

Tax Scan - Simplifying Tax Laws

आयकर अपीलीय अधिकरण “F” न्यायपीठ मुंबई में।

IN THE INCOME TAX APPELLATE TRIBUNAL “F” BENCH, MUMBAI

**BEFORE SHRI C.N. PRASAD, JUDICIAL MEMBER AND
SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.3123/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2010-11)

Income Tax Officer (TDS), 3(5), Room No. 1008, 10 th floor, Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road (W), Mumbai – 400 002.	बनाम/ v.	Mr. Vikram Singh Shah, 228, Vardhaman Market, Sector 17, Vashi, Navi Mumbai-400 703.
स्थायी लेखा सं./PAN : AAZPS3120L		
(अपीलार्थी / Appellant)	..	(प्रत्यर्थी / Respondent)

Assessee by	Shri Mukundraj M Chate
Revenue by :	Shri Devendra Jain

सुनवाई की तारीख / **Date of Hearing** : 21-03-2016

घोषणा की तारीख / **Date of Pronouncement** : 16-06-2016

आदेश / ORDER

PER RAMIT KOCHAR, Accountant Member

This appeal, filed by the Revenue , being ITA No. 3123/Mum/2014, is directed against the appellate order dated 17-02-2014 passed by learned Commissioner of Income Tax (Appeals)- 13, Mumbai (hereinafter called “the CIT(A)”), for the assessment year 2010-11, the appellate proceedings before the learned CIT(A) arising from the order dated 28-11-2011 passed by the learned Assessing Officer (hereinafter called “the AO”) u/s 201(1) & 201(1A)) of the Income Tax Act, 1961 (Hereinafter called “the Act”).

2. The grounds of appeal raised by the Revenue in the memo of appeal filed with the Income Tax Appellate Tribunal, Mumbai (hereinafter called “the Tribunal”) read as under:-

“(i) On the facts and in the circumstances of the case and in law, the Ld, CIT(A) has erred in holding that the amount paid by the Lessee (Mr. Vikram Singh Shah) to the lessor (CIDCO) was not in the nature of rent, as defined in the Explanation (i) to section 194I of the Act for the purpose of deduction of tax at source.

(ii) On the facts and in the circumstances of the case and in law, the Ld, CIT(A) has erred in accepting the claim of the assessee that no tax was deductible under section 194I from the payment made by the assessee to CIDCO for acquisition of the plot of land on lease from CIDCO.

(iii) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred 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 194I from the payment made to CIDCO and levying interest under section 201(1A).

(iv) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the definition of rent, as contained in section 194I and in resorting to interpretative reasoning whereas as per the settled principle of jurisprudence, this exercise is required only when the law is unclear.

(v) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in going into the question of taxability of the payment made by the assessee to CIDCO despite the decision of the Apex Court in the case of The Aggarwal Chambers of Commerce V. Ganpat Rai Hiralal, 33 ITR 245 where it has been held that the persons who are responsible for deduction of tax at source are not concerned with the ultimate result of assessment."

3. The brief facts of the case are that information was received by the A.O. that the assessee has paid lease premium to the City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO) but no tax was deducted at source u/s 194I of the Act on payment of lease premium to

CIDCO by the assessee. The A.O. called the assessee to file copy of P & L A/c, Balance Sheet , copy of TDS returns and form no 24Q/26Q for the financial year. The assessee duly filed the required details. The A.O. observed from the books of accounts of the assessee that during the period the assessee has paid a premium of Rs. 1,05,80,528/- to CIDCO and no tax has been deducted at source on such payment. The assessee submitted copy of agreement to lease dated 24th November, 2009 showing that the consideration of Rs. 1,05,80,528/- is lease premium paid for a period of 60 years for acquiring residential plot of land . The assessee submitted that CIDCO has used the terminology of lease premium because for the first 4 years from the date of lease agreement ,the assessee has been given license and authority to enter upon the land for erecting a building for residential purposes and after completion of the construction of residential building within the time period, the agreement to lease provides that legal interest would be granted to the assessee whereby lease deed will be entered into by CIDCO with the assessee. The copy of the lease deed was also enclosed. It was submitted that the lease premium of Rs. 1,05,80,528/- is nothing but total consideration paid for the plot of land which the assessee has purchased as per the agreement to sell entered into with the CIDCO and duly registered in assessee's name as per Index No. II. Lease period is 60 years with an yearly rent of Rs. 100/- would be entered into with CIDCO. Thus, it was submitted that the lease premium amount of Rs. 1,05,80,528/- is nothing but a sale consideration as per agreement to sale and Index No. II for acquiring lease hold rights for 60 years which is virtually an ownership and legal interest in the land in favour of the assessee. It was submitted by the assessee that Section 194I of the Act stipulate payment of rent for use of land , while in the instant case payment of Rs.1,05,80,528/- is made to CIDCO for acquiring legal interest in the land in favour of the assessee.

The A.O. considered the definition of rent as defined in section 194-I of the Act which as per the A.O. is of wider scope and the definition of rent given under explanation creates a legal fiction whereby almost anything and everything relating to payment in relation to the property transaction where there is a lease or rent is covered. The CIDCO has taken almost 95% of the total amount due on the plot of land even before entering into the lease deed and a nominal amount is taken annually in the form of lease rent. Thus as per the AO, the payment of premium is nothing but advance rent paid by the assessee for the use of land for a period of 60 years was the observation of the AO. The A.O. relied upon the decision of Hon'ble Karnataka High Court in the case of CIT v. H.M.T. Ltd., 203 ITR 820 (Kar.) wherein it was held that premium on lease is in nature of advance rent and therefore is allowable as revenue expenditure. The A.O. observed that the assessee does not have the right to sublet the property. The plea of the assessee that CIDCO is a government body and there is no requirement to deduct tax at source was also rejected by the A.O. as provisions of section 196 of the Act is not applicable to CIDCO. CIDCO is neither the government nor is it a corporation established by or under Central Act, Section 196 of the Act is not applicable. The A.O. held that the assessee shall follow statutory provisions which stipulated deduction of tax at source in case the payment falls within the ambit of the provisions of section 194 I of the Act. Thus it was held by the A.O. that the payment on account of lease premium is definitely rent within the meaning of section 194 I of the Act because rent means any payment by whatever name called under any lease etc. for the use of any land etc. . Since the payment on account of lease premium is included in definition of rent as defined in Explanation (i) to section 194 I of the Act there is no need to refer to any decision or case law, because as per decision of Supreme Court rules of interpretation/ construction come into play only where there is ambiguity in law and such rules of interpretation/ construction have no place when the law is clear and unambiguous. CIDCO is neither government nor a

corporation incorporated under a Central Act. Accordingly as per the AO, it does not qualify for exclusion from the TDS under provisions of Chapter XVII-B as provided for under section 196 of the Act. On given facts, it is clear that the assessee was liable to deduct T.D.S. on any payment by whatever name called made by it to CIDCO under the lease for the use of land. Since, it has not been done, the T.D.S. default under Chapter XVII-B of the Act has occurred. On facts and circumstances it is clear that all payments made by the assessee to the CIDCO are for using the land and rights related to use of land. There is no right of ownership/title in the plot of land as per the AO . This is conclusively proved by restrictive clauses putting encumbrance on the assessee as held by the AO. Thus as per the AO vide orders dated 28.11.2011 , the assessee is in default u/s 201(1) /201(1A) of the Act.

4. Aggrieved by the orders dated 28.11.2011 passed by the A.O. u/s 201(1) and 201(1A) of the Act, the assessee filed its first appeal before the learned CIT(A).

5. Before the learned CIT(A) the assessee submitted that the assessee along with his wife Mrs. Kavita Vikram Shah purchased a plot of land from CIDCO Ltd. vide an agreement to sell dated 24th November, 2009 for a total consideration of Rs. 1,05,45,789/-. The payment details are as under:-

Name of the joint owners	Relation	Amount (Rs)
Mr. Vikram Shah	Appellant	55,35,395
Mrs. Kavita Shah	wife	50,10,394

The agreement to sell dated 24-11-2009 was entered into with CIDCO and registered with the Sub-Registrar, Thane on 25th November, 2009 as per Index No. II. A copy of the agreement to sell is also enclosed which clearly shows that the total consideration of Rs. 1,05,45,789/- is lease premium for a

period of 60 years. It was submitted by the assessee that during the first 4 years , the assessee was given license and authority to enter upon the land for the purposes of construction of building for residential purposes and after completion of the construction within the time period, legal interest in the land would be granted to the assessee. Thus, it was submitted that agreement to lease is a temporary document executed for construction of the residential building. However, the assessee can enter into lease deed after the construction of residential building with an intention to create legal interest in the land. It was submitted that premium and rent have separate and distinct connotation in law as per section 105 of the Transfer of Property Act, 1882 whereby rent specified as money paid periodically or on specified occasion to the transferor of land , and premium on the other hand means a consideration of a price paid for transfer of a right to enjoy the property. Thus, it was submitted that there is a difference between the rent and premium. Further rent as defined in section 194-I of the Act envisages payment made under a lease only for use of the land without there being any corresponding acquisition or larger rights in the said leasehold plots. Thus, premium is paid prior to the creation of the landlord and tenant relationship that is before the commencement of the tenancy. Another fact is that it is a onetime non-recurring payment for transferring and purchasing the right granted by the lessor. Thus it was submitted that the premium paid to CIDCO amounting to Rs. 1,05,45,789/- is nothing but the total consideration paid for the plot of land which the assessee has purchased. The agreement to lease is only a temporary arrangement to enable the assessee to comply with the condition of completing the construction within the stipulated period and once the said condition is fulfilled , a lease deed for a period of 60 years with a yearly rent of Rs. 100/- will be executed. Thus, the agreement to lease is nothing but a sale consideration and TDS is not deductible as the payment made is for acquiring legal interest. Hence, it was submitted that assessee is not liable to deduct TDS. In support, the assessee relied on the decision of

Tribunal-Mumbai in the case of ITO (TDS) v. Navi Mumbai SEZ (P.) Ltd. [2014] 147 ITD 261 (Mum), decision of the Tribunal-Delhi in the case of ITO v. Indian Newspapers Society [2013] 37 taxmann.com 401 and decision of the Tribunal-Mumbai in the case of ITO (TDS) v. Wadhwa & Associates Realtors (P.) Ltd. [2014] 146 ITD 694(Mum.Trib.). The learned CIT(A) accepted the contentions of the assessee and held that it is undisputed fact that out of the entire payment of Rs. 1,05,80,528/- the assessee paid an amount of Rs. 55,36,395/- and balance was paid by his wife as per the agreement to lease dated 24th November, 2009 for acquiring ownership rights in plot of land for a period of 60 years together with yearly rent of Rs. 100/-. The learned CIT(A) observed that this issue has been decided in favour of the assessee by the Tribunal-Mumbai & Delhi and as such the assessee cannot be held as under default for levy of tax u/s 201/201(1A) of the Act, vide appellate order dated 17-02-2014 .

6. Aggrieved by the appellate orders dated 17-02-2014 of the learned CIT(A), the Revenue is in appeal before the Tribunal.

7. The ld. D.R. relied upon the orders of the AO.

8. The ld. Counsel for the assessee submitted that the assessee along with his wife has made payment of Rs.1,05,80,528/- to CIDCO for acquisition of the property. The sale consideration was paid for 60 years acquisition of the title in the property. This issue is squarely covered in favour of the assessee by the decision of the ITAT in the cases of ITO (TDS) v. Navi Mumbai SEZ (P.) Ltd. [2014] 147 ITD 261(Mum.Trib.), decision of the Tribunal- Delhi bench in the case of ITO v. Indian Newspapers Society [2013] 37 taxmann.com 401 and in the case of the Tribunal-Mumbai in the case of ITO (TDS) v. Wadhwa & Associates Realtors (P.) Ltd. [2014] 146 ITD 694(Mum.Trib.).

9. We have considered the rival contentions and also perused the material available on record including the relied upon case laws. We have observed that the assessee along with his wife Mrs. Kavita Vikram Shah purchased a plot of residential land whereby lease deed for a period of 60 years will be executed in favour of the assessee and his wife for which lease premium has been paid for a sum of Rs. 1,05,80,528/- to CIDCO. Initially, the assessee entered into an agreement to sell dated 24th November, 2009 and the agreement to lease which was registered on 25th November, 2009. After completion of construction of residential building within four years, the lease deed will be executed in favour of the assessee and his wife whereby ownership title/rights shall be granted in favour of the assessee. It is observed that the lease deed will be entered into by the assessee for a period of 60 years for which the payment has been made. We have observed that similar issue came before the co-ordinate benches of this Tribunal as cited by the Id. Counsel for the assessee herein above, and this issue has been decided in favour of the assessee. The decision of the Mumbai Tribunal in the case of ITO v. Navi Mumbai SEZ Private Limited (2014) 147 ITD 261(Mum.Trib.) is reproduced hereunder:

“17. We have carefully considered the submissions of the Id. Representatives of the parties, orders of the authorities below and the cases relied upon (supra). We have also carefully considered the provisions of section 194-I which deal with the provisions for deduction of income Tax at source from income by way of rent. The Explanation (i) to section 194-I of the Act defines the expression "rent". It is worthwhile and relevant to state section 194-I which is a subject matter of dispute. It reads as under :

'194-I Rent.— Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident 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, [deduct income-tax thereon at the rate of—

(a) two per cent for the use of any machinery or plant or equipment; and

(b) ten per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings:

Provided that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed one hundred and eighty thousand rupees :

Provided further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section.

Explanation.—For the purposes of this section,—

(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,—

(a) land; or

- (b) building (including factory building); or*
- (c) land appurtenant to a building (including factory building); or*
- (d) machinery; or*
- (e) plant; or*
- (f) equipment; or*
- (g) furniture; or*
- (h) fittings,*

whether or not any or all of the above are owned by the payee;

- (ii) where any income is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."*

18. *On perusal of the explanation, we agree with the ld. DR that the word "rent" as defined u/s 194-I has a wide meaning than the rent in common parlance.*

19. *In the case before us, the assessee has entered in to lease agreements with CIDCO for acquisition of leasehold rights in the land to develop and operate the Special Economic Zone at Navi Mumbai. Assessee has paid premium for demised lease land. The question before us is as to whether the said lease premium paid by the assessee to CIDCO to acquire leasehold rights for 60 years under the lease deed(s) is liable for deduction of tax at source being rent within the meaning of section 194-I of the Act or not. AO has stated that the said payment made by assessee under lease agreements qualifies for rent for the purpose of section 194-I of the Act as it partakes all the characteristics of*

rent and whereas the assessee has contended that the assessee has obtained leasehold rights in the said leasehold lands on payment of lease premium and the said lease premium is not paid under a lease. Hence, it is a capital expenditure and not an advance rent. We observe that the main thrust of the AO to hold the premium paid by assessee to hold it as rent is on the definition of rent under section 194-I of the Act that it creates a legal fiction and the lease deed(s) entered into contain various restrictive covenants. That the said payments in substance are for consideration for use of land under the lease deed(s), hence provisions of section 194-I of the Act is attracted.

20. *On the other hand, we observe that Government of Maharashtra appointed CIDCO as the nodal agency for setting up of Special Economic Zone at Navi Mumbai "NMSEZ". That the assessee has been jointly promoted as a Special Purpose Vehicle (SPV) by CIDCO and Dronagiri Infrastructure Pvt Limited (DIPL) to develop and operate the Special Economic Zone at Navi Mumbai. Pursuant thereto assessee and CIDCO entered into Development Agreement and the assessee is required to make payment of lease premium in respect of the land which was being acquired by CIDCO and being allotted to assessee from time to time. As per Development Agreement, the assessee is to develop and market "NMSEZ". There is no dispute to the fact that the assessee has acquired leasehold right in the land for the purpose of developing, designing, planning, financing, marketing, developing necessary infrastructure, providing necessary services, operating and maintaining infrastructure administrating and managing "SEZ". By virtue of said lease deed(s), the assessee has acquired the rights to determine, levy, collect, retain, utilize user charges fee for provision of services and /or tariffs in accordance with terms and conditions provided in the Development Agreement and the lease deed (s) entered into. Therefore, we agree with ld. CIT(A) that lease deed(s) and the Development Agreement have assigned to the assessee leasehold right which includes bundle of rights. The Assessee has paid the premium for lease deed(s) for the demised land to*

acquire entire rights of the land for a period of 60 years. Therefore, we are of the considered view that the said payment of lease premium is a payment for acquisition of leasehold land and not merely for use of land. The assessee has made payment for entering into lease agreements to acquire lease hold rights in the land for a period of 60 years and not under a lease. Similar issue came up before the Special Bench ITAT Mumbai in the case of Mukund Ltd. (supra). The assessee acquired a land on lease for a period of 99 years from the Maharashtra Industrial Development Corporation (MIDC) and paid Rs.2.04 crores as premium of leasehold land and apart from fixing annual rent at Rs.1 per annum. The assessee claimed that the said premium on leasehold land is a revenue expenditure, which was disallowed by the AO holding it as a capital in nature. Ld. CIT(A) held that the premium cannot be treated as capital expenditure as the assessee did not acquire ownership of land. It was held that it was an expenditure relatable to 99 years and should be allowed on proportionate basis. However, on further appeal to the Tribunal, the Tribunal held that the benefit conferred on the assessee on lease hold rights in 99 years against lump sum payment of the premium was of an enduring nature. It was held that there was no material on record to suggest that the sum of Rs.2.04 crores had been paid by way of advance rent nor there was any provision for its adjustment towards rent or for its re-payment to the assessee. It was held that the consideration paid by the assessee was capital expenditure and accordingly the issue was decided against the assessee.

21. *In the case before us also the assessee has paid lease premium to acquire the demised leasehold land and there is no material on record that the said lease premium paid by the assessee is refundable to the assessee and/or is in the nature of advance rent or merely for use of land. We observe that the term "rent" though has been defined in section 194-I of the Act, but other terms like, lease, lease premium, lessor and lessee etc have not been defined under the Income Tax Act. The ld. CIT(A) has rightly stated in the impugned order that the*

meaning of these terms as provided in the Transfer of Property Act, 1882 have to be considered. The term lease is defined under section 105 of Transfer of Property Act, 1882 as "A lease of immoveable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who , accepts the transfer on such terms.

In the case of lease price is called the premium, and the money, share, service or any other thing to be rendered is called the rent; the transferor is called lessor and the transferee is called lessee.

21.1 *Therefore, the above section brings out the distinction between price paid for a transfer of right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the Lessor is parted with for a price, the price paid is called lease premium or salami. But the periodical payments made for the continuous enjoyment of the benefit under the lease are in the nature of rent. The Hon'ble Apex Court has held in the case of A.R. Krishnamurthy (supra) that lease of land is transferred of interest in the land and creates a right in rem : and there is a transfer of title in favour of the lessee though the lessor has the right of reversion after the period of lease terminates. It was held that grant of mining lease at a premium is a capital asset. The Hon'ble Delhi High Court also brought out the difference between the amount payable for acquiring lease hold rights as premium and the amount which would be payable for use of assets as rent in Bharat Steel Tubes Ltd. v. CIT [2001] 252 ITR 622/119 Taxman 6 (Delhi). Their Lordships have held that when the premium is paid at the beginning of the mining lease for a long period, ordinarily represents the purchase of an out and out sale of the property and the sum received is capital and not income, but rent or royalty paid periodically is income. It was held that the principle is the same, whether*

the premium is for a simple lease of land or for a lease of mineral rights. Therefore, when the interest of the lessee is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. That the former is capital and the later is revenue in nature. Their Lordships of the Hon'ble Delhi High Court stated that rent is allowable as deduction u/s 30 of the Act. It is stated that section 105 of the Transfer of Property Act, 1882 also make a distinction between the rent and premium payable under lease. When the interest of the lessor is charged with for a price, the price paid is premium or salami but the periodical payment made for the continuous enjoyment of the benefits under lease are in the nature of rent. Their Lordships held that formal is capital and later is revenue in nature. A similar issue also came up before the Hon'ble Jurisdictional High Court in the case of CIT v. Khimline Pumps Ltd. [2002] 258 ITR 459/125 Taxman 104 (Bom.). In the said case open plot of land was leased out to APVE Ltd, a company for a period of 95 years on payment of a premium of Rs.1,62,400/- and yearly rent of Rs.1. In the lease, the company had, at the end of 95 years to deliver a vacant possession of the land. The company was entitled to remove any building, erections or structures put up by it on the land. The company had erected building, plant and machinery thereon. APVE Ltd. were to be wound up and its assets were sold under direction of Hon'ble High Court. The assessee company offered Rs. 75 lakhs of which the AO held that Rs.45 lakhs related to acquisition of lease hold land. But that amount could not be deducted as it was capital expenditure. The Tribunal held it was capital expenditure, but without giving reasons, held that since benefit of the expenditure would be existed in 71 years, a proportionate amount relatable to each year viz Rs.63,380/- might be allowed as deduction on account of payment of rent. On appeal to the Hon'ble High Court the Hon'ble Jurisdictional High Court agreed with the AO that Rs.45 lakhs was a capital expenditure. Therefore the Tribunal could not direct the department to apportion the amount over a period of 71 years. Their Lordships held that in order to

ascertain true character and purport of the payment the court has to go by the substance of transaction and not by manner in which the assessee allocates the items for accounting purposes.

21.2 *We observe that in the case before us, there is a transfer of substantive interest of lessor for the leasehold land in favour of the assessee. That there is a conferment of right on the lessee by acquiring leasehold land and the premium has been paid in lieu thereof and not for the purpose of use of land. The case cited by the ld. CIT(A) of Raja Bahadur Kamakshya Narain Singh of Ramgarh v. CIT [1943] 11 ITR 513 (PC) and the case of the Hon'ble Apex Court in the case of CIT v. Panbari Tea Co. Ltd. [1965] 57 ITR 422 (SC) squarely apply to the facts of the case before us that the lease premium paid by the assessee to CIDCO for acquiring leasehold land is capital expenditure to acquire capital asset and not for the use of land. Therefore, we agree with ld. AR that the lease premium paid by the assessee for acquiring leasehold land with a right to develop and market, NMSEZ, cannot be said to be an advance payment of rent. Accordingly, premium paid by the assessee for acquiring leasehold land under the lease deed(s) entered into, although with restrictive covenants is a capital expenditure, and it does not fall within the ambit of rent under section 194-I of the Act.*

21.3 *We observe that similar issue has also been considered recently by the Mumbai Bench of Tribunal vide order dated 3.7.2013 (supra) in the case of Wadhwa and Associates Realtors (P.) Ltd. (supra) and the Tribunal vide para 5 of the said order has held that the ld. CIT(A) is justified to hold that the whole transaction towards grant of leasehold transaction right to the assessee is nothing but a transaction of transfer of property and the lease premium is the consideration for the purchase of said leasehold rights. It is relevant to state that the Tribunal in the above order has also considered the decision of the Hon'ble Calcutta High Court, and the decision of Karnataka High Court (supra)*

on which the AO has placed reliance . We consider it prudent to state para 5 of the said order of the Tribunal which reads as under :

'5. After considering the facts and the submissions and the nature of transaction, the Ld. CIT(A) observed that the amount charged by MMRD as lease premium is equal to the rate prevalent as per Stamp Duty recovery for acquisition of the commercial premises. These rates are prescribed for transfer of property and not for the use as let out tenanted property. The Ld. CIT(A) further observed that even the additional FSI given for additional charges as per Ready Reckoner rates only. It is the finding of the Ld. CIT(A) that the whole transaction towards grant of leasehold transaction rights to the assessee is nothing but a transaction of transfer of property and the lease premium is the consideration for the purchase of the said leasehold rights. The ld. CIT(A) went on to discuss the judicial decisions relied upon by the AO of Hon'ble Calcutta and Karnataka High Court and observed that both the decisions pertain to the same issue i.e. whether lease premium was a revenue or a capital expenditure. The ld. CIT(A) also discussed the decision in the case of Raja Bahadur Kamakshya Narain Singh of Ramgarh v. Commissioner of Income-tax [11 ITR 513 PC](#) wherein it has been held that the payment which under the lease is exigible by the lesser may be classed under 3 categories (1) Premium or salary (2) the minimum royalty and (3) the royalty per ton . The salami have been rightly treated as capital receipt. It is a single payment made for the acquisition of the right of the lessees to enjoy the benefits granted both by the lease. The Ld. CIT(A) has also considered the decision of the Hon'ble Supreme Court in the case of Sindhurani Chaudhurani (supra) wherein it has been held that Salami is in the form of a lump sum non recurring payment made by a prospective tenant to the landlord as a consideration and is paid anterior to the constitution of relationship of landlord and tenant, it is not "rent" within the meaning of the word used in the definition of "agricultural income" in section 2(1)(a) of the I.T.

Act. It has all the characteristics of a capital payment and it is not revenue. The Ld. CIT(A) further discussed certain other judicial decisions and in particular the decision of the Hon'ble Jurisdictional High Court in the case of CIT v. Khimline Pumps Ltd., 258 ITR 459 wherein the Hon'ble Jurisdictional High Court has held that an amount of Rs. 45 lakhs paid by the assessee to M/s. APVE Ltd., for acquisition of leasehold land was a capital expenditure and hence the same was not deductible. The Ld. CIT(A) has further considered the decision of the Special Bench of Mumbai Tribunal in the case of JCIT v. Mukund Ltd. 106 ITD 231 wherein the issue was whether the premium paid for acquiring leasehold right in land is revenue or capital. The Special Bench has held that the same is capital expenditure.

5.2 The Ld. CIT(A) has distinguished the facts of the cases relied upon by the AO at page-53 para 5.39 of his order and after distinguishing the cases came to the conclusion that in none of these cases, the issue of 'lease premium as in the case of the assessee vis-à-vis 'rent' has been considered. At para 5.41 of his order at page-54, the Ld. CIT(A) says that "I have also considered the other cases relied upon the AO. These cases lay down general principles of interpretation of Law. I find that none of the above cases the court has held that the lease premium in similar circumstances is in the nature of advance rent and hence liable for deduction of TDS u/s. 194-I of the Act. The cases relied upon by the AO are thus distinguishable on facts and in law and the same cannot be made applicable to the facts of the present case where the issue raised is completely different."

5.3 The Ld. CIT(A) finally considered the decision of the Tribunal in the case of M/s. National Stock Exchange of India Ltd. in ITA Nos. 1955/M/99, 2181/M/99, 4853/M/04, 4485/M/04, 4854/M/04, 356/M/01 and 5850/M/00. At para 5.45 of his order on page 57, the Ld. CIT(A) has given a comparative chart of the facts in the case of the assessee and that in the case of NSE and after comparing the facts finally concluded that the facts of

the case of the NSE are identical to the facts of the case of the assessee and observed that in the case of NSE, the stand of the department as well as the decision of the Tribunal was that the consideration paid for acquiring leasehold rights in land is a capital expenditure and not 'rent'.

5.4. The Ld. CIT(A) finally concluded that the amount paid by the assessee is lease premium for acquiring leasehold rights and additional FSI in respect of the leased plot and the same is not in the nature of rent as contemplated u/s. 194-1 of the Act. Accordingly, the assessee was not required to deduct tax at source u/s. 194-1 of the Act and deleted the demand raised by the assessee.'

21.4 *Similar issue has come up before the Delhi Bench of the Tribunal in the case of The Indian News Papers Society (supra) and the Tribunal has held that the lease premium paid by the assessee to MMRDA does not fall under section 194-I of the Act and therefore the provisions of section 201(1) of the Act does not apply because the said lease premium was capital expenditure to acquire land on lease with substantial right to construct and cover the building complex.*

22. *During the course of hearing ld. DR submitted that the above decisions of ITAT, Delhi Bench and ITAT Mumbai Bench (supra) are distinguishable. Whereas the decision of ITAT, Chennai Bench in the case of Foxconn India Developers (P.) Ltd (supra) should be considered and be followed . We observe that the said decision of ITAT has been considered by the ld. CIT(A) in para 5.40 of the impugned order. On perusal of the said order of ITAT, Chennai Bench, we observe that in the said order of Chennai Bench only the provisions of section 194-I has been considered in respect of upfront charges paid in respect of lease of land for a period of 99 years. On perusal of the facts of the case, it is observed that the assessee had already entered into lease agreements and the said payment was made to SIPCOT Ltd under lease agreement. Therefore, the said payment is for lease or use of land and*

accordingly the payment could not be said to have been made for acquiring leasehold land and hence, it is observed that the Chennai Bench has held that the payment by the assessee company to CIDCO is rent u/s 194-I of the Act. Therefore, we are of the considered view that the above decision of ITAT Chennai Bench (supra) relied upon by ld. DR is not applicable to the case before us. On the other hand, the Special Bench Decision of ITAT, Mumbai in the case of Mukund Ltd. (supra) squarely apply wherein it has been held that the premium paid for acquiring lease hold right in land is a capital expenditure. The Special Bench decided the issue after considering the various judgments of the Hon'ble Jurisdictional High Court, Hon'ble Apex Court, various decisions of the Tribunal as discussed hereinabove which have distinguished between the lease premium and rent under the Income Tax Act. The Hon'ble Apex Court has held in the case of Enterprising Enterprises v. Dy. CIT [2007] 293 ITR 437/160 Taxman 188 that the assessee which had taken a quarry on lease, the lease rent paid was capital expenditure and the Hon'ble High Court also affirmed the decision of the Tribunal. The Hon'ble Apex Court while confirming the decision of the Hon'ble High Court held that premium for lease or any lumpsum payment for obtaining a lease for a long period is a payment for enduring advantage, so that it is a capital expenditure which is not deductible . The Hon'ble Apex Court also confirmed the decision of Hon'ble Madras High Court that even the alternate claim for proportionate deduction of the amount, paid during the period of lease is not admissible. Therefore, considering the reasons as mentioned hereinabove and the decisions of ITAT, Mumbai Bench (supra) wherein it has been held that single payment made for acquisition of right of lease to enjoy leasehold rights in the land granted to the assessee is a capital expenditure. Similarly, ITAT Delhi Bench (supra) has held that the lease premium paid by assessee to CIDCO is not in the nature of rent as contemplated u/s 194-I of the Act. Hence, we agree with ld. CIT(A) that the provisions of section 194-I of the Act to deduct TDS on the lease premium paid by the assessee is not attracted. In view of above, we uphold the order (s) of ld.

CIT(A) to delete the demand raised by the AO u/s 201(1) and 201(1A) of the Act by rejecting the grounds of appeal taken by the department. Hence, the grounds of appeal taken by the department are rejected in all the appeals for the assessment years under consideration.

23. *In the result, appeals of the department for assessment years 2006-07 to 2009-10 are dismissed.”*

Respectfully following the said decisions of the co-ordinate benches of this Tribunal, in our opinion, the assessee cannot be held as an assessee in default u/s 201/201(1A) of the Act. We donot find any infirmity in the orders of the learned CIT(A) which we confirm. The grounds of appeal 1(i) to (v) raised by the Revenue are hereby dismissed. We order accordingly.

10. In the result, the appeal filed by the Revenue in ITA NO. 3123/Mum/2014 for the assessment year 2010-11 is dismissed.

Order pronounced in the open court on 16th June , 2016.

आदेश की घोषणा खुले न्यायालय में दिनांक: 16-06-2016 को की गई ।

Sd/-
(C.N.PRASAD)
JUDICIAL MEMBER

sd/-
(RAMIT KOCHAR)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated 16-06-2016v

व.नि.स./ R.K., Ex. Sr. PS

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)- concerned, Mumbai
4. आयकर आयुक्त / CIT- Concerned, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai "F" Bench
6. गार्ड फाईल / Guard file.

सत्यापित प्रति //True Copy//

आदेशानुसार/ BY ORDER,

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai