IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES: D: NEW DELHI

BEFORE SHRI N.K. SAINI, ACCOUNTANT MEMBER
AND
SHRI LALIET KUMAR, JUDICIAL MEMBER

ITA Nos. 1917 & 1918/Del/2016
Assessment Year: 2011-12

ATS Infrastructure Ltd., K-19, Sector-18, Noida	Vs.	DCIT (TDS), Noida.
PAN: AADCA 0609 B		
(Appellant)		(Respondent)

Assessee By	:	Ms. Mala Rajan, CA & Shri K.N. Goyal, CA.
Department By	:	Shri Umesh Chand Dubey, Sr. DR

Date of Hearing	:	28.11.2016
Date of Pronouncement	:	30.11.2016

O R D E R

PER: LALIET KUMAR, J.M.:

Both are the appeals filed by the assessee arise against the order dated 27/01/2016 passed by the ld. CIT(A)-I, Noida for the A.Y. 2011-12, wherein the assessee has raised following grounds of appeals;

Grounds in ITA No. 1917/Del/2016

1. *That the impugned order of the learned Deputy Commissioner of Income Tax (TDS) (DCIT) is patently against law, erroneous and merits to be quashed.*

2. *That, on the facts and in the circumstances of the case and in law, the learned DCIT has grossly erred in holding that the appellant was liable to deduct tax of Rs. 94,01,465 under section 194A of the Income Tax Act, 1961 (Act) on interest payment of Rs. 9,40,14,650/- to Greater Noida Industrial Development Authority (GNIDA), which being a corporation established under the Uttar Pradesh Industrial Area Development Act, 1976, an Act passed by the State Legislature is exempt per notification No. 3489 dated 22/10/1970 of the Central Board of Direct Taxes under Section 194A(3)(iii)(f) of the Act.*

3. *That the learned DCITY has erred in raising a demand of Rs. 94,01,465/- towards short deduction of tax at source under section 201(1) of the Act and further levying interest of Rs. 37,52,031/- under Section 201(1A) of the Act on the alleged default under section 194A of the Act while there is no default.*

4. *That the learned DCIT has erred in determining a short deduction of tax of Rs. 8,07,810/- on payment of bus hire charges to M/s Lease Plan India Limited of Rs. 90,70,521/- holding the payment as liable to tax deduction @ 10% under section 194I of the Act while the applicable TDS rate is 2% whether under section 194C as applied by the appellant or under section 194I as assessed by the DCIT.*

5. *That the learned DCIT has erred in determining tax deduction liability on a payment of Rs. 90,70,521/- to M/s Lease Plan India Limited while the actual payment during the year was Rs. 1,00,53,343/- on which due tax at the rate of 2% under section 194C had been deducted and deposited by the appellant.*

6. *That the learned DCIT has further erred in raising a demand of Rs. 2,98,890/- towards interest under section 201(1A) for alleged short deduction of tax at source under section 194I on the bus hire charges paid to M/s Lease Plan India Ltd.*

7. *That in the first appeal, the learned Commissioner of Income Tax (Appeals)-I, Noida has erroneously decided the appeal in the context on non-deduction of tax at source on lease rent payment to GNIDA of Rs. 9,40,14,650/- instead of interest payment and has not disposed off the actual grounds of appeal relating to tax deduction liability on interest payment to GNIDA under section 194A and bus hire charges under either of the sections 194C or 194I.*

Grounds in ITA No. 1918/Del/2016

1. *That the impugned order of the learned Additional Commissioner of Income Tax (TDS) (Addl.CIT) is patently against law, erroneous and merits to be quashed.*

2. *That, on the facts and in the circumstances of the case and in law, the learned Addl.CIT has grossly erred in levying a penalty of Rs.94,01,465 under section 271C of the Act for non-deduction of tax at source under section 194A of the Act of the same amount on interest payment to Greater Noida*

Industrial Development Authority (GNIDA), a Corporation established under a State Act.

3. *That, on the facts and in the circumstances of the case and in law, the learned Addl.CIT has grossly erred in levying a penalty of Rs.8,07,810 under section 271C for short deduction of tax at source of equivalent amount by applying TDS rate of 10% under section 194I on payment of bus hire charges to M/s. Lease Plan India Limited instead of the applicable rate of 2% whether held as liable to tax deduction either under section 194C or 194I of the Act.*

4. *That the learned Commissioner of Income Tax (Appeals) is not justified in dismissing the appeal of the appellant against the impugned order on a technical ground that the appellant's counsel had wrongly mentioned the section of levy of penalty as section 271(1)(c) instead of 271C."*

2. Firstly we take ITA No. 1917/JP/2016.

Regarding ground Nos. 1 to 4 of the appeal, brief facts of the case are that the assessee company is engaged in the business of development of group housing projects for the last many years. A survey was conducted on 03/02/2010 to check the correct applicability of TDS provisions for the assessment year 2011-12. A show cause notice was issued but no one attended the proceedings and as such summons U/s 131 of the Income Tax Act, 1961 (hereinafter referred as the Act) was issued on 08/01/2014. Pursuant thereto Shri Deepak Kumar, CA appeared and sought time to

furnish the details/explanation. However, he failed to provide the details, therefore, the matter was decided by the A.O. The A.O. has held that the assessee has failed to deduct TDS at source at the time of crediting/making payment of interest to the lessor i.e. Greater Noida Industrial Development Authority (in shot GNIDA). The A.O. has held as under:-

> *In view of the above facts, it is inferred that the assessee was required to deduct tax at source at the time of crediting/making payment of interest to the Lessor i.e. GREATER NOIDA INDUSTRIAL DEVELOPMENT AUTHORITY. By not doing so, the assessee has not performed its duty as envisaged U/s 200 of the Income Tax Act. I, therefore, hold the assessee in default U/s 201 of the Income Tax Act. Demand on account of short deduction of tax U/s 201 of the Income Tax Act and interest thereon U/s 201(1A) is, thus, charged as under:*

Month	*Amount of Interest Paid (Rs.)*	*Date of Payment*	*TDS deducted (Rs.)*	*TDS required to be deducted (Rs.)*	*Short Deduction under section 201*	*Defaults Months*	*Interest under section 201(1A)*
June	*30,387,650*	*30.06.2010*	*Nil*	*3,038,765.00*	*3,038,765.00*	*46*	*1,397,832*
March	*63,627,000*	*31.03.2011*	*Nil*	*6,362,700.00*	*6,362,700.00*	*37*	*2,354,199*
Total				*9,401,465.00*	*9,401,465.00*		*3,752,031*

3. Being aggrieved by the order of the A.O., the assessee carried the matter before the ld. CIT(A), who has summarily passed an order in appeal by rejecting the contentions of the assessee and held as under:-

"Although, the ld. A.O. has in its order examined several issues regarding the legal status of the Noida Authority to whom lease rent was paid and has also examined the applicability of section 194A of I.T. Act, 1961 to the case of the Noida Authority the dispute between the appellant and the revenue is Very simple and boils down to the issue whether tax is to be deducted at source on payment of lease rent to the Noida Authority. I have already decided this issue in favour of revenue and against the appellant in the case of M/s. H-one India Ltd., Udyog Vihar, Surajpur, Gr. Noida vide appeal order No.05/2014-15/Noida dated 31/12/2015. Respectfully adhering to my decision to the said case I do not find any infirmity in the order of the AO and the same is therefore confirmed. Appeal of the appellant fails."

4. Now the assessee is in appeals before us. The ld. AR of the assessee has submitted that the DCIT(TDS) has raised a demand of Rs. 1,02,09,275/- (94,01,465+8,07,810) U/s 201(1) of the Act towards TDS and Rs. 40,50,921 U/s 201(1A) towards interest. It was further submitted that this Tribunal in ITA No. 1359/Del/2014 dated 07/08/2015 has decided the issue of TDS on interest payment to GNIDA vide order dated 07/08/2015. The Hon'ble Tribunal has held as under:-

"11. Adverting to the facts of the instant case, we find that the assessee is a statutory corporation established by means of the UP Industrial Area Development Act, 1976. It has been noticed above from the preamble of this Act that it has been

made for development of certain areas in the State into industrial and urban township. Instead of enacting area-wise Industrial Area Development Acts, the UP Government enacted a common UP Industrial Area Development Act, 1976 to cover Authorities under different areas with its distinct name. But, for the creation of various area-wise authorities such as NOIDA and Ghaziabad Authorities, there is no other purpose of the UP Industrial Area Development Act, 1976. In other words, we can also say that this Act is nothing but a culmination of several area-wise Industrial Area Development Acts. Since NOIDA has been notified under the UP Industrial Area Development Act, we are of the considered opinion that the expression 'any corporation established by a State Act' shall include ITA No. 1359/Del/2014 NOIDA (New Okhla Industrial Development Authority) in the given circumstances.

12. *We find that identical issue involving payment of interest by some banks to Ghaziabad Development Authority without tax withholding came up for consideration before the Delhi Bench of the Tribunal in the case of Chief/Senior Manager, Oriental Bank of Commerce vs. ITO. Vide its order dated 15.7.2011 in ITA No.2228/Del/2011, the Tribunal has held that the payment of interest by Oriental Bank of Commerce to Ghaziabad Development Authority is covered within the provisions of section 194A(3)(iii)(f) and, hence, there is no obligation for deduction of tax at source. Consequently, the*

order passed u/s 201(1) was set aside. Similar view has been taken by the Amritsar Bench of the Tribunal in the case of ITO (TDS) vs. Branch Manager Jammu & Kashmir Bank Ltd. Vide its order dated 24.4.2012 in ITA No.206 to 210/Asr/2011, the Tribunal has held that payment of interest by the bank to Jammu Development Authority (Jammu) is exempt u/s 194A(3)(iii)(f) and, hence, there can be no liability u/s 201(1) and 201(1A) on the bank and resultantly, the bank cannot be treated as an assessee in default u/s 201(1) and 201(1A). Likewise view has been taken by the Amritsar Bench of the Tribunal in ITO vs. the Branch Manager, Jammu, Jammu & Kashmir Bank Ltd., by its order dated 2.7.2012, a copy of which has also been placed on record. All these precedents support the proposition that the payment of interest by banks to the State Industrial Development Authorities does not require any deduction of tax at source in terms of section 194A(3)(iii)(f) and, hence, the failure to deduct tax at source on such interest cannot lead to the banks being treated as assessee in default. No material has been placed on record to demonstrate that all/any of the above orders have either been reversed or modified in any manner by the Hon'ble High Courts. Further, the ld. DR failed to point out any contrary decision. In view of the legal position discussed supra and these precedents, we are of the considered opinion that the ld. CIT(A) was justified in reversing the order passed by the Addl. CIT (TDS),

Ghaziabad declaring the assessee liable u/s 201(1) and 201(1A) of the Act. We, therefore, uphold the impugned order."

It was also submitted by the ld AR of the assessee that the judgment of the Tribunal passed in ITA No. 1359/Del/2014 was upheld by the Hon'ble Allahabad High Court in the case of CIT(TDS) & Anr Vs. Canara Bank passed in Income Tax Appeal No. 64 of 2016 dated 04/04/2016, wherein the Hon'ble High Court has held as under:-

"It empowers the Authority with the previous approval of the State Government to levy such taxes, as it may consider necessary, for maintaining or continuing any amenities in the industrial development area. The Authority has to maintain its own fund. The object of the Authority is to prepare in such form and at such time every year as the State Government may specify, a budget. Section 41 deals with the control of the State Government over the Authority. The dissolution of the Authority is also provided for in section 58. It can appropriately be gathered from the aforesaid provisions that NOIDA has been established by the Industrial Act and otherwise also even by necessary implications it is more than apparent that NOIDA has been established by the State Industrial Act. There is, therefore, no doubt that NOIDA owes its existence to a Statute which is the fountainhead of its powers.

Even otherwise, the fine distinction sought to be made by learned counsel for the appellants losses significance when the provisions

of section 194-A(3)(iii)(c) and (d) are examined. They provide that the income credited or paid to the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1952 or the Unit Trust of India established under the Unit Trust of India Act, 1963 are exempted from payment of tax at source. There is no doubt that Life Insurance Corporation of India and the Unit Trust of India are established by the Acts. The Act, therefore, does not place any emphasis on 'by' or 'under' the Act.

In this view of the matter, reference to the Financial Corporation Act by learned counsel for the appellants to substantiate that NOIDA has been established under a State Act is not of significance. This apart, as has been pointed out by learned Senior Counsel for the respondent-Bank, the said Central Act authorised the State Government to issue the notification whereas the Industrial Act authorises the State Government to issue the notification.

In this connection, we need to remind ourselves by observations made in paragraph 9 in the judgment of S.S. Dhanoa (supra). The Supreme Court pointed out that a Corporation established "by" or "under" an Act of Legislature can only mean a body corporate which owes its existence and not merely its corporate status to the Act and in this connection the Supreme Court referred to : a municipality; a zila parishad; or a gram panchayat which owe their existence and status to an Act of Legislature.

NOIDA has been granted a status of a Municipality under Article 243-Q of the Constitution of India which deals with the constitution of a Municipality. The said Article provides that there

shall be constituted in every State, - (a) a Nagar Panchayat for a transitional area, that is to say, an area in transition from a rural area to an urban area; (b) a Municipal Council for a smaller urban area; and (c) a Municipal Corporation for a larger urban area. The proviso to Article 243-Q, however, stipulates that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, specify to be an industrial township.

The State Government has issued a notification dated 24 December 2001 in exercise of the powers conferred under the proviso to clause (1) of Article 243-Q of the Constitution. The said notification provides that having regard to the size of NOIDA which has been declared to be an Industrial Development Area by a notification dated 17 April 1976 and the municipal services being provided by NOIDA, the Governor is pleased to specify that NOIDA would be an "Industrial Township" with effect from the date of publication of the notification. This clearly means that instead of Municipal Corporation providing services, NOIDA would provide the said services and if that be so, then as observed by the Supreme Court in S.S. Dhanoa (supra), NOIDA will owe its existence to an Act of the State.

We have, therefore, no manner of doubt from a reading of the provisions of the Industrial Area Development Act that the NOIDA has been constituted by the State Act and, therefore, entitled to

exemption of payment of tax at source under section 194-A(1) of the Act.

The decision of the Division Bench of this Court in New Okhla Industrial Development Authority (supra), on which reliance has been placed by learned counsel for the appellants, would, therefore, not come to the aid of the appellants as it was restricted to the issue as to whether NOIDA would be a local authority or not and did not deal with the issue involved in this appeal as to whether the NOIDA is a Corporation established by a State Act."

On the basis of the above, it was submitted that no TDS was deductible at source at the interest payment made to GNIDA by the appellant and therefore, the appeal is required to be allowed.

5. On the other hand, the ld Sr. DR has submitted that the judgment relied by the ld. AR of the assessee is not applicable as it pertains to Noida Development Authority and not in respect of the GNIDA. It was submitted that the order passed by the ld. CIT(A) was a cryptic order and therefore, the issue is required to be reexamined by the ld. CIT(A) with detailed reasoning. In rebuttal, the ld AR of the assessee has brought to our notice the order passed by the ld. CIT(A) dated 29/07/2016 passed in appeal No. 151/2015-16 wherein the ld. CIT(A) instead of applying the judgment of Hon'ble Allahabad High Court has not applied the judgment on the pretext

that the said judgment is not passed by the Hon'ble Jurisdictional High Court. The finding of the said order is as under:-

> *"5. The order dated 04/04/2016 of Hon'ble Allahabad High Court is an order and not the judgment. The facts and the issues of law which were considered by me in my earlier order in the case of the appellant as well as others similarly placed banks have not been considered by Hon'ble Allahabad High Court in the order dated 04/04/2016. The orders passed by me were not contested by the appellant U/s 253 of IT Act, 1961 before the ld. ITAT which was a statutory right of the appellant banks. Instead, the appellant bank as well as various other similarly placed banks have moved before Writ petitions Hon'ble Allahabad High Court which were listed for 26/07/2016. However, while issuing notice to the respondents and where the undersigned authority is the respondent No.1, Hon'ble Allahabad High Court did not stay the orders passed by me. From these facts it is clear that the facts of the two cases being the one decided by Hon'ble Allahabad High Court by order dated 04/04/2016 and the other cases being challenge to by order against the appellant bank and others are different."*
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> *6. In view of the above, the order dated 04/04/2016 of Hon'ble Allahabad High Court will not apply to the facts of the present case. With due respect to the Jurisdictional High Court it is held that the issues involving the present appeal*

were not adjudicated by Hon'ble Allahabad High Court in its order dated 04/04/2016 and as my order on the issue involved here is operating, in respectfully compliance of the same, I hold that the case canvassed by the ld. counsel for the appellant bank has not merit and there is no infirmity in the impugned order passed by the ld. A.O.. The same is therefore confirmed. The appeal of the appellant fails, is dismissed."

6. We have heard the rival contentions of both the parties and perused the material available on the record. The Tribunal vide order dated 07/8/2015 has decided the issue that the TDS is not required to be deductible on the interest paid to the Noida Authorities. The reasoning of the Coordinate Bench in the case of CIT(TDS) Vs Canara Bank is clearly applicable to the present case as well. Further The Greater Noida Industrial Development Authority (GNIDA) is a public authority constituted u/s. 3 of Uttar Pradesh Industrial Area Development Act, 1976 (UP Act No. 6 of 1976). GNIDA is responsible for the planned development of the area under its jurisdiction. (ii) GNIDA is declared as Industrial Township by the Governor of Uttar Pradesh under proviso to clause (1) of Article 243Q of the Constitution of India. It is a Local Authority in as much as, it is bestowed with the authority to discharge functions of an industrial Township as well as municipality. GNIDA does not have a separate

municipality. (iii) GNIDA discharges functions of maintaining sewerage, water, electricity, roads and social infrastructure such as school, colleges, universities, dispensaries, hospitals, parks, community centers etc for the benefit of public at large. Thus the functions and activities of GNIDA are similar to the Noida Development Authority.

We find that the identical issue involving the payment of the interest by the banks to Noida Development Authority and Gaziabad Development Authority has already been adjudicated supra by the Tribunal as well as the by the Hon'ble Allahabad High Court, therefore, the authorities below are bound by the authoritative pronouncement of the judgment of the Tribunal as well as by the Hon'ble Allahabad High Court

The ld. Sr.DR has failed to point out any contrary judgment. In view of the legal position discussed supra and the binding judgments, we are of the considered opinion that the order of the A.O. and the ld. CIT(A) are required to be set aside. Accordingly, we hold that the assessee is not liable to deduct TDS on the payments made by it to the GNIDA. In the light of the above, the appeal of the assessee is allowed.

7. Grounds No. 5 to 7 of the appeal, in this regard, the assessee hired buses from a company M/s Lease Plan India Limited on lease rental basis.

It the A.O on examination found that the amount was paid or credited by vouchers and the assessee had claimed deduction of tax U/s 194C of the Act @ 2% as against actual payment of Rs. 9070521/-. The A.O. has opined that the assessee was required to deduct tax @ 10% U/s 194I of the Act, which was effective from 01/4/2008.

8. The ld CIT(A) on first appeal has summarily decided this issue as mentioned hereinabove and had upheld the findings of the A.O.

9. We have heard the rival contentions of both the parties, perused the material available on the record and have also perused the applicable provisions in this case of payment of the higher charges of lease rent of cars etc. to M/s Lease Plan India Limited. The applicable Section 194I provides as under:-

> **194-I.** 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 :

[**Provided also** that no deduction shall be made under this section where the income by way of rent is credited or paid to a business trust, being a real estate investment trust, in respect of any real estate asset, referred to in clause (*23FCA*) of section 10, owned directly by such business trust.]

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."

A reading of the assessment order clearly provides that the A.O. has applied the definition of rent U/s 194-I, which was applicable prior to the Finance Act No. 2 of 2009 w.e.f. 01/10/2009 and has not applied the provision in force during the assessment year as mentioned hereinabove. In view thereof, this issue is remanded back to the file of the A.O. with a direction to examine the applicable provision of the law during the relevant

assessment year and decide the appeal accordingly. Therefore, this issue is restored back to the file of the A.O.

10. Now we take ITA No. 1918/Del/2016:

We have decided the quantum appeal of the assessee and have allowed grounds No. 1 to 4 of the appeal and have restored back the grounds No. 5 to 7 of the appeal to the file of the A.O.. Since we have partly allowed the appeal of the assessee and have restored back the remaining ground, therefore, it would be in the interest of justice, if the present appeal arising of the quantum proceedings is also restored back to the file of the A.O. with a direction to initiate the proceedings in the case, the issue No. 5 to 7 are decided against the assessee, in accordance with law. With this observation, this appeal of the assessee is also set aside to the file of the A.O.

11. In the result, both the appeals of the assessee are partly allowed.

The order pronounced in the open court on 30/11/2016.

Sd/-	Sd/-
[N.K. SAINI]	[LALIET KUMAR]
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated, 30th November, 2016.

*Ranjan
Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT (A)
5. DR, ITAT

AR, ITAT, NEW DELHI.