

IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: G: NEW DELHI

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND
SHRI PRADIP KUMAR KEDIA, ACCOUNTANT MEMBER

ITA No.6205/Del/2012
Assessment Year: 2015-16

M/s Sawhney Builders Pvt. Ltd., A-4, Nizamuddin West, Delhi 110013 PAN AAACS 1409 C	vs.	The ACIT (TDS), Noida
(Appellant)		(Respondent)

For Assessee :	Shri Manoj Kumar, CA
For Revenue :	Ms. Meenakshi Dohre, Sr DR

Date of Hearing :	27.03.2023
Date of Pronouncement :	11.04.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

This appeal filed by the assessee is directed against the order dated 09.09.2019 of the Ld. CIT(A), New Delhi relating to Assessment Year 2015-16.

2. The grounds of appeal raised by the assessee read as under:

1. That having regard to the facts and circumstances of the case, Ld. CIT(A) has erred in law and on facts in confirming the action of Ld. A.O. in treating the assessee in default as per Sec 201(1)/201(1A) Income Tax Act, 1961.

2. That in any view of the matter and in any case, the reassessment order is bad in law and against the facts and circumstances of the case.

3. That in any case and in any view of the matter action of Ld. CIT(A) in not quashing the impugned assessment order as the assessment order is not sustainable on various legal and factual grounds.

4. That CIT(A) has erred in law and on the facts in confirming the action of Ld. AO for treating the assessee in default for Rs. 43,03,610/- on account of non-compliance of TDS provisions us 194A and that too without appreciating the facts and circumstances of the case.

3. First of all it is pertinent to mention that earlier by way of ex-party order dated 19.04.2017 the appeal of the assessee was dismissed on account of non-persecution. Again said ex-party order assessee filed MA No. 626/Del/2017 which was allowed by the Tribunal by order dated 19.09.2022 and the said ex-party order dated 19.04.2017 was set aside and appeal was restored for a fresh hearing. In pursuance thereto the appeal of the assessee is heard and being adjudicated by this order.

4. The Ld. AR submitted that the Ld. CIT(A) has erred in law and on facts in confirming the action of the AO in treating the assessee in default as per section 201(1)/201(1A) of the Income Tax 1961 (hereinafter for short the Act). The learned AR further submitted that the Ld. CIT(A) has further heard in confirming the action of the AO for treating the in default on account of non-deduction of TDS u/s. 194A of the Act for Rs. 43,03,610/-. Further placing vehement reliance on the judgement of Hon'ble Calcutta High Court vs PCIT West Bengal Housing Infrastructure Development Corporation, the learned counsel submitted that the payment by the builder/developer for delayed allotment of plot of land or other property is not interest u/s. 2(28A) of the Act and the same has to be treated as amount paid as damage/compensation to the allottees and the percentage is applied to the period of delayed for calculation amount of damages or compensation and the same cannot be treated as payment of interest to the allottees. The learned AR, therefore submitted that when the amount paid by the assessee to its allottee on account of delay is not an interest payment then the assessee is not required to deduct TDS under the

provision of section 194A of the Act or any other provision of the Act, therefore the order of authorities below may kindly be set aside.

5. Replying to the above the learned Senior DR supported the orders of authorities below and submitted that the assessee had paid interest to the parties as per copy of the account obtained during the course of survey proceedings u/s. 133A of the Act, and the name of expenses thereto has been changed as compensation on cancelation in its books of accounts by the assessee as well as in the auditor's report after survey proceedings. The learned Senior DR submitted that therefore the averments in the books of accounts and auditor's report is nothing but and after thought action of the AO to avoid the rigor of TDS provision of section 194A of the Act. The learned Senior DR submitted that the assessee was rightly treated as assessee in default under the provision of Act and the AO was right in charging amount of Rs. 43,03,610/-.

6. On careful consideration of rival submissions first of all we note that the assessee is consistently submitting that the assessee is a builder and the assessee has taken registration amount from applicants from allotment of plots/flats for its upcoming projects at

Ghaziabad but could not deliver the promises of allotment of plot/flat on time to the applicants/allottees. It was also a factual position stated by the assessee that due to said delay the assessee has to pay compensation/damages for non-compliance to the respective applicants/allottees. It was also explained that till September 2009 the assessee deducted TDS u/s. 194A of the Act incorrectly treating the amount of compensation as interest under inadvertent mistake which was later on corrected by the tax consultant that in fact it's an amount of compensation/damages to the allottees to compensate the delay as the assessee could not deliver the promises to them. This factual position have not been controverted by the learned Senior DR except alleging that when the assessee itself was treating the amount of payment as interest till September 2009 then what prompted the assessee to convert the nomenclature of payment from interest to compensation and non-complying the TDS provision of section 194A of the Act.

7. In the rejoinder the learned AR submitted that under wrong assumption the assessee was consistently committing mistake and treating the amount of compensation as interest and making the

payment after deduction the TDS. Thereafter, keeping in view the advice of tax expert to rectify the mistake then the assessee was right in changing the nomenclature as per the factual position and intention of payment. Therefore, merely because in the earlier point of time under an advertent mistake, the assessee was treating the payment as interest he cannot be compelled to commit same mistake continuously after advice of tax consultant and thus such inadvertent mistake of assessee does not entitle the Assessing Officer to treat the assessee in default for taking action against the assessee on account of non-deduction of TDS u/s. 194A of the Act.

8. At this juncture, we find it appropriate to take respectfully cognizance of judgment of Hon'ble High Court of Calcutta in the case of ***PCIT vs. West Bengal Housing Infrastructure Development Corporation reported as 413 ITR 82 (Calcutta)*** wherein the Their Lordship, under identical facts and circumstances held that the payment for delayed allotment of plot of land by the builder/developer is not interest u/s. 2(28A) of the Act since there was neither any borrowings of money nor was there incurring of debt on part of assessee therefore TDS provision of

section 194A of the Act cannot be applied to such a situation to treat the assessee as assessee in default alleging the non-compliance.

9. The similar view has been expressed by the co-ordinate bench of ITAT Delhi in the case of ***Delhi Development Authority vs. ITO reported as (1995) 53 ITD 19 (Del)***. The learned Sr. DR has not brought any contention or factual position to substantiate that the facts of matrix at present case is distinct of similar to the facts of said cases referred hereinabove, which could lead us to take a different view and conclusion.

10. Therefore, in view of foregoing we reach to a logical conclusion that the impugned payment is nothing but compensation/damages paid by the assessee to its allottees which cannot be tagged as interest u/s. 2(28A) of the Act. Therefore, TDS provision of section 194A of the Act is not applicable towards such payment. Therefore the assessee cannot be treated as assessee in default for non-compliance of TDS provisions on account of such payments. Therefore, orders of the authorities below are not sustainable and thus we set aside the same.

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

Order pronounced in the open court on 11.04.2023.

Sd/-
(PRADIP KUMAR KEDIA)
ACCOUNTANT MEMBER

Sd/-
(CHANDRA MOHAN GARG)
JUDICIAL MEMBER

Dated: 11th April, 2023.

NV/-

Copy forwarded to :

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

// By Order //

Asstt. Registrar, ITAT, New Delhi