (AT) 249 (Mum) [SB], CIT v. INTERNATIONAL HOUSING COMPLEX (KER) BEARING ITA NO 770 OF 2009 which was converse case where the Assessee offered the lease premium received for 99 years as rental income in each year, but the revenue assessed the same as capital gains which was ratified by the High Court.

The abovementioned view has been approved by the jurisdictional Delhi High Court in KRISHAK BHARATI Co-operative Ltd. v. Dy. CIT [2013] 350 ITR 24 (Delhi) decided ON 12.07.2012 to which my attention was drawn by the learned counsel vide letter dated 23.07.2012 enclosing the copy of the same. Thus in conformity with the consistent stand of the judiciary including the latest pronouncement of the jurisdictional High Court, in my view, undoubtedly premium in relation to leased land is a payment on capital account not liable to be classified as revenue outgoing and I hold accordingly. On the facts and circumstances of the present case, even the revenue in its affidavit in reply dated 14.09.2011 filed in the Bombay High Court in Writ petition no 1504 of 2011(Indian Newspaper Soceity v. ITO (TDS) [2011] 339 ITR 365 (Bom.) instituted by the Appellant has accepted that Mumbai Metropolitan Regional Development Authority has construed the receipt of premium as a capital receipt not exigible to tax and the AO (TDS), Delhi cannot now approbate and reprobate, on the above issue.

In DURGA KHANNA v. CIT 72 ITR 796 (SC), the Supreme Court held that the onus is on the revenue to demonstrate that premium has been camouflaged as advance rent and the Assessing Officer, in the instant case has not brought on record any material to indicate that the rent has been suppressed and the premium has been inflated. In my opinion, to prove such a factual case of measly rent and enlarged premium where an arm of the government is a party [Mumbai Metropolitan Regional Development Authority] to the lease agreement, the burden would very heavy and onerous. Such a state of affairs cannot be presumed without cogent evidence and the AO has made no attempt to lead any such evidence whatsoever, much less to substantiate the same.

In that view of the matter, I hold that the impugned sum does not constitute advance rent, but lease premium for capital expenditure not falling within the operative realm of Section 194-1 of the Act. I am strengthened in my view by the orders passed by CIT(A)-14, Mumbai in favour of the Assessee in the cases listed on page no.9 above, copies of which are placed on record by the Appellant wherein facts are identical and all the seven cases pertain to the land leased by MMRDA in the same or adjoining area which is fortified by the plan appearing at page no.- 44 and 59 of the lease deed dated 09.04.2008 [G block-page 43 of the factual paper book.]"

12. In view of above observations, we clearly observe that the Commissioner of Income Tax(A) has also dealt with other cases pertaining to the land leased by Mumbai Metropolitan Regional Development Authority in the same or adjoining area and has held that the impugned deposit of lease premium does not constitute advance rent but it is a lease premium for acquiring land with right to construct a commercial building although with certain restrictions, but it is a capital expenditure not falling within the ambit of section 194-I of the Act. We also observe that the payment of lease premium was not to be made on periodical basis but it was one time payment to acquire the land with right to construct a commercial complex thereon and the lease premium was paid to Mumbai Metropolitan Regional Development Authority in four installments, therefore, we are unable to see any perversity, infirmity or any other valid reason to interfere with the findings of the Commissioner of Income Tax(A). Accordingly, this issue is decided in favour of the

assessee by disposing ground no.2 of ITA 5207/D/12 and ground no.1 of ITA 5208/D/12.

Ground no.3 of ITA No.5207/D/12 and ground no.2 of ITA 5208/D/12.

13. Apropos these grounds, the DR submitted that the Commissioner of Income Tax(A) has erred in not treating the assessee as assessee in default within the meaning of section 201(1) of the Act for non-payment of TDS on payment made to Mumbai Metropolitan Regional Development Authority. The DR further contended that as per section 201 of the Act where any person including the Principal Officer of a company who is required to deduct any sum in accordance with the provisions of this Act or referred to sub-section 1A of Section 192 of the Act being an employer does not deduct or does not pay or after deduction fails to pay the whole or in part of the tax as required by the Act, then such person shall, without prejudice to any other sections which he may incur, be deemed to be an assessee in default in respect of such taxes.

14. Replying to the above, the counsel of the assessee submitted that the payment of lease premium was payment of capital expenditure and the payment was not liable for tax deduction at source by the payee, therefore, the assessee had no occasion to deduct tax at source and in this situation, the Assessing Officer/TDS officer wrongly held that the assessee was liable to deduct tax at source on payment of lease premium to MMRDA. The counsel of the assessee vehemently submitted that when TDS was not required to be made, how the assessee can be held liable for default in not deducting TDS from the payment of lease rent paid to Mumbai Metropolitan Regional Development Authority.

15. On careful consideration of the rival submissions, we observe that as per section 194-I of the Act, any person , not being an individual or a Hindu undivided family, who is responsible for paying any income by way of rent, 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, shall deduct income-tax thereon at the rate prescribed therein. Since in the present case, we have held that the lease premium paid by the assessee was capital in nature and was not rent, therefore, we are unable to approve the findings of TDS Officer/Assessing Officer that the assessee was liable to deduct TDS on payment of lease premium to MMRDA. At this point, we place reliance on the judgment of Hon'ble jurisdictional High Court of Delhi in the case of Krishak Bharati Cooperative Ltd. vs DCIT (2013) 350 ITR 24 (Del)/[2012] 23 taxmann.com 265/10 Taxman 123 wherein their lordships held that for premium on acquisition of lease hold rights in the land, lease for 90 years with substantial interest in the land, then lease premium constituted capital expenditure.

16. In view of discussions made hereinabove, we are not in agreement with the findings of the Assessing Officer and we decline to hold that the Commissioner of Income Tax(A) has erred in not treating the assessee as assessee in default within the meaning of section 201(1) of the Income Tax Act for non-deduction of TDS on payment of lease premium to MMRDA. At the cost of repetition, it is worthwhile to

mention that for invoking the provisions of section 201(1) of the Act, this is a pre-condition that the person should be required to deduct any sum in accordance with the provisions of this Act and he does not deduct, or does not pay or after deduction fails to pay the whole or in part of the tax as required under the provisions of the Act, then only such person shall be deemed to be an assessee in default in respect of payment of such tax. In the case in hand, the assessee was not liable to deduct any tax on payment of lease premium to MMRDA because it was capital expenditure to acquire land on lease with substantial right to construct a commercial building complex.

17. To sum up, we finally hold that the assessee was not liable to deduct tax at source from the payment made to MMRDA as lease premium, therefore, the Commissioner of Income Tax(A) rightly decided this issue in favour of the assessee and we have no reason to interfere with the findings of the Commissioner of Income Tax(A) in this regard. Accordingly, ground no. 3 of ITA 5207/D/12 and ground no.2 of ITA 5208/D/12 being devoid of merits are dismissed.

18. In the result, both the appeals of the revenue are dismissed."

(C.2.1) The relevant portion of the aforesaid order dated 27/1/2014 of Co-ordinate Benches of ITAT, Delhi is also reproduced below for ready reference:

3. AO in this case held that the TDS was required to be deducted by the assesee under section 194I of the I.T. Act on the lease premium of Rs. 16,93,03,285/- paid to MMRDA towards additional premium for additional built up area. In this regard, AO referred to similar addition made in earlier assessment year.

3.1 AO further held that the assessee company has failed to deduct the TDS as above for which no reasonable cause could be furnished , therefore, the deductor company was treated as assessee in default under section 201(2) of the I.T. Act.

4. Upon assessee's appeal Ld. CIT(A) following the reasoning in his two appellate orders in assessment year 2008-09 and 2010-11, held that he was of the view that the impugned payment made from any angle cannot be determined as rent as postulated in section 194I and hence he held that the assessee was not liable to deduction of tax at source and thus cannot be treated as assessee in default under section 201 of the I.T. Act.

5. Against the above order the Revenue is in appeal before us.

6. We have heard both the counsel and perused the records. Ld. Counsel of the assessee at the out set submitted that the issue involved is squarely covered in favour of

the assessee by the decision of the Tribunal in assessee's own case in ITA No. 5207/Del/2012 (A.Y. 2007-08) and in ITA No. 5208/Del/2012 for asstt. year 2009-10 vide order dated 20.6.2013. In the said order the Tribunal had referred to the CIT(A)'s order and affirmed the same by holding as under:-

> *Para 12. In view of above observations, we clearly observe that the Commissioner of Income Tax(A) has also dealt with other cases pertaining to the land leased by MMRDA in the same or adjoining area and has held that the impugned deposit of lease premium does not constitute advance rent but it is a lease premium for acquiring land with right to construct a commercial building although with certain restrictions, but it is a capital expenditure not falling within the ambit of section 194-I of the Act. We also observe that the payment of lease premium was not to be made on periodical ITA No.5207 & 5208/Del/2012.*
>
> *Para 16. In view of discussions made hereinabove, we are not in agreement with the findings of the Assessing Officer and we decline to hold that the Commissioner of Income Tax(A) has erred in not treating the assessee as assessee in default within the meaning of section 201(1) of the Income Tax Act for non-deduction of TDS on payment of lease premium to MMRDA. At the cost of repetition, it is worthwhile to mention that for invoking the provisions of section 201(1) of the Act, this is a precondition that the person should be required to deduct any sum in accordance with the provisions of this Act and he does not deduct, or does not pay or after deduction fails to pay the whole or in part of the tax as required under the provisions of the Act, then only such person shall be deemed to be an assessee in default in respect of payment of such tax. In the case in hand, the assessee was not liable to deduct any tax on payment of lease premium to MMRDA because it was capital expenditure to acquire land on lease with substantial right to construct a commercial building complex.*
>
> *Para 17. To sum up, we finally hold that the assessee was not liable to deduct tax at source from the payment made to MMRDA as lease premium, therefore, the Commissioner of Income Tax(A) rightly decided this issue in favour of the assessee and we have no reason to interfere with the findings of the Commissioner of Income Tax(A) in this regard. Accordingly, ground no. 3 of ITA 5207/D/12 and ground no.2 of ITA 5208/D/12 being devoid of merits are dismissed."*

7. Ld. DR could not controvert the above submissions. Thus on identical facts in preceding year Tribunal has decided the issue in assessee's favour. Respectfully following the precedent as above, we uphold the order of the Ld. CIT(A) and decide the issue in favor of the assessee

8. In the result, the Appeal filed by the Revenue stands dismissed."

(C.3) At the time of hearing, the Ld. AR for assessee further pleaded that the issue in dispute has also already been decided in favour of the assessee by Central Board of Direct Taxes ("CBDT", for short) vide Circular No. 35/2016 [F. No. 275/29/2015-IT(B)], Dated 13-10-2016, in which CBDT has taken note of order of Hon'ble Delhi High Court in assessee's own case. The relevant portion of the aforesaid CBDT Circular dated 13-10-2016 is also reproduced below for ready reference:

2. *The issue of whether or not TDS under section 194-1 of the Act is applicable on 'lump sum-lease premium' or 'one-time upfront lease charges" paid by an assesses for acquiring long-term leasehold rights for land or any other property has been examined by CBDT in view of representations received in this regard.*

3. *The Board has taken note of the fact that in the case of The Indian Newspaper Society (ITA Nos. 918 & 920/2015) the Hon'ble Delhi High Court has ailed that lease premium paid by the assessee for acquiring a plot of land on an 80 years lease was in the nature of capital expense not falling within the ambit of section I94-I of the Act. In this case, the court reasoned that since all the rights easements and appurtenances in respect of the said land-were in effect transferred to the lessee for 80 years and since there was no provision in lease agreement for adjustment of premium amount paid against annual rent payable, the payment of lease premium was a capita! expense not requiring deduction of fax at source under section 194-1 of the Act.*

4. *Further, in the case Foxconn India Developer 1 .muted (Tax Case Appeal No. 801/2013), the Hon'ble Chennai High Court held that the one-time non-refundable upfront charges paid by the assessee for the acquisition of leasehold rights over an immovable property for 99 years could not be taken to constitute rental income in the hands of the lessor, obliging the lessee to deduct tax at source under section 194-1 of the Act and that in such a situation the lease assumes the character of "deemed sale". The Hon'ble Chennai) High Court has also in the cases of Tril Infopark Limited (Tax Case Appeal No. 882/2015) ruled that TDS was not deductible on payments of lump sum lease premium by the company for acquiring a long-term lease of 99 years.*

5. *In all the aforesaid cases, the Department has accepted the decisions of the High Courts and has not filed an SL,P. Therefore, the issue of whether or not TDS under section 194-1 of the Act is to he made on lump sum lease premium or one-time upfront lease charges paid for allotment of land or any other property on long-term lease basis is now settled in favour of the assessee.*

6. In view of the above, it is clarified that lump sum lease premium or one-time upfront lease charges, which are not adjustable against periodic rent, paid or payable for acquisition of long-term leasehold rights over land or any other property are not payments

in the nature of rent within the meaning of section 194-I of the Act. Therefore; such payments are not liable for TDS under section 194-1 of the Act."

(D) We have heard both sides patiently. We have carefully perused the materials available on record. We find that the case of Revenue, vide aforesaid order dated 20.06.2013 passed U/s 201(1)/201(1A) of I.T. Act is based on orders passed in assessee's own case for F.Y. 2007-08 (Assessment Year 2008-09), F.Y. 2009-10 (Assessment Year 2010-11) and F.Y. 2010-11 (Assessment Year 2011-12). We also find that the Co-ordinate Benches of ITAT, Delhi, vide aforesaid order dated 27.01.2014 and 20.06.2013 have already decided the issues in dispute in favour of the assessee for these very years, in assessee's own case. The relevant portions of the orders of Co-ordinate Benches of ITAT, Delhi have already been reproduced in foregoing paragraphs **(C.2)** and **(C.2.1)** of this order. Revenue has not been able to show any distinguishing facts and circumstances pertaining to the present appeal before us (A.Y. 2012-13) to distinguish the facts of the present appeal from facts in F.Y. 2007-08 (Assessment Year 2008-09), F.Y. 2009-10 (Assessment Year 2010-11) and F.Y. 2010-11 (Assessment Year 2011-12). We also find that the issue in dispute is already decided in favour of the assessee by aforesaid CBDT Circular dated 13-10-2016. We also find that in the impugned appellate order dated 28.10.2016, the Ld. CIT(A) has decided the issue in favour of the assessee after considering the decision of Hon'ble Jurisdictional High Court in assessee's own case as referred in aforesaid CBDT Circular dated 13-10-2016. It is well settled that circulars of CBDT which are beneficial to the assessee are binding on Revenue authorities. Whether in proceedings U/s 201(1)/201(1A) of I.T. Act before the AO; or in the course of appellate

proceedings either before Ld. CIT(A) or in ITAT, Revenue has failed to bring any distinguishing facts and circumstances of this year to light as compared with facts and circumstances in aforesaid years in F.Y. 2007-08 (Assessment Year 2008-09), F.Y. 2009-10 (Assessment Year 2010-11) and F.Y. 2010-11 (Assessment Year 2011-12). Therefore, in view of the foregoing; and respectfully following the orders dated 27.01.2014 and 20.06.2013 of Co-ordinate Benches of ITAT, Delhi in assessee's own case; and after due consideration of aforesaid CBDT Circular dated 13-10-2016 which takes into account the orders of hon'ble Jurisdictional High Court in assessee's own case; we are of the view that impugned appellate order dated 28.10.2016 of the Ld. CITA) is to be sustained. Accordingly, the issue in dispute regarding applicability of Section 194I of I.T. Act is decided in assessee's favour and it is held that the assessee was not required to deduct tax at source U/s 194I of I.T. Act in respect of payment of lease premium amounting to aforesaid Rs. 13,81,17,243/-.

(E) The appeal filed by Revenue is dismissed and the Cross Objection filed by Assessee is allowed.

Order pronounced in Open Court on 14/01/21.

Sd/-	**Sd/-**
(SUDHANSHU SRIVASTAVA)	**(ANADEE NATH MISSHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 14/01/21
Pooja)

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

Date of dictation	
Date on which the typed draft is placed before the dictating Member	
Date on which the typed draft is placed before the Other Member	
Date on which the approved draft comes to the Sr. PS/PS	
Date on which the fair order is placed before the Dictating Member for pronouncement	
Date on which the fair order comes back to the Sr. PS/PS	
Date on which the final order is uploaded on the website of ITAT	
Date on which the file goes to the Bench Clerk	
Date on which the file goes to the Head Clerk	
The date on which the file goes to the Assistant Registrar for signature on the order	
Date of dispatch of the Order	