INCOME TAX : One time lump sum paid by assessee to a Government undertaking for getting lease of land for period of 99 years was not a payment in nature of rent and, therefore, assessee was not required to deduct tax at sources under section 194-I on said payment

[2020] 121 taxmann.com 334 (Madras)

HIGH COURT OF MADRAS

Nagarjuna Oil Corporation Ltd.

v.

Assistant Commissioner of Income Tax, TDS, Circle II, Chennai**

DR. VINEET KOTHARI AND M.S. RAMESH, JJ.
T.C.A. NOS. 60 TO 62 OF 2017†
OCTOBER 16, 2020

Section 194-I of the Income-tax Act, 1961 - Deduction of tax at source - Rent (Lease Payment) - Assessment years 2009-10, 2010-11 and 2012-13 - Whether one time lump sum paid by assessee to a Government undertaking for getting lease of land for period of 99 years was not a payment in nature of rent and, therefore, assessee was not required to deduct tax at sources under section 194-I on said payment - Held, yes [Paras 2, 4 and 6] [In favour of assessee]

Circulars and Notifications : Circular No. 35/2016 [F.No.275/29/2015-IT(B)], dated 13-10-2016

CASE REVIEW

Foxconn India Developer (P.) Ltd. v. *ITO (TDS)* [2016] 68 taxmann.com 95/239 Taxman 513 (Mad.) (para 6) *followed.*

CASES REFERRED TO

Tril Infopark Ltd. v. *ITO (TDS)* [2017] 88 taxmann.com 390 (Chennai - Trib.) (para 2), *Foxconn India Developer (P.) Ltd.* v. *ITO (TDS)* [2012] 24 taxmann.com 48/53 SOT 213 (Chennai - Trib.) (para 2) and *Foxconn India (Chennai) Developer (P.) Ltd.* v. *ITO (TDS)* [2016] 68 taxmann.com 95/239 Taxman 513 (Mad.) (para 4).

R. Venkat Narayanan *for the Appellant.* **V. Rajesh**, Jr. Standing Counsel *for the Respondent.*

JUDGMENT

Dr. Vineet Kothari, J. - The present appeals have been filed by the Assessee raising the following substantial questions of law arising from the order of the learned Tribunal dated 11 March 2016 by which the learned Tribunal dismissed the appeal of the Assessee for AY 2009-10, 2010-11 and 2012-13.

> "1. Whether on the facts and circumstances of the case and in law the Tribunal was right in holding that the payments made by Assessee to M/s. SIPCOT Ltd. for payment of land is in the nature of rent and hence Assessee ought to have deducted tax at source under section 194 I of the Act?

2. Whether on the facts and circumstances of the case and in law the Tribunal was right in holding that since Assessee had not deducted tax at source in respect of payments to SIPCOT the provisions of Section 201(1A) are attracted?"

2. The issue involved before the learned Tribunal was whether one time lump sum paid by the Assessee for getting 99 years lease of land from the Government Undertaking *viz.*, SIPCOT was a payment in the nature of rental and therefore, the Assessee was required to deduct tax at sources under section 194 I of the Act and having failed to do so, the said payment was liable to be added back to the declared income of the Assessee? The learned Tribunal followed the earlier view of its own in the case of *Tril Infopark Ltd.* v. *ITO (TDS)* [2017] 88 taxmann.com 390 (Chennai - Trib.) and *Foxconn India Developer (P.) Ltd.* v. *ITO (TDS)* [2012] 24 taxmann.com 48/53 SOT 213 (Chennai - Trib.).

3. The relevant part of the order of the learned Tribunal is quoted below for ready reference :—

"However ld.AR submitted that since the lease deed executed between the parties was produced before the lower authorities, there was no necessity to remit the issue back to the file of the AO for fresh consideration and issue is to be decided in favour of the Assessee in view of the judgment of Hon'ble Supreme Court in the case of *A. R. Krishnamurthy and Another* v. *CIT* reported in [1989] 176 ITR 0417 (SC), the judgment of the jurisdictional High Court in the case of *CIT* v. *Rane Brake Linings Ltd.* reported in [2014] 365 ITR 0401 (Mad.) and also the order of the Tribunal in the case of *ITO* v. *Dhirendra Ramji Vora* in ITA No. 3179/Mum/2012 *vide* order dated 9-4-2014 wherein held that one time lump sum paid by the Assessee for the purpose of acquiring land for a period of 99 years, renders enduring advantages to Assessee and expenditure in this regard will be capital in nature. Permanent lease is as much alienation as a sale. In our opinion, the jurisdictional High Court judgment (365 ITR 0401) was very much considered by the Tribunal in the case of M/s. TRIL Infopark Ltd. After that, it was observed that if the recipient has paid the taxes, then it may not be necessary to recover the TDS amount from the Assessee and the Revenue can only recover the interest under section 201(1A) of the Act till the payment was made by the recipient.

6. Further, it was observed that with effect from 13-7-2007, any amount paid by the Assessee, by whatever name called, under any lease, sublease, tenancy or any other agreement or arrangement for the use of the land has to be treated as rent. Since the Madras High Court in *Rane Brake Linings Ltd.* (*supra*) had no occasion to consider the explanation (*i*) to Section 194-I which was introduced with effect from 13-7-2006, that judgment cannot be applied to the facts of the case as held by the Tribunal in the case of M/s. TRIL Infopark Ltd., in our opinion, the order of the Tribunal in the case of *Foxconn India Developers (P) Ltd.* v. *ITO* (*supra*) is squarely applicable and the Assessee is liable to deducted TDS. Since the recipient has paid the taxes, the Assessee is liable for payment of interest under section 201(1A) of the Act. Accordingly, we are inclined to dismiss the appeals of the Assessee.

7. In the result, all the three appeals filed by the Assessee for assessment years 2009-10, 2010-11 and 2012-13 stand dismissed."

4. Both the learned Counsel fairly pointed out that the earlier view of the learned Tribunal stood reversed by a Co-ordinate Bench of this Court in the case of *Foxconn India Developer (P.) Ltd.* v. *ITO (TDS)* [2016] 68 taxmann.com 95/239 Taxman 513 (Mad.) in which a Division Bench of this Court has held that such lump sum payment made by the Assessee for getting a long term lease does not amount to payment of rent and the same is not adjustable against the annual rent payable by the Assessee and therefore, the provisions of Section 194I of the Act will not apply to such circumstances. The said judgment of the Division Bench of this Court has since been accepted by the Central Board of Direct Taxes which has issued Circular No. 35/2016 [F.NO.275/29/2015-IT (B)], dated 13-10-2016, holding that the Assessee is not entitled to deduct any tax at sources in such circumstances.

5. The relevant part of the judgment of the Division Bench as well as the aforesaid Circular are quoted below for ready reference :—

Foxconn India Developer (P.) Ltd.

'Questions of law arising in the case:

35. Having seen (*a*) the legal contentions revolving around (*i*) Section 105 of the Transfer of Property Act, (*ii*) the *Explanation* under section 194-I (*iii*) the decisions making a distinction between the salami and rent and (*iv*) the indicators available in Chapter XX-C, let us now turn our attention to the questions of law arising for consideration.

36. The first question of law that we have formulated in paragraph 1 of the decision is: Whether the upfront payment made by an assessee, under whatever name including premium, for the acquisition of leasehold rights over an immovable property for a long duration of time say 99 years, could be taken to constitute rental income at the hands of the lessor, obliging the lessee to deduct tax at source under section 194-I of the Act.

37. We have already seen from the law on the point that the substance of the transaction is of importance and the answer to the question would depend upon the agreement between the parties. Therefore, we may have get back to the facts of the case.

38. As we have indicated in paragraph 3 above, SIPCOT acquired a vast extent of land measuring about 2469 acres. The purpose of the acquisition was to develop the area into an industrial park. The requisitioning body namely the SIPCOT thus became a developer. The assessee was chosen as the co-developer under G.O.Ms.No.27 (Industries) dated 1-3-2006 and the Memorandum of Understanding that they entered into with the Government of Tamil Nadu dated 3-3-2006, for establishing the Sriperumbudur Hi-Tech Special Economic Zone. After becoming a co-developer by virtue of the Government Order dated 1-3-2006 and the Memorandum of Understanding dated 3-3-2006, the assessee signed another Memorandum of Understanding with SIPCOT on 11-1-2007. Based upon these, two orders of allotment dated 11-1-2007 and 10-4-2007 were issued. The orders of allotment prescribed the payment of One Time Non-refundable Upfront Charges by the assessee to SIPCOT. It was only after these payments were made that two lease deeds were executed on 30-4-2008.

39. Keeping the above facts in mind, if we have a look at a letter dated 9-3-2009, issued by SIPCOT to the assessee, it can be seen as to how the parties wanted the payment of upfront charges to be treated. In paragraph 1 of the letter dated 9-3-2009, SIPCOT stated the following:

(*i*) The upfront charges paid by your Company has been treated as 'Deemed Sale' and accounted as 'Income from Area Development Activity' as detailed below:

"a. Rs. 1050 lakhs paid for 100 acres of Land allotted on 11-1-2007 relating to the Financial year 2006-07 (Assessment year 2007-08) is accounted in that year.

b. Rs. 1659.20 lakhs paid for 51.85 acres of land in SEZ area allotted on 10-4-2007 relating to the Financial year 2007-08 (Assessment year 2008- 09) is accounted in the year."

40. Therefore, it is clear that the lessor as well as the lessee intended to treat the transaction as "deemed sale". This is one indicator for arriving at the answer to the substantial question of law.

41. There is also intrinsic evidence in the two deeds of lease themselves to suggest that the assessee was chosen not merely as a lessee of the land, but as a co-developer along with SIPCOT to establish a project in the "Product Specific Special Economic Zone". The relevant portion of the preamble to

the lease deeds is extracted as follows:

"WHEREAS the Government of Tamil Nadu issued G.O. Ms. No.27 Industries (MIB.1) Department dated 1-3-2006 in relation to the party of the second part to establish the project in the "Product-Specific Special Economic Zone" named Sriperumbudur Hi Tech ZEZ and jointly develop with the party of the first part for the activities to be carried out with unfettered right of usage in the area earmarked by the party of the first part.

WHEREAS the party of the second part has signed a Memorandum of Understanding with the Government of Tamil Nadu dated 03rd March 2006 [hereinafter referred to as "TN MOU"] regarding the possibility of establishing several manufacturing bases with all infrastructure facilities to include electronic hardware manufacturing and supporting services facility in the State of Tamil Nadu. The said TNMOU has offered the related concessions and incentives to the party of the second part.

WHEREAS the party of the second part as "Developer" signed a Memorandum of Understanding with the party of the first part on 11-1-2007 [hereinafter referred to as "SIPCOT MOU"] to establish its project and as a co-developer the party of the second part shall develop its project in product-Specific SEZ jointly with the party of the first part along with its customers and vendors in HI-Tech SEZ."

42. As a matter of fact, the Government of India, Ministry of Commerce and Industry also issued a letter of approval dated 13-2-2007 for the proposal jointly made by the assessee and SIPCOT. The relevant portion of the letter of approval dated 13-2-2007 issued by the Government of India reads as follows:—

"With reference to your above mentioned application, Government of India is pleased to approve your proposal as Co-Developer for providing infrastructure facilities in the SIPCOT Hi tech SEZ for electronics/telecom hardware and support services, including trading and logistics activities at Sriperumbudur, Tamil Nadu, as per the details given below:

(1) Name of the Co-Developer -Foxconn India Developer (P.) Ltd.

(3) Details of facilities proposed to be provided :Providing following infrastructure facilities in the SEZ:

A list of facilities to be provided in the SEZ is at Annexure-I."

43. Therefore, it is crystal clear that the One Time Non-refundable Upfront Charges paid by the assessee was not (*i*) under the agreement of lease and (*ii*) merely for the use of the land. The payment made for a variety of purposes such as (*i*) becoming a co-developer (*ii*) developing a Product Specific Special Economic Zone in the Sriperumbudur Hi-Tech Special Economic Zone (*iii*) for putting up an industry in the land. The lessor as well as the lessee intended to treat the lease virtually as a deemed sale giving no scope for any confusion. In such circumstances, we are of the considered view that the upfront payment made by the assessee for the acquisition of leasehold rights over an immovable property for a long duration of time say 99 years could not be taken to constitute rental income at the hands of the lessor, obliging the lessor to deduct tax at source under section 194-I. Hence, the first substantial question of law is answered in favour of the appellant/assessee.

44. Once the first substantial question of law is answered in favour of the appellant/assessee, by holding that the assessee was not under an obligation to deduct tax at source, it follows as a corollary that the appellant cannot be termed as an assessee in default. As a consequence, there is

no question of levy of interest under section 201(1-A) of the Act.

45. In the result, the appeal is allowed, the first substantial question of law is answered in favour of the appellant/assessee. In view of our answer to the first substantial question of law, the second substantial question of law does not arise. No costs.

CBDT CIRCULAR

Section 194-I of the Income-tax Act, 1961 -Deduction of tax at source - Rent -Applicability of TDS provisions of section 194-I on lumpsum lease premium paid for acquisition of long term lease.

Circular No.35/2016 [F.No.275/29/2015-IT (B)], dated 13-10-2016

Section 194-I of the Income-tax Act, 1961 (the Act) requires that tax be deducted at source at the prescribed rates from payment of any income by way of rent. For the purposes of this section, "rent" has been defined as any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land or building or machinery or plant or equipment or furniture or fittings.

2. The issue of whether or not TDS under section 194-I of the Act is applicable on 'lump sum lease premium' or 'one-time upfront lease charges" paid by an assessee for acquiring long-term leasehold rights for land or any other property has been examined by CBDT in view of representations received in this regard.

3. The Board has taken note of the fact that in the case of The Indian Newspaper Society (ITA Nos. 918 & 920/2015), the Hon'ble Delhi High Court has ruled that lease premium paid by the assessee for acquiring a plot of land on an 80 years lease was in the nature of capital expense not falling within the ambit of section 194-I of the Act. In this case, the court reasoned that since all the rights easements and appurtenances in respect of the said land were in effect transferred to the lessee for 80 years and since there was no provision in lease agreement for adjustment of premium amount paid against annual rent payable, the payment of lease premium was a capital expense not requiring deduction of tax at source under section 194-I of the Act.

4. Further, in the case Foxconn India Developer Ltd. (Tax Case Appeal No. 801/2013), the Hon'ble Chennai High Court held that the one-time non-refundable upfront charges paid by the assessee for the acquisition of leasehold rights over an immovable property for 99 years could not be taken to constitute rental income in the hands of the lessor, obliging the lessee to deduct tax at source under section 194-I of the Act and that in such a situation the lease assumes the character of "deemed sale". The Hon'ble Chennai High Court has also in the cases of Tril Infopark Ltd. (Tax Case Appeal No. 882/2015) ruled that TDS was not deductible on payments of lump sum lease premium by the company for acquiring a long-term lease of 99 years.

5. In all the aforesaid cases, the Department has accepted the decisions of the High Courts and has not filed an SLP. Therefore, the issue of whether or not TDS under section 194-I of the Act is to be made on lump sum lease premium or one-time upfront lease charges paid for allotment of land or any other property on long-term lease basis is now settled in favour of the assessee.

6. In view of the above, it is clarified that lump sum lease premium or one-time upfront lease charges, which are not adjustable against periodic rent, paid or payable for acquisition of long-term leasehold rights over land or any other property are not payments in the nature of rent within the meaning of section 194-I of the Act. Therefore, such payments are not liable for TDS under section 194-I of the Act.

6. In view of the aforesaid agreed position between the parties, the present appeals filed by the Assessee

are liable to be allowed. We respectfully follow the judgment of the Coordinate Bench of this Court in the case of *Foxconn India Developer (P.) Ltd.* (*supra*) and allow the appeals of the Assessee and answer the aforesaid questions in favour of the Assessee and against the Revenue. No order as to costs.

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* In favour of assessee.

† Arising out of order dated 11-3-2016 paned by Chennai ITAT in ITA nos. 2267, 2268, 2269/Mds/2014.