IN THE INCOME TAX APPELLATE TRIBUNAL
[DELHI BENCH : "F" NEW DELHI]

BEFORE DR. B. R. R. KUMAR, ACCOUNTANT MEMBER

AND

SH. YOGESH KUMAR U.S., JUDICIAL MEMBER

I.T.A. No. 6262/DEL/2019 (A.Y 2017-18)

Pivotal Infrastructure Ltd. 309, 3rd Floor, JMD Pacific Square Sec-15, Part-II, Gurgaon, Haryana **PAN No. AADCP9575F** **(APPELLANT)**	Vs.	Addl. CIT Special Range 76, 3rd Floor, Ayakar Bhawan, District Centre, Laxmi Nagar New Delhi **(RESPONDENT)**

Appellant by	**Sh. Vijay Singla, CA**
Respondent by	**Sh. Sanjay Nargas, Sr DR**

Date of Hearing	**28.11.2022**
Date of Pronouncement	**30.11.2022**

ORDER

PER YOGESH KUMAR U.S., JM

This appeal is filed by the assessee against the order dated 27/06/2019 of the ld. Commissioner of Income Tax (Appeals)–31, New Delhi [hereinafter referred to CIT (Appeals)] for Assessment Year 2017-18.

2. The assessee has raised the following substantive grounds of appeal:-

"1. That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order of Rs 14,24,000,00 u/s 271(l)(c) passed by the Ld Add! CIT,

Range-76, Delhi (Ld AO) as the same was passed without application of mind and was purely based on whims and wishes of the Ld AO and was based on vague and ambivalent notices.

2. That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that underline payments of EDC/IDC to HUDA is a statutory obligation levied by the State Govt of Haryana under the HUDA Act and the payment of which is to be essentially made without any choice / option to the payer.

3. That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that there exists no master servant or contractual relationship between the DTCP/HUDA and the assessee.

4. That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that the provisions of Chapter XVII of the Act in as much as no tax was required to be withheld on EDC/IDC *payments made to DTCP/HUDA and the assessee could not be treated as assessee in default.*

5. That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that the initiation of proceedings under Sec 201(1)/201(1A) of the Act is illegal, bad in law, prejudice to the interest of the assessee, void ab initio, without *any basis and is purely on non-application of mind.*

6. That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that all the payments were made at the directions of the DTCP & and it was a pre-condition to grant a license for colonization, being payments made to State Government are not amenable to tax withholding under Chapter XVII in terms of Sec 196 of the Act.

7) *That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that the revenue is failed to pin point the precise provisions / sections under which the assessee is required to withhold the tax on EDC/IDC payments and the penalty orders are passed purely on the mercy of Ld AO & relying on the basis of survey report.*

8) *That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order which passed without appreciating that the HUDA is liable to assessment u/s 143(3) & tax alleged to be not deducted there from cannot once again be received from the assessee, in terms of Sec 201(1) of the Act.*

9) *That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order which was passed without appreciating that there exists no contract between HUDA/DTCP for payments of EDC/IDC, rather it is a statutory obligation. In contract there exists* always *a wish to change the contractor, but in the present case it has to be paid without any negotiations & bargaining's under compulsion. No control over pricing or terms of work, time framework or other normal provisions of the Act. There also exists no right with the assessee to*

terminate the contract, change the terms of the contract. Rather these options are available to HUDA/DTCP under statutory / legal provisions

10) *That on the facts and in the circumstances of the case and in law, Ld CIT-A grossly erred in not deleting the impugned penalty order was passed without appreciating that on the facts and in the circumstances of the case and in law, Ld AO in passing the penalty order u/s 271(l)(c) by violating the principles of audi-alterm pattern i.e. Principles of natural justice, and are prejudicial to the interest to the assessee."*

3. Brief facts of the case are that, a survey u/s 135A was carried out at the business/office premises of the Haryana Urban Development Authority. (H0DA) by the DOT (TDS), Panchkula who forwarded the details and findings of the survey. On detailed examination of the survey report and verification of the facts of the ease of assesses, the AO noticed that TDS was not made on payment of External Development Charges (EDC) and accordingly penalty u/s 271C Act was initiated on 24/07/2017 In response, the assessee filed a reply dated 09.11. 2017 stating that *provisions* of section 194C of the Act were not applicable on payment, of EDC because the payment was made to the Government and not to the HUDA. The AO noticed that demand drafts for EDC payment were issued in the name Chief Administrator, HUDA and the amount paid by the assessee for the years under consideration i.e. A.Y 2013-14 & 2016-17 was Rs. 19,90,00,000/- Rs. 7,12,00,000/-, respectively. The AO further mentioned that HUDA Develops Urban Infrastructure for which it was receiving EDC charges from various parties and quantum of such charges received are under: -

F.Y	EDC (Rs.)
2013-14	29,27,36,60,772/-
2014-15	26,65.79,24.887 / -
2015-16	16,52,80,62,274/-
2016-17 (upto December 2016)	9,88,80,40,377
Total	79,34,76,88,310/-

4. The Ld. A.O. was of the opinion that HUDA is taxable entity who was rendering services for External Development Work and receiving the consideration for such services, in view of Circular No, 681 of CBDT dated 08/03/1994, the TDS was applicable on EDC charges. Thereafter, the AO has reproduced various circulars dated *15.01.2002,* 08.07.2002, 25.09.2009 and 14.08.1996 issued by Accounts Officer, for Chief Controller of Finance. HUDA, Panchkula vide which EDC charges were fixed. The Ld. A.O. was of the opinion that the assessee has paid EDC for the work carried out by Huda and hence the same was liable for TDS and passed penalty order u/s 271 C of the Act by imposing penalty for the year under consideration of Rs. 14,24,000/-.

5. Aggrieved by the penalty order dated 12/01/2018 the assessee has preferred an appeal before the CIT(A). The Ld.CIT(A) vide order dated 27/06/2019 dismissed the appeal.

6. Aggrieved by the order impugned dated 27/06/2019 passed by Ld.CIT(A), the assessee has preferred the present appeal on the grounds mentioned above.

7. The Ld. Counsel for the assessee has produced order passed by the Co-ordinate Bench in ITA No. 6261/Del/2019 for the Assessment Year 2014-15 and submitted that the present appeal is squarely covered of the order of the Co-ordinate Bench. The Ld. DR has not dispute the said facts.

8. We have heard the parties, perused the material on record and gave our thoughtful consideration. The Co-ordinate Bench of this Tribunal in ITA No. 6261/Del/2019 for the Assessment Year 2014-15 while dealing with the similar issues held as under:-

"5. Giving thoughtful consideration to the matter on record it can be observed that the Co-ordinate Bench orders in M/s. Perfect Constech P. Ltd. case and in RPS Infrastructure Ltd. vs. ACIT ITA No. 5805, 5806, 5349/Del/2019, which is also relied in M/s Santur Infrastructure Pvt Ltd V ACIT (supra) cast sufficient light on the controversy where in it is held that assessee builder or developers or colonizers are not required to deduct tax at source at the time of payment of EDC to the HUDA and otherwise also there is no justification of penalty.

6. As for convenience the relevant findings at para no. 5 in M/s. Perfect Constech Pvt. Ltd (supra) is reproduced;

"5. We have heard the rival submissions and have also perused the material on record. It is seen that in Para 4.3.2, subparagraph (iv) of the order passed u/s 271C of the Act, the LD.AO has himself noted that the demand draft of the EDC amounts are drawn in favour of the Chief Administrator, HUDA though routed through the Director General, Town and Country Planning, Sector-18, Chandigarh. He has also referred to the notes to accounts to the financial statements of HUDA wherein it has been stated that "other liabilities also include external development charges received through DGTCP, Department of Haryana for execution of various EDC works. The expenditure against which have been booked in Development Work in Progress, Enhancement compensation and Land cost."

Undisputedly, the payment of EDC was issued in the name of Chief Administrator, HUDA. It is also not in dispute that HUDA has shown EDC as current liability in the balance sheet, but in the 'Notes' to the Accounts Forming part of the Balance Sheet, it has been shown that EDC has been received for execution of various external development works and as and when the development works are carried out, the EDC's liabilities are reduced accordingly. It is also not in dispute that HUDA is engaged in acquiring land, developing it and finally handing it over for a price. It is also not in dispute that EDC is fixed by HUDA from time to time. However, the fact of the matter remains that payment has been made to HUDA through DTCP which is a Government Department and the same is not in pursuance to any contract between the assessee and HUDA. Thus, the payment of EDC is not for carrying out any specific work to be done by HUDA for and on behalf of the assessee but rather DTCP which is a Government Department which levies these charges for carrying out external development and engages the services of HUDA for execution of the work. Therefore, it is our considered view that the assessee was not required to deduct tax at source at the time of payment of EDC as the same was not out of any statutory or contractual liability towards HUDA and, therefore, the impugned penalty was not leviable. We note that similar view has been taken by the Coordinate Benches of ITAT Delhi in the cases of Santur Infrastructure Pvt. Ltd. vs. ACIT in ITA 6844/Del/2019 vide order dated 18.12.2019, Sarv Estate Pvt. Ltd. vs. JCIT in ITA No.5337 & 5338/Del/2019 vide order dated 13.09.2019 and Shiv Sai Infrastructure (Pvt.) Ltd. vs. ACIT in ITA No.5713/Del/2019 vide order dated 11.09.2019. A similar

view was also taken by the Coordinate Bench of ITAT Delhi in case of R.P.S Infrastructure Ltd. vs. ACIT in 5805, 5806 & 5349/Del/2019 vide order dated 23.07.2019. Therefore, on an identical facts and respectfully following the orders of the Co-ordinate Benches as aforesaid, we hold that the impugned penalty u/s 271C of the Act is not sustainable. The order of the Ld. CIT (A) is set aside and the penalty is directed to be deleted."

7. Similarly para no. 11 in the case RPS Infrastructure Ltd (Supra) is also reproduced below where in the question of justification of penalty under Section 271C of the Act was also examined;

"11. We have heard the rival submissions, perused the relevant findings given in the orders passed by the authorities below and the various judgments and materials relied upon by both the sides. On going through the facts, we note that dispute is with regard to non-deduction of tax in respect of payment of EDC charges made by the assessee to HUDA. As per the LD.AO, HUDA is neither a local authority nor Government, thus, the payments made to it by the assessee on account of EDC charges were liable for TDS under section 194C of the Act. Since, assessee has failed to deduct the TDS; therefore, it is liable for penalty under section 271C of the Act. On the other hand, the case of the assessee is that obligation to pay EDC charges is arising out of the license granted by DTCP and these payments are to be made for obtaining the license and as per the direction of the DTCP, the same have been paid to HUDA. Further, these payments are not in the nature of payment or in pursuance of works contract. There is no privity of contract between the assessee and the HUDA. On the contrary, the

agreement is between Assessee Company and the DTCP which admittedly is a Government Department as agreement has been signed by DTCP on behalf of Governor of Haryana. We are of the view that we need not go in all these issues. From the facts, it is evident that the payments have been made by the assessee to HUDA which is an authority of Haryana Government created by enactment of Legislature for carrying out developmental activities in the state of Haryana. Such Authorities admittedly are not in the category of local authority or Government. These payments were made during the year 2013-2016 and during this period, that is, prior to issue of CBDT Circular dated 23.12.2017, there was no clarity as regard the deduction of tax on these payments. We are of the view that the assesse was under a bonafide belief that no tax is required to be deducted at source on such payments, firstly, for the reason that agreement was between DTCP, who is Governmental authority and licence was granted by the Government and EDC charges was directed to be paid to HUDA, therefore, this could led to reasonable cause that TDS was not required to be deducted; Secondly, DTCP had issued a clarification dated 29.06.2018 to the effect that no TDS was/is required to be deducted in respect of payments of EDC and this clarification issued by DTCP, covers both past and future as the words used are was/is. This shows that Governmental authority itself has demanded not to deduct TDS. In case even if tax was required to be deducted on such payment but not deducted under a bonafide belief then no penalty shall be leviable under section 271C of the Act as there was no contumacious conduct by the assessee. Our view is fully supported from the judgment of the Hon'ble Supreme Court in

the case of Commissioner of income tax vs. Bank of Nova Scotia, 380 ITR 550, wherein the Hon'ble Court has held as under :

"2. The matter was pursued by the Revenue before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal vide order dated 31.03.2006 entered the following findings:

"11. We have carefully considered the rival submissions. In the instant case we are not dealing with collection of tax u/s 201(1) or compensatory interest u/s 201(1A). The case of the assessee is that these amounts have already been paid so as to end dispute with Revenue. In the present appeals we are concerned with levy of penalty u/s 271-C for which it is necessary to establish that there was contumacious conduct on the part of the assessee. We find that on similar facts Hon'ble Delhi High Court have deleted levy of penalty u/s 271-C in the case of Itochu Corporation 268 ITR 172 (Del) and in the case of CIT v. Mitsui & Company Ltd. 272 ITR 545.

Respectfully following the aforesaid judgments of Hon'ble Delhi High Court and the decision of the ITAT, Delhi in the case of Television Eighteen India Ltd., we allow the assessee's appeal and cancel the penalty as levied u/s 271-C."

3. Being aggrieved, the Revenue took up the matter before the High Court of Delhi against the order of the Income Tax Appellate Tribunal. The High Court rejected the appeal only

on the ground that no Substantial question of law arises in the matter.

4. On facts, we are convinced that there is no substantial question of law, the facts and law having properly and correctly been assessed and approached by the Commissioner of Income Tax (Appeals) as well as by the Income Tax Appellate Tribunal. Thus, we see no merits in the appeal and it is accordingly dismissed."

8. Further in case of TDI Infrastructure Ltd Versus Addl CIT, ITA no 6653/Del/2019, vide order dated 6/7/2022, the Bench, to which one of us was in quorum, had taken into consideration a clarification memo no DTCP/ACCFTS/AO(AQ) /CAO/2894/2018 dated 19.06.18 issued by the Directorate of Town and Country Planning, Haryana which made it very obvious that receipts on account of EDC are being deposited in the Consolidated Fund of the State, accordingly directions were issued to colonizer like present assessee, to not deduct TDS. Once the fact of receipt of amounts received by HUDA being deposited in Consolidated Fund of State is established, there can be no second opinion that Assessee was rightly directed by DTCP, Haryana to not deduct the TDS. Even otherwise no intentional default is attributed to assessee and the default, if any, was on account of ambiguity which had arisen out of a direction contained in a statutory document, so no penalty can be justified u/s 271C of the Act, which is meant to address contumacious conduct.

9. As a wholesome effect of above, the Bench is of considered opinion that levy of penalty u/s 271C of the Act cannot be sustained. The grounds raised in the appeal are allowed. Appeal is accordingly allowed. The impugned order is set aside."

9. By respectfully following the above order of the Co-ordinate Bench, in the absence of any fresh facts or any other ratio contrary to the above, we are of the opinion the grounds the grounds of appeal of the assessee is deserves to be allowed.

10. In the result, the appeal filed by the assessee is allowed and penalty imposed by the A.O. stood deleted.

Order pronounced in the Open Court on : 30.11.2022.

Sd/-	**Sd/-**
(B. R. R. KUMAR)	**(YOGESH KUMAR U.S.)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Dated : 30/11/2022

R.N Sr. PS

Copy forwarded to :

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

ASSISTANT REGISTRAR
ITAT NEW DELHI