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IN THE HIGH COURT OF DELHI AT NEW DELHI

ITA 918/2015

COMMISSIONER OF INCOME TAX-TDS

..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel.

versus

THE INDIAN NEWS PAPER SOCIETY

..... Respondent

Through: Mr. Sunil Fernandes with Mr. Deepak
Pathak and Ms. Misthi Jain, Advocates.

AND

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ITA 920/2015

COMMISSIONER OF INCOME TAX-TDS

..... Appellant

Through: Mr. Rohit Madan, Senior Standing
counsel.

versus

THE INDIAN NEWS PAPER SOCIETY

..... Respondent

Through: Mr. Sunil Fernandes with Mr. Deepak
Pathak and Ms. Misthi Jain, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

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10.12.2015

ITA 918/2015 and CM No. 29413/2015 (for condonation of delay in re-filing the appeal)

ITA Nos. 918/2015 & 920/2015

Page 1 of 5

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By:AMULYA

ITA 920/2015 and CM No. 29546/2015 (for condonation of delay in re-filing the appeal)

1. These are two appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act') directed against the common order dated 20th June 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 5207 & 5208/Del/2012 for Assessment Years ('AYs') 2008-09 and 2010-11 respectively.

2. At the very outset, the Court would like to observe that there is an extraordinary delay of 740 days in re-filing of these appeals. The explanation offered is the standard one regarding the practice directions issued by this Court for e-filing of the appeals. As has already been observed by this Court in several orders, the practice directions were issued after consultation with the bar and after giving sufficient time for the bar to get acquainted with the requirement of e-filing. Additionally, the Court has also provided scanning machines at the filing counter so that no difficulty is caused to the bar for switching over to the system of e-filing. In any event, the delay of over two years on this ground is wholly unacceptable. Consequently, the Court is not persuaded to condone the extraordinary delay of 740 days in re-filing the appeals.

3. Nevertheless the appeals have also been examined on merits. The short point urged by the Revenue in these appeals is that the lease premium paid by the Assessee to the Mumbai Metropolitan Regional Development Authority ('MMRDA') on 27th December 2005 and 18th February 2008 in the total sum of Rs.88,72,55,000 for acquiring a plot of land on an 80 year lease at Bandra-Kurla Complex, Mumbai was in the nature of a capital expense not falling

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within the ambit of Section 194I of the Act. While the Assessing Officer ('AO') treated it as revenue expenditure, the Commissioner of Income Tax (Appeals) ['CIT (A)'] reversed it and held it to be in the nature of a capital expense not requiring deduction of tax at source under Section 194I of the Act. The ITAT has in the impugned order concurred with the CIT (A) and dismissed the Revenue's appeals.

4. Mr. Rohit Madan, learned Senior Standing counsel for the Revenue submitted that the actual annual rent was a nominal sum and, therefore, what in fact was paid by the Assessee to MMRDA was in the nature of advance rent. According to him, the premium paid had camouflaged the annual rent payable over the period of 80 years for the land in question. He submitted that under Section 194I of the Act, any payment of rent for land would attract TDS. He placed reliance on a large number of decisions including *Commissioner of Income Tax, Tamil Nadu v. Madras Auto Service (P) Ltd.* [1998] 233 ITR 468 (SC) and the decision of the Madras High Court in *Commissioner of Income Tax v. Gemini Arts P. Ltd.* (2002) 254 ITR 201. He also referred to the recent decision of this Court in *Krishak Bharati Cooperative Ltd. v. Deputy Commissioner of Income Tax* (2013) 350 ITR 24 (Del).

5. Mr. Sunil Fernandes, learned counsel appearing for the Assessee referred to the specific factual findings of the CIT (A) at its discussion of the clauses of the lease agreement which have been set out *in extenso* by the ITAT in the impugned order.

6. At the outset, it requires to be noticed that under Section 194I of the Act the responsibility for deducting tax at source arises when a person pays "to a resident any income by way of rent." The deduction has to be effected "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..." at the rate specified in Section 194I of the Act. The critical word, therefore, is "income" in the hands of the payee. On facts it requires to be first noted that the clauses of the lease agreement with MMRDA dated 9th April 2008 clearly state that the payment of Rs.88,52,75,000 is only on the ground of lease premium and not rent. There is no provision in the lease agreement for adjustment of the premium amount against the annual rent of Rs.10,415 payable by the Assessee to MMRDA.

7. The second factor is that under the lease agreement, the plot of land "together with all the rights, easements and appurtenances and the like for 80 years commencing from 01. 04.2008" was demised to the Assessee. A third factor which has been noticed in the impugned order of the ITAT is that in the writ petition filed by the Assessee in the Bombay High Court, being WP (C) NO. 1504 of 2001, an affidavit has been filed by the Revenue in which it accepted that "MMRDA has construed the receipt of premium as a capital receipt not eligible to tax." The above three undisputed factual aspects, in the considered view of the Court, conclusively settle the issue whether the premium paid to the MMRDA by the Assessee in terms of the lease agreement is, in fact, only a capital and not a revenue expenditure.

8. The impugned order of the ITAT refers to several decisions of the Supreme Court including *A.R. Krishnamurthy v. Commissioner of Income Tax* 172 ITR 311 (SC) and *R. K. Palshikar* 172 ITR 311 (SC) which have construed the payment made for transfer of leasehold rights for long period of time as a benefit of an enduring nature. The recent decision of this Court in *Krishak*

7

Bharati (*supra*) also decides this particular issue likewise although on the facts of that case, the appeal of the that Assessee was dismissed. In **Durga Khanna v. Commissioner of Income Tax** 72 ITR 796 (SC), the Supreme Court held that, *prima facie*, premium or *salami* was not income and the onus was on the Revenue to show that facts existed which would make it a revenue payment. The decisions cited by Mr. Madan clearly turned on their own facts. As far as the present case is concerned, the facts brought on record, and which have not been contested by the Revenue, unmistakably show that the payment of the lease premium for the land given on lease to the Assessee for a period of 80 years with "all the rights, easements and appurtenances" was in the nature of a capital expenditure. This coupled with the fact that the MMRDA did not treat the receipt as income clinches the issue in favour of the Assessee and against the Revenue.

9. This being the main issue on merits, the Court does not consider it necessary to decide the other issue of limitation that arises in AY 2008-09.

10. The appeals are accordingly dismissed both on the ground of the extraordinary delay of 740 days in re-filing the appeals as well as on merits.



S. MURALIDHAR, J



VIBHU BAKHRU, J

DECEMBER 10, 2015/dn