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IN THE HIGH COURT OF DELHI AT NEW DELHI

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ITA 324/2016

PR. COMMISSIONER OF INCOME TAX-4 Appellant
Through: Mr. Rahul Chaudhary, Senior Standing
Counsel with Mr. Raghvendra Singh, Junior
Standing counsel.

versus

INVECON PVT. LTD. Respondent
Through: Ms. Kavita Jha and Ms. Roopali Gupta,
Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE NAJMI WAZIRI

ORDER
13.07.2016

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1. This appeal by the Revenue against the order dated 20th November 2015 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 3562/Del/2013 for the Assessment Year ('AY') 2007-08.

2. The question urged by the Revenue in this Court is virtually the same question as was raised before the ITAT which is set out in first para of the impugned order, viz., whether the Commissioner of Income Tax (Appeals) ['CIT(A)'] erred in deleting the additions made by the Assessing Officer ('AO') on account of failing on the part of the Assessee company to deduct tax under Section 194 H of the Income Tax Act, 1961 ('Act') in respect of the payments made to Vikram Electric Equipment Pvt. Ltd. ('VEEPL').

3. In the impugned order the ITAT has relied on its earlier order passed in ITA Nos. 2361 and 1953/Del/2011 in the case of Finian Estate Developers Pvt. Ltd. (order dated 5th October 2011) where similar transactions of payments made by the Assessee to consolidators of land pursuant to the agreement entered into by the Assessee with DLF Commercial Project Corporation were examined. The ITAT concluded that the payments made by the Assessee in the present case to VEEPL were on similar terms and conditions as obtaining in *Finian Estate Developers (supra)*. Accordingly, the ITAT held that the case was covered squarely by its decision in *Finian Estate Developers (supra)*. It held that the expenses incurred by the Assessee towards consolidation of land was not liable to deduction of tax at source under Section 194 H of the Act and disallowance under Section 40(a) (ia) of the Act.

4. At the outset, it was pointed by Ms. Kavita Jha, learned counsel for the Assessee, that there is a series of orders passed by the ITAT in relation to the similarly placed Assessee and the orders of the ITAT in those cases have been affirmed by this Court by dismissing the appeals of the Revenue. All those cases involved payments made to VEEPL that were disallowed by the AO under Section 40(a) (ia) of the Act on the ground that there was failure to deduct tax at source in respect of such payment under Section 194H of the Act. The details of the said orders are as under:

i. ***Principal Commissioner of Income Tax-6 v. Mohak Real Estate Pvt. Ltd.*** (order dated 8th December 2015 in ITA No. 928 of 2015 930 of 2015)

ii. ***Principal Commissioner of Income Tax v. Nayef Estate Pvt. Ltd*** (order

dated 18th November 2015 in ITA No. 885 of 2015)

iii. ***CIT v. Zebian Real Estate*** (order dated 5th November 2015 in ITA No. 257 of 2015)

iv. ***CIT v. Panthea Builders & Developers P. Ltd.*** (order dated 5th November 2015 in ITA No. 270 of 2015).

v. ***CIT v. Finian Estates Developers Pvt. Ltd.*** and ***CIT v. First India Estate and Services Pvt. Ltd.*** (order dated 26th August 2015 in ITA No. 234 of 2014 and ITA No. 236 of 2012)

5. The Court would like to refer to the order dated 5th November 2015 in ***CIT v. Zebian Real Estate*** where there is a discussion of the background under which the above orders came to be passed. The central question which arose in all those cases concerned the payments made to VEEPL by the Assessee as ‘consolidator’ to acquire land pursuant to the agreement entered into by the Assessee with DLF Commercial Project Corporation . It is not in dispute that the Memorandum of Understanding (‘MOU’) entered into by the Assessee with VEEPL in the present case, pursuant to an identical agreement between the Assessee and the DLF Commercial Project Corporation, is no different from the MOUs entered into by the aforementioned Assesseees with VEEPL.

6. The Court in its order dated 5th November 2015 noticed that although the ITAT had decided the question that has been urged in the case of *Finian Estate Developers (supra)* in favour of the Assessee and against the Revenue when an appeal was filed by the Revenue against the said decision of the ITAT in the case of ***Finian Estate Developers (supra)***, the Revenue did not raise a challenge to the decision of the ITAT on the above question.

Accordingly, the Court noted in its order dated 15th November 2015 that the decision of the ITAT in *Finian Estates Developers Pvt. Ltd.* (*supra*) attained finality.

7. Mr. Raghvendra Singh, learned counsel for the Respondent made an attempt to distinguish the present case from the aforementioned cases. In the first place, he urged that merely because the Revenue did not question the finding of the ITAT in the case of *Finian Estate Developers* (*supra*), should not preclude the Revenue from challenging the decision of the ITAT in the present case although it may have followed its own decision in *Finian Estate Developers* (*supra*). He submitted that the terms and conditions under which the payment was made by the Assessee to VEEPL would have to be individually examined to determine if the case was similar to that of Finian Estates. He urged that whereas in the present case the sale consideration as reflected in the sale deed produced before the AO was Rs. 8,41,84,664, the purchase price shown in the books of account was Rs. 15,85,22,527. Here the Assessee had booked Rs. 7,43,37,863 to the purchases over and above the amount reflected in the sale deed and this payment was made directly to VEEPL. According to him this raises a question as to the genuineness of the transaction between the Assessee and the VEEPL and this was the basis on which the AO proceeded to hold that the tax had to be deducted at source under Section 194 of the Act.

8. There is a difficulty in accepting the above submission of the learned counsel for the Revenue. In the first place, the Court finds that although the entire MOU was placed before the AO there was no discussion of the MOU

to support the conclusion that the agreement between the Assessee and VEEPL was a sham agreement. The second difficulty is that although the AO has raised questions regarding the genuineness of the transaction it does not appear to be based on any enquiry undertaken by the AO. The AO could have easily invoked the statutory power to undertake the enquiry if he had any doubt about the genuineness of the agreement between the Assessee and the VEEPL. Thirdly, the Court finds that a desperate attempt has been made by the AO to characterize the payments made by the Assessee to VEEPL as brokerage, although admittedly, the payment made amounted to Rs. 7,93,47,974. In particular, the Court finds that the plausible explanation offered by the Assessee in its letter dated 15th December 2009 bringing out the distinction between a consolidator and a broker has not been addressed by the AO.

9. A short question that arises for consideration is whether the payment made by the Assessee to the VEEPL could be treated as brokerage for the purpose of Section 194H of the Act. On facts, the Court is satisfied that such payments could not be characterized as brokerage only for the purposes of bringing it within the ambit of Section 194H of the Act. In that sense, the basic background facts concerning the MOU entered into by the Assessee with the VEEPL is no different from the MOU entered into by the Assessee in the similar cases with VEEPL as aforementioned. Consequently, the Court finds that no error has been committed by the ITAT in following its order in *Finian Estate Developers* and rejecting the Revenue's appeal.

10. No substantial question of law arises in the present case.

11. The appeal is dismissed.

S.MURALIDHAR, J

NAJMI WAZIRI, J

JULY 13, 2016
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