

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 28TH DAY OF SEPTEMBER, 2021

PRESENT

THE HON'BLE MRS.JUSTICE S.SUJATHA

AND

THE HON'BLE MR. JUSTICE RAVI V. HOSMANI

**I.T.A.No.673/2016 C/W I.T.A.No.671/2016 &
I.T.A.No.672/2016**

IN I.T.A.No.673/2016:

BETWEEN :

BANGALORE METRO RAIL
CORPORATION LIMITED,
3RD FLOOR, BMTC COMPLEX,
K.H.ROAD, SHANTI NAGAR,
BENGALURU-560027

...APPELLANT

(BY SRI A.SHANKAR, SENIOR COUNSEL A/W
SRI BHAIKAV KUTTAIAH, ADV.)

AND :

DEPUTY COMMISSIONER OF
INCOME TAX, CIRCLE-16(1)
4TH FLOOR, HMT BHAVAN,
BENGALURU-560032

...RESPONDENT

(BY SRI K.V.ARAVIND, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 05.08.2016 PASSED IN ITA NO.874/BANG/2015, FOR THE ASSESSMENT YEAR 2013-2014 PRAYING TO A) TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED ABOVE AND ANSWER THE SAME IN FAVOUR OF THE

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APPELLANT. B) TO ALLOW THE APPEAL AND SET ASIDE THE FINDINGS TO THE EXTENT AGAINST THE APPELLANT IN THE ORDER PASSED BY THE ITAT, BENGALURU 'B' BENCH IN ITA NO.874/BANG/2015 RELATING TO ASSESSMENT YEAR 2013-2014 VIDE ITS ORDER DATED 05.08.2016.

IN I.T.A.No.671/2016:

BETWEEN :

BANGALORE METRO RAIL
CORPORATION LIMITED,
3RD FLOOR, BMTC COMPLEX,
K.H.ROAD, SHANTI NAGAR,
BENGALURU-560027

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...RESPONDENT

(BY SRI K.V.ARAVIND, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 05.08.2016 PASSED IN ITA NO.872/BANG/2015, FOR THE ASSESSMENT YEAR 2011-2012. PRAYING TO A) TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED ABOVE AND ANSWER THE SAME IN FAVOUR OF THE APPELLANT. B) TO ALLOW THE APPEAL AND SET ASIDE THE FINDINGS TO THE EXTENT AGAINST THE APPELLANT IN THE ORDER PASSED BY THE ITAT, BENGALURU 'B' BENCH IN ITA NO.872/BANG/2015 RELATING TO ASSESSMENT YEAR 2011-2012 VIDE ITS ORDER DATED 05.08.2016.

IN I.T.A.No.672/2016:

BETWEEN :

BANGALORE METRO RAIL
CORPORATION LIMITED,
3RD FLOOR, BMTC COMPLEX,
K.H.ROAD, SHANTI NAGAR,
BENGALURU-560027

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(BY SRI K.V.ARAVIND, ADV.)

THIS INCOME TAX APPEAL IS FILED UNDER SECTION 260-A OF INCOME TAX ACT 1961, ARISING OUT OF ORDER DATED 05.08.2016 PASSED IN ITA NO.873/BANG/2015, FOR THE ASSESSMENT YEAR 2012-2013 PRAYING TO A) TO FORMULATE THE SUBSTANTIAL QUESTIONS OF LAW AS STATED ABOVE AND ANSWER THE SAME IN FAVOUR OF THE APPELLANT. B) TO ALLOW THE APPEAL AND SET ASIDE THE FINDINGS TO THE EXTENT AGAINST THE APPELLANT IN THE ORDER PASSED BY THE ITAT, BENGALURU 'B' BENCH IN ITA NO.873/BANG/2015 RELATING TO ASSESSMENT YEAR 2012-2013 VIDE ITS ORDER DATED 05.08.2016.

THESE APPEALS HAVING BEEN HEARD AND RESERVED, COMING ON FOR PRONOUNCEMENT OF JUDGMENT, THIS DAY, **S. SUJATHA, J.**, DELIVERED THE FOLLOWING:

J U D G M E N T

Since common and akin issues are involved in these appeals, they are heard together and disposed of by this common judgment.

2. ITA Nos.671/2016, 672/2016 and 673/2016 are filed by the assessee under Section 260A of the Income Tax Act, 1961 ('Act' for short) challenging the common order dated 05.08.2016 of the Income Tax Appellate Tribunal, Bangalore Bench "B", Bangalore ('Tribunal' for short) in ITA Nos.872/Bang/2015, 873/Bang/2015, 874/Bang/2015 relating to the assessment years 2011-12, 2012-13 and 2013-14 respectively.

3. The appeals were admitted by this Court to consider the following substantial questions of law:-

"1. Whether the Tribunal erred in law in not holding that since the levy of service charges is still under dispute between BMRCL and KIADB, an order requiring remittance of Tax-

Deduction at source on such service charges is not in accordance with law on the facts and circumstances of the case?

2. *Whether the Tribunal erred in law in not holding that the service charges fail the test of real income and consequently the order for Tax Deduction at Source is unsustainable in law on the facts and circumstances of the case?*

3. *Whether the Tribunal erred in law in not holding that the provisions of section 194J are not applicable to the facts and consequently there is no need to deduct any tax at source on the facts and circumstances of the case?*

4. *Without prejudice whether the Tribunal erred in law in not holding M/s KIADB being an entity registered under Section 12A of the Act, no Tax Deduction at Source would be required to be made and consequently the appellant BMRCL cannot be held to have defaulted for non-deduction of Tax Deduction at Source on the facts and circumstances of the case?*

5. *Whether the Tribunal erred in law in not deleting the interest under section 201(1A) on the facts and circumstances of the case?"*

4. The appellant - assessee is a Special Purpose Vehicle entrusted with the task of implementation of Bangalore Metro Rail Project, a joint venture of Government of India and Government of Karnataka. For the purpose of construction of piers/portals via duct across the precincts of Bengaluru region, the assessee approached the Karnataka Industrial Area Development Board ('KIADB' for short) for acquisition of land in a smooth manner and entered into an agreement with M/s KIADB on 20.6.2005. The appellant paid a sum of Rs.1,225 Crores to KIADB during 2005-06 to 2012-13 which the appellant - assessee claims to be the payments made towards acquisition of the land.

5. The Assessing Officer initiated proceedings under Section 201 of the Act for the assessment years under consideration on the ground that the appellant ought to have deducted tax at source on payments made to KIADB and passed separate orders holding that

the appellant, as an assessee in default under Section 201(1), levied interest under Section 201(1A) of the Act negating the submissions made by the assessee. Being aggrieved, the assessee preferred the statutory appeals before the Commissioner of Income Tax (Appeals) [(CIT(A)) for short]. The CIT(A) passed the common order holding that the Assessing Officer was justified in passing the order under Section 201(1) and levying interest under Section 201(1A) of the Act, against which the assessee preferred appeals in ITA Nos.872/Bang/2015, 873/Bang/2015, 874/Bang/2015 before the Tribunal, which came to be dismissed. Being aggrieved, the assessee has preferred these appeals.

6. Learned Senior counsel Sri. A. Shankar for the appellant - assessee submitted that the impugned service charges do not constitute income in the hands of recipient - KIADB and hence the question of TDS requirement does not arise. The rate of service charges

has not reached finality and the matter is still pending before the High Power committee of Karnataka Government. As such, TDS on compensation amount paid to KIADB for disbursement was not warranted. The service charges shall constitute as income of the KIADB only upon determination by the appropriate authority i.e., the State Government. The Tribunal failed to appreciate these material aspects. Learned Senior counsel further submitted that the assessee as well as the KIADB are substantially controlled by the Government of Karnataka and the recipient - KIADB is not even liable to pay tax on this amount. No part of Rs.1,225 Crores has been claimed by the assessee as expenses and the recipient - KIADB also not offered any income in this regard. The sum and substance of the arguments is that the impugned service charges cannot constitute income accruing or arising in the hands of KIADB for taxation.

7. Inviting the attention of the Court to the provisions of Section 194J of the Act, it was argued that the phrase “income tax on income comprised therein” has been interpreted by this Court in the case of **Commissioner of Income Tax vs. Kaiyani Steels Ltd.**, reported in **(2018) 91 taxmann.com 359 (Karnataka)**, wherein it has been held that the primary factor to attract Section 194J is the ingredient of “income comprised therein”. The assessee cannot be treated as the assessee in default for not deducting tax under Section 194J of the Act. In the present case, the KIADB has not recognized any income out of Rs.1,225 Crores paid by the assessee, the entire amount is shown as deposit receipt as shown in the balance sheet. Hence, no deduction of TDS was necessary and there is no income comprised in the payments made. As per the agreement entered with the KIADB, 21% was the service charges which was reduced to 4% for Phase I and subsequently, it was reduced to 1% for Phase II.

Though Government of Karnataka issued the Government Order dated 21.06.2012 fixing the service charges for acquisition of land for the Bangalore Metro Rail project by KIADB at 4%, Agenda No.5 of the proceedings of the 27th High Power committee held on 10.12.2013 would indicate that BMRCL has informed that 4% service charges charged by KIADB is on the higher side. High power Committee after deliberations decided that KIADB should not charge 4% on compensation paid. The Chief Secretary has stated that the Finance Department should work out the modalities for meeting the administrative expenses which KIADB requires in acquiring the lands for BMRCL.

8. Thus, it was submitted that no final decision has been taken by the Government of Karnataka regarding payment of service charges to KIADB by the appellant for the Phase – I. On the other hand, it has been decided at 1% for the Phase - II. Drawing the

attention of the Court to the order of the Assessing Officer inasmuch as Note No.29 to accounts for the year ending 31.03.2013 mentioned by the auditors, extracted in the said order, it was pointed out that the total cost of land and properties acquired through KIADB for right of way for Bangalore Metro Rail project is subject to quantum of service charges payable to KIADB. The balances are under reconciliation with KIADB. Thus, it was argued that the Assessing Officer has failed to appreciate this portion of the note “subject to quantum of service charges payable to KIADB” and has arrived at a finding that the payment made to KIADB is inclusive of service charges payable to KIADB. Learned Senior counsel appearing for the appellant – assessee has placed reliance on host of judgments.

9. Learned counsel Sri. K.V. Aravind for the revenue argued that as per the agreement entered into between the appellant - assessee and KIADB, the

service charges at 10% over the tentative costs was liable to be paid by the assessee. Subsequently, the said service charges was modified to 7.5% and thereafter Government of Karnataka has issued the Government Order dated 21.06.2012 fixing the service charges at 4%. As could be seen, Note No.29 to accounts for the year ending 31.03.2013 extracted by the Assessing Officer would disclose that the amount of Rs.11,26,09,86,779/- is inclusive of service charges payable to KIADB. It was submitted that the nature of assessment in the hands of payee is irrelevant. Application and registration under Section 12A of the Act is subject to complying with Sections 11 and 12. The assessee cannot take the contention that the amounts paid to KIADB is not an income in the hands of the KIADB. Section 194J does not impose an obligation on the assessee to ascertain whether the deductee is liable to tax or not. It was submitted that

KIADB was subjected to assessment. The service charges collected by KIADB are offered to tax.

10. Learned counsel for the revenue has relied upon catena of judgments in support of his contentions.

11. We have carefully considered the rival submissions of the learned counsel appearing for the parties and perused the material on record.

12. Section 194J of the Act reads thus:

“194J. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any sum by way of –

(a) fees for professional services, or

(b) fees for technical services, or

[(ba) any remuneration or fees or commission by whatever name called, other than those on which tax is deductible under section 192, to a director of a company, or

[(c) xxxx

(d) xxxx

shall, at the time of credit of such sum to the account of the payee or at the time of payment thereof in cash or by issue of cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to two per cent of such sum in case of fees for technical services (not being a professional services), or royalty where such royalty is in the nature of consideration for sale, distribution or exhibition of cinematographic films and ten per cent of such sum in other cases, as income-tax on income comprised therein.”

13. In the case of **Commissioner of Income-tax vs. Hindustan Housing and Land Development Trust Ltd.**, reported in **(1986) 27 Taxman 450A (SC)**, the Hon’ble Apex Court while considering whether the extra amount of compensation was income arising or accruing to the assessee, has held that there is a clear distinction between the cases, where the right to receive payment is in dispute and it is not a question of merely quantifying the amount to be received and cases where the right to receive payment is admitted and the quantification only of the amount payable is left to be

determined in accordance with settled or accepted principles.

14. In **Commissioner of Income-tax, Bangalore vs. L. Sambashiva Reddy**, reported in **(2015) 62 taxmann.com 174 (Karnataka)**, the Co-ordinate Bench of this Court in the context of the interim award received whether is liable to tax during the assessment year of receiving the said interim award or when the final award is passed, held that when an assessee receives money, either under an award or by a decree of the court, or under an award passed by the arbitrator, if the amount paid to him is not in dispute, then that amount represents his income. He should offer it to tax in the previous year of the date of payment of the said amount. But if the amount due to him is in dispute and it is subject-matter of a litigation and during the pendency of the litigation, if any interim order is made for payment of the said amount, the said

payment is subject to the final result of the said proceedings. As the matter was pending before the Hon'ble Andhra Pradesh High Court and in pursuant to the directions of the Hon'ble Andhra Pradesh High Court, the interim award was made, it was held that the assessee is liable to pay the tax only after the final conclusion of the dispute before the Hon'ble Andhra Pradesh High Court.

15. In **Kalyani Steels Ltd.**, supra, (where one of us, Hon'ble SSJ was a member), it has been held thus:

“11. This provision (194J) makes it clear that deduction at source shall be on such income not otherwise. The primary factor to attract Section 194J is the ingredient of “income comprised therein”. If no income is reflected in the balance sheet and P & L account of HSL towards the reimbursement charges paid on cost to cost basis by KSL and ML, it ceases to have the character of income. As such, the assessee cannot be treated as the assessee in default in not deducting tax at source under Section 194J of the Act. The arguments of the revenue that the fees paid by the

assessee is towards technical services is imaginary one not established with substantial material.

12. xxxx

13. It is trite that, if there is no income embedded in a payment, then TDS provisions would not apply as TDS is only an alternative method of collection of taxes. It is beneficial to refer to the judgment of this Court in the case of *Hyderabad Industries Ltd., vs. ITO* [1991] 59 Taxmann 202/138 ITR 749 (Kar.), wherein it is held that, “an amount which will not be included in the total income of a person cannot be considered as “income” for the purpose of deduction of tax at source at all. The purpose of deduction of tax at source is not to collect a sum which is not a tax levied under the Act, it is to facilitate the collection of tax lawfully leviable under the Act.” In view of the factual finding of the appellate authorities that the payment made by KSL and ML to HSL for various expenses incurred would be a reimbursement and not a fee for technical services, Section 194J of the Act is not attracted.”

16. The judgment in **Karnataka Power Transmission Corporation Ltd., vs. Deputy**

Commissioner of Income-tax reported in **(2016) 67 taxmann.com 259** deals with Section 194A of the Act.

The relevant portion is quoted hereunder:

“26. Section 194A of the Act mandates the tax deductor to deduct ‘income tax’ on ‘any income by way of interest other than income by way of interest on securities’. The phrase ‘any income’ and ‘income tax thereon’ if read harmoniously, it would indicate that the interest which finally partakes the character of income, alone is liable for deduction of the income tax on that income by way of interest. If the said interest is not finally considered to be an income of the deductee, as per reversal entries of the provision, Section 194A(1) of the Act would not be made applicable. In other words, if no income is attributable to the payee, there is no liability to deduct tax at source in the hands of the tax deductor.”

17. In the case of **Commissioner of Income Tax vs. Eli Lilly & Co. [India] [P.] Ltd.**, reported in **(2009) 178 Taxman 505 (SC)**, the Hon'ble Apex Court

considering the scope of Section 201[1] and Section 201[1A] has held thus:

“34. A perusal of Section 201(1) and Section 201(1A) shows that both these provisions are without prejudice to each other. It means that the provisions of both the sub-sections are to be considered independently without affecting the rights mentioned in either of the sub-sections. Further, interest under Section 201(1A) is compensatory measure for withholding the tax which ought to have gone to the exchequer. The levy of interest is mandatory and the absence of liability for tax will not dilute the default. The liability of deducting tax at source is in the nature of a vicarious liability, which pre-supposes existence of primary liability. The said liability is a vicarious liability and the principal liability is of the person who is taxable. A bare reading of Section 201(1) shows that interest under Section 201(1A) read with Section 201(1) can only be levied when a person is declared as an assessee-in-default. For computation of interest under Section 201(1A), there are three elements. One is the quantum on which interest has to be levied. Second is the rate at which interest has to be charged. Third is the period for which interest has

to be charged. The rate of interest is provided in the 1961 Act. The quantum on which interest has to be paid is indicated by Section 201 (1A) itself. Sub-section (1A) specifies "on the amount of such tax" which is mentioned in sub-section (1) wherein, it is the amount of tax in respect of which the assessee has been declared in default. The object underlying Section 201(1) is to recover the tax. In the case of short deduction, the object is to recover the shortfall. As far as the period of default is concerned, the period starts from the date of deductibility till the date of actual payment of tax. Therefore, the levy of interest has to be restricted for the above stated period only. It may be clarified that the date of payment by the concerned employee can be treated as the date of actual payment."

18. In the case of **GE India Technology Centre [P.] Ltd., vs. Commissioner of Income-Tax and another** reported in **(2010) 193 Taxman 234 (SC)**, the Hon'ble Apex Court based on the decision of **Transmission Corporation of A.P. Ltd., vs. CIT** reported in **(1999) 105 Taxman 742 (SC)** has held thus:

“9. Therefore, as stated earlier, if the contention of the Department was accepted it would mean obliteration of the expression "sum chargeable under the provisions of the Act" from Section 195(1). While interpreting a Section one has to give weightage to every word used in that section. While interpreting the provisions of the Income Tax Act one cannot read the charging Sections of that Act de hors the machinery Sections. The Act is to be read as an integrated Code. Section 195 appears in Chapter XVII which deals with collection and recovery. As held in the case of *C.I.T. Vs. Eli Lilly & Co. (India) (P.) Ltd.* [312 ITR 225] the provisions for deduction of TAS which is in Chapter XVII dealing with collection of taxes and the charging provisions of the I.T. Act form one single integral, inseparable Code and, therefore, the provisions relating to TDS applies only to those sums which are "chargeable to tax" under the Income-tax Act.”

19. The words “such sum” and “income tax on income comprised therein” also finds a place in Section 194C[1]. Adverting to the said provision and referring to ***Brij Bhushan Parduman Kumar V/s. CIT*** reported in **1979 [2] SCR 16**, in ***Associated Cement Co. Ltd., vs.***

Commissioner of Income-tax reported in **[1993] 201 ITR 435**, the Hon'ble Apex Court has observed that the words “income comprised therein” appearing immediately after the words, “deduct an amount equal to two percent of such sum as income tax” from their purport, cannot be understood as a percentage amount deductible from the income of the contractor out of the sum credited to his account or paid to him in pursuance to the said contract. Indeed, it is neither possible nor permissible to the payer to determine what part of the amount paid by him to the contractor constitutes the income of the latter. It is also not possible to think that the Parliament could have intended to cast such impossible burden upon the payer nor could it be attributed with the intention of enacting such an impractical and unworkable provision.

20. There is no cavil on these legal principles as collated. However, the crux of the controversy herein, is

not about the percentage amount deductible from the income of the KIADB, it is whether the payment of Rs.1225 Crores paid by the assessee includes the service charges and constitutes the income. The assessee's main ground that no service charges were paid to the KIADB and the amount of Rs.1225 Crores paid to the KIADB is part of the compensation to the lands acquired requires consideration as the same goes to the root of the matter. The liability to deduct tax would arise only if payment was made towards service charges by the assessee which attracts tax liability. The primary factor to attract Section 194J is the ingredient of 'income comprised therein' as held in **Kalyani Steels Ltd.**, supra. In order to establish the same, learned Senior counsel for the assessee has referred to Annexure to Schedule – D – Annexure – D1; deposit from allottees in the balance sheet of the KIADB as at 31.03.2013, copy of which is made available at page 179 of the appeal memo. In

Sl.No.16 of the said Annexure – D1, Code No.5047 shows deposit of Bangalore Metro Rail Project as Rs.12250000050.00 and it is submitted that the same tallies with the payment shown by the assessee for the assessment years in question. It is vehemently contended that ledger accounts in books of KIADB reflects that no service charges from BMRCL has been collected. On the contrary, the assessment orders of the KIADB placed before the Court refers to certain sum shown as the amount received towards service charges. However, the break-up of the same is not available. Be that as it may, it is the strong case of the assessee that the amount of Rs.1225 Crores paid by it, is shown as deposit by the KIADB.

21. The aforesaid factual aspects requires re-examination by the Tribunal being the last fact finding authority inasmuch as the payment of Rs.1225 Crores made by the assessee vis-à-vis the accounts of KIADB

relating to the said transaction. Given the circumstances, a finding is necessary whether Rs.1225 Crores includes the service charges or not which is the primary dispute. Hence, we restore the matter to the file of the Tribunal sans answering the substantial questions of law, setting aside the impugned order, keeping open all the rights and contentions of the parties.

22. Hence, we pass the following

ORDER

- i) The appeals are allowed in part.
- ii) The impugned common order dated 05.08.2016 of the Income Tax Appellate Tribunal, Bangalore Bench “B”, Bangalore in
ITA No.872/Bang/2015, ITA
No.873/Bang/2015 and ITA
No.874/Bang/2015 relating to the

assessment years 2011-12, 2012-13 and 2013-14 respectively are set aside.

- iii) The matter is remanded to the Tribunal for re-consideration keeping open all the rights and contentions of the parties .
- iv) The Tribunal shall reconsider the matter and pass appropriate orders in accordance with law keeping in mind the observations made hereinabove, in an expedite manner.

**Sd/-
JUDGE**

**Sd/-
JUDGE**

PMR/NC