**IN THE INCOME TAX APPELLATE TRIBUNAL DELHI**

**(DELHI BENCH 'H' : NEW DELHI)**

**BEFORE DR. B.R.R. KUMAR, ACCOUNTANT MEMBER**
**AND**
**SH. ANUBHAV SHARMA, JUDICIAL MEMBER**

ITA No.1856/Del/2020
(Assessment Year : 2017-18)

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| M/s. Vipul Ltd.,<br>Vipul Tech Square, Golf Course Road, Gurugram, Haryana-122009<br>PAN : AAACA5396C | Vs. | ACIT<br>Circle-26(2)<br>New Delhi |
| **(APPELLANT)** | | **(RESPONDENT)** |

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| Assessee by | Shri Sidharth Arora, CA |
| Revenue by | Shri M. Baranwal, Sr. DR |

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| Date of hearing: | 21.07.2022 |
| Date of Pronouncement: | 29th.07.2022 |

## ORDER

**PER ANUBHAV SHARMA, JM:**

The appeal has been filed by the assessee against order dated 22.09.2020 in appeal no. 10433/2019-20 in assessment year 2017-18 passed by Commissioner of Income Tax (Appeals)-9, New Delhi (hereinafter referred to as the First Appellate Authority in short 'Ld. F.A.A.') in regard to the appeal before it arising out of assessment order dated 26.12.2019 u/s 143(3) of the Income Tax Act, 1961 passed by ACIT, New Delhi (hereinafter referred to as the Assessing Officer 'AO').

2. The facts in brief are that the assessee had filed a return declaring income of Rs. 2,33,94,820/- and the case was taken up for scrutiny. The assessee company is engaged in the business of real estate development and related activities and is following the percentage completion method. Ld. AO observed that a sum of Rs. 1,90,529/- was incurred at club being cost for club services and facilities. The Ld. AO considered the same to be in the nature of personal expenses and the amount was disallowed.

2.1 Further, Ld. AO observed that the assessee had paid external development charges (EDC) to HUDA for which advance tax has not been deducted. The Ld. AO observed that HUDA is a taxable entity carrying out activities to acquire, develop and dispose of land for residential, commercial and institutional purposes in urban states of Haryana. It is not a part of Government or Corporation established under a Central Act which is exempted u/s 196 for deduction of TDS and accordingly 30% of Rs. 4,95,24,157/- was added back to the income of assessee.

2.2 Further, Ld. AO had disallowed a sum of Rs. 45,501 /- on account of expenses relating to previous years under the head 'Welfare Expenses, internal excess charges, deposited charges, business promotion'.

3. Ld. CIT(A) had sustained the same , therefore assessee has come in appeal raising following grounds :-

> *1. "On the facts and circumstances of the case, the LA/- CIT(A) has erred both in facts and law in rejecting the contention of the appellant that the payments of EDO have been made to comply with the terms and conditions of the agreement executed between the appellant and the Governor of Haryana, acting through Director Town and Control Planning, Haryana and thus provisions of TDS are not applicable on such payments, and therefore disallowance ofRs. 1,48,57,247/- made u/s 40(a)(ia) of the Act is highly unjustified, uncalled for and bad in law.*
>
> *2. On the facts and circumstances of the case, the Ed/- CIT(A) has erred both in facts and law in rejecting the contention of the*

*appellant that the payments* ofEDC *made by the appellant company are not in the nature of payments specified under section 194C of the Act.*

*3. The Ed/- CIT(A) has erred in law and facts of the case in confirming the action of the Ed/- AO in disallowing the club expenses of Rs. 1,90,529/- incurred for promoting the business of the appellant company, alleging it to be of personal nature and brushing aside the justification and explanation given by the appellant, which is highly unjustified, uncalled for and bad in law.*

*4. The appellant company craves the right to leave, add, amend or modify any ground of appeal."*

4. Heard and perused the record.

5. At the time of arguments, Ld. Counsel for the assessee stated at Bar, that ground no. 3 is not pressed and submitted that ground no. 1 is covered by judgments of Co-ordinate Benches. In regard to ground no. 2 it was submitted that Ld. Tax Authorities have failed to appreciate that the expenditures were made by the Managing Director of the company for promotion of the business and conducting of business meetings. It was submitted that no personal benefit was derived by the Managing Director.

6. On the other hand, Ld. DR submitted that the notification which is relied to give benefit to the assessee in regard to external development charges is of year 2018 while the matter concerns assessment year 2017-18. It was submitted that no evidence was produced that expenditures incurred on club had any concern whatsoever with the business activity.

7. In regard to **ground no. 1** it can be observed that, the Co-ordinate Bench orders in **M/s. Perfect Constech P. Ltd. ITA no. 6907/Del/2019** and in **RPS Infrastructure Ltd. vs. ACIT ITA No. 5805, 5806, 5349/Del/2019**, which is also relied in **M/s Santur Infrastructure Pvt Ltd V ACIT (ITA no 6844/Del/2019)** cast sufficient light on the controversy where in it is held that assessee builder or developers or colonizers are not required to deduct tax at source at the time of payment

of EDC to the HUDA.

7.1 As for convenience the relevant findings at para no. 5 in **M/s. Perfect Constech Pvt. Ltd** (supra) is reproduced;

> *"**5**. We have heard the rival submissions and have also perused the material on record. It is seen that in Para 4.3.2, subparagraph (iv) of the order passed u/s 271C of the Act, the LD.AO has himself noted that the demand draft of the EDC amounts are drawn in favour of the Chief Administrator, HUDA though routed through the Director General, Town and Country Planning, Sector-18, Chandigarh. He has also referred to the notes to accounts to the financial statements of HUDA wherein it has been stated that "other liabilities also include external development charges received through DGTCP, Department of Haryana for execution of various EDC works. The expenditure against which have been booked in Development Work in Progress, Enhancement compensation and Land cost." Undisputedly, the payment of EDC was issued in the name of Chief Administrator, HUDA. It is also not in dispute that HUDA has shown EDC as current liability in the balance sheet, but in the 'Notes' to the Accounts Forming part of the Balance Sheet, it has been shown that EDC has been received for execution of various external development works and as and when the development works are carried out, the EDC's liabilities are reduced accordingly. It is also not in dispute that HUDA is engaged in acquiring land, developing it and finally handing it over for a price. It is also not in dispute that EDC is fixed by HUDA from time to time. However, the fact of the matter remains that payment has been made to HUDA through DTCP which is a Government Department and the same is not in pursuance to any contract between the assessee and HUDA. Thus, the payment of EDC is not for carrying out any specific work to be done by HUDA for and on behalf of the assessee but rather DTCP which is a Government Department which levies these charges for carrying out external development and engages the services of HUDA for execution of the work. Therefore, it is our considered view that the assessee was not required to deduct tax at source at the time of payment of EDC as the same was not out of any statutory or contractual liability towards HUDA and, therefore, the impugned penalty was not leviable.*

*We note that similar view has been taken by the Co-ordinate Benches of ITAT Delhi in the cases of Santur Infrastructure Pvt. Ltd. vs. ACIT in ITA 6844/Del/2019 vide order dated 18.12.2019, Sarv Estate Pvt. Ltd. vs. JCIT in ITA No.5337 & 5338/Del/2019 vide order dated 13.09.2019 and Shiv Sai Infrastructure (Pvt.) Ltd. vs. ACIT in ITA No.5713/Del/2019 vide order dated 11.09.2019. A similar view was also taken by the Co-ordinate Bench of ITAT Delhi in case of R.P.S Infrastructure Ltd. vs. ACIT in 5805, 5806 & 5349/Del/2019 vide order dated 23.07.2019. Therefore, on an identical facts and respectfully following the orders of the Co-ordinate Benches as aforesaid, we hold that the impugned penalty u/s 271C of the Act is not sustainable. The order of the Ld. CIT (A) is set aside and the penalty is directed to be deleted."*

7.2 Similarly para no. 11 in **the case RPS Infrastructure Ltd ( Supra)** is also reproduced below where in the question of justification of penalty under Section 271C of the Act was also examined;

*"**11**. We have heard the rival submissions, perused the relevant findings given in the orders passed by the authorities below and the various judgments and materials relied upon by both the sides. On going through the facts, we note that dispute is with regard to non-deduction of tax in respect of payment of EDC charges made by the assessee to HUDA. As per the LD.AO, HUDA is neither a local authority nor Government, thus, the payments made to it by the assessee on account of EDC charges were liable for TDS under section 194C of the Act. Since, assessee has failed to deduct the TDS; therefore, it is liable for penalty under section 271C of the Act. On the other hand, the case of the assessee is that obligation to pay EDC charges is arising out of the license granted by DTCP and these payments are to be made for obtaining the license and as per the direction of the DTCP, the same have been paid to HUDA. Further, these payments are not in the nature of payment or in pursuance of works contract. There is no privity of contract between the assessee and the HUDA. On the contrary, the agreement is between Assessee Company and the DTCP which admittedly is a Government Department as agreement has been signed by DTCP on behalf of Governor of Haryana. We are of the view that we need not go in all these issues. From the facts, it is*

*evident that the payments have been made by the assessee to HUDA which is an authority of Haryana Government created by enactment of Legislature for carrying out developmental activities in the state of Haryana. Such Authorities admittedly are not in the category of local authority or Government. These payments were made during the year 2013-2016 and during this period, that is, prior to issue of CBDT Circular dated 23.12.2017, there was no clarity as regard the deduction of tax on these payments. We are of the view that the assesse was under a bonafide belief that no tax is required to be deducted at source on such payments, firstly, for the reason that agreement was between DTCP, who is Governmental authority and licence was granted by the Government and EDC charges was directed to be paid to HUDA, therefore, this could led to reasonable cause that TDS was not required to be deducted; Secondly, DTCP had issued a clarification dated 29.06.2018 to the effect that no TDS was/is required to be deducted in respect of payments of EDC and this clarification issued by DTCP, covers both past and future as the words used are was/is. This shows that Governmental authority itself has demanded not to deduct TDS. In case even if tax was required to be deducted on such payment but not deducted under a bonafide belief then no penalty shall be leviable under section 271C of the Act as there was no contumacious conduct by the assessee. Our view is fully supported from the judgment of the Hon'ble Supreme Court in the case of* ***Commissioner of income tax vs. Bank of Nova Scotia, 380 ITR 550,*** *wherein the Hon'ble Court has held as under :*

"2. *The matter was pursued by the Revenue before the Income Tax Appellate Tribunal. The Income Tax Appellate Tribunal vide order dated 31.03.2006 entered the following findings:*

*"11. We have carefully considered the rival submissions. In the instant case we are not dealing with collection of tax u/s 201(1) or compensatory interest u/s 201(1A). The case of the assessee is that these amounts have already been paid so as to end dispute with Revenue. In the present appeals we are concerned with levy of penalty u/s 271-C for which it is necessary to establish that there was contumacious conduct on the part of the assessee. We find that on similar facts Hon'ble Delhi High Court have deleted levy of penalty u/s 271-C in the*

*case of Itochu Corporation 268 ITR 172 (Del) and in the case of CIT v. Mitsui & Company Ltd. 272 ITR 545.*

*Respectfully following the aforesaid judgments of Hon'ble Delhi High Court and the decision of the ITAT, Delhi in the case of Television Eighteen India Ltd., we allow the assessee's appeal and cancel the penalty as levied u/s 271-C."*

*3. Being aggrieved, the Revenue took up the matter before the High Court of Delhi against the order of the Income Tax Appellate Tribunal. The High Court rejected the appeal only on the ground that no Substantial question of law arises in the matter.*

*4. On facts, we are convinced that there is no substantial question of* law, *the facts and law h*aving *properly and correctly been assessed and approached by the Commissioner of Income Tax (Appeals) as well as by the Income Tax Appellate Tribunal. Thus, we see no merits in the appeal and it is accordingly dismissed."*

8. Further in case of **TDI Infrastructure Ltd Versus Addl CIT, ITA no 6653/Del/2019,** vide order dated 6/7/2022, the Bench, to which one of us was in quorum, had taken into consideration a clarification memo no DTCP/ACCFTS/AO(AQ) /CAO/2894/2018 dated **19.06.18** issued by the Directorate of Town and Country Planning, Haryana which made it very obvious that receipts on account of EDC are being deposited in the Consolidated Fund of the State, accordingly directions were issued to colonizer like present assessee, to not deduct TDS. Once the fact of receipt of amounts received by HUDA being deposited in Consolidated Fund of State is established, there can be no second opinion that Assessee was rightly directed by DTCP, Haryana to not deduct the TDS. Even otherwise no intentional default is attributed to assessee and the default, if any, was on account of ambiguity which had arisen out of a direction contained in a statutory document, so no penalty can be justified u/s 271C of the Act, which is meant to address contumacious conduct. Ground is allowed in favour of assessee/appellant.

9. In regard to **ground no. 2** it can be observed that as far as the subscription fee to Clubs is concerned the nature of business activity of the assessee company is such that for procurement of business the Managing Director may have to attend the clients and entertain them occasionally at clubs. However, the four clubs to which the payments have been made are all 'Golf Clubs' and how only their membership would benefit the company is not ascertainable. Thus, there is every possibility that the expenditure incurred on subscription or food and beverage, with these Golf Clubs, have traits of personal benefits to the Managing Director, as well. Thus, there is justification to restrict, the disallowance proportionally to Rs. 50,000/-on total disallowance of Rs. 1,90,529/-. Accordingly the ground is decided partly in favour of the assessee/appellant.

**10.** As a consequence of above , the appeal is decided in favour of the assessee/appellant, as **allowed, with consequential effects to be given by the Ld. AO.**

**Order pronounced in the open court on 29th July, 2022.**

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| **Sd/-** | **Sd/-** |
| **(DR. B.R.R.KUMAR)** | **(ANUBHAV SHARMA)** |
| **ACCOUNTANT MEMBER** | **JUDICIAL MEMBER** |

*Date:- 29th .07.2022*
***Binita, SR.P.S***

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT, NEW DELHI