IN THE INCOME TAX APPELLATE TRIBUNAL
KOLKATA BENCH (A), KOLKATA
[Before Shri P.M. Jagtap, AM & Shri S.S. Viswanethra Ravi, JM]

I.T.A. Nos. 708 & 712/Kol/2016
Assessment Year: 2012-13

ACIT Circle 3 (TDS) Kolkata**.....*****Appellant***
10B, Middleton Row, 7th Floor,
Kolkata – 700 071.

SDV International Logistics Ltd**.....*****Respondent***
7, KYD Street,
Kolkata – 700 016.
[TAN: CALAO 1045 C]

I.T.A. No. 510/Kol/2016
Assessment Year: 2012-13

SDV International Logistics Ltd**.....*****Appellant***
7, KYD Street,
Kolkata – 700 016.
[TAN: CALAO 1045 C]

ACIT Circle 3 (TDS) Kolkata**.....*****Appellant***
10B, Middleton Row, 7th Floor,
Kolkata – 700 071.

Appearances by:
Shri Soumesh Dash, Addl. CIT, Sr. DR appearing on behalf of the Revenue.
Shri Anup Sinha, FCA appearing on behalf of the Assessee.

Date of concluding the hearing : September 04, 2018
Date of pronouncing the order : September 12, 2018

ORDER

Per P.M. Jagtap, AM

Out of these three appeals, two appeals being ITA No. 708/K/2016 (Revenue's Appeal) and ITA No. 510/K/2016 (Assessee's Appeal), are cross-appeals which are directed against the order of Ld. CIT(A) – 24, Kolkata dated 29.01.2016 and the same are being disposed of along with ITA No. 712/K/2016 which involves a consequential issue relating to penalty u/s 271C of the Income Tax Act, 1961.

2. The relevant facts of the case giving rise to these appeals are as follows. The assessee in the present case is a company. A survey u/s 133A of the Act was carried out in the case of the assessee. On the basis of documents found during the course of survey, the A.O. was of the view that the assessee company had not complied with the TDS provisions properly in the following cases:

> *"i. TDS was not made at all on payment of Rs. 1,52,37,877/- during F.Y. 2011-12, being communication charges, which is liable for TDS u/s 194J @ 10%.*
> *ii. TDS u/s 194C of the Act was made on payment of Rs. 1,71,71,481/- for manpower supply which is in the nature of managerial service and liable for TDS u/s 194J.*
> *iii. It also appeared from the Form 16 for the F.Y. 2011-12, issued by the deductor company to its employees that benefit of deduction on House Rent Allowance and benefit of interest on self-occupied house property were allowed simultaneously."*

3. The assessee company, therefore, was called upon by the A.O. to explain as to why it should not be treated as assessee in default within the meaning of section 201(1) of the Act for non-deduction / short deduction of tax at source. In reply, it was submitted by the assessee that the net amount of communication charges was substantially lower than what was pointed out by the A.O. and the same involved payment for the use of internet connectivity which was not in the nature of payment covered by section 194J. This explanation of the assessee was not found acceptable by the A.O. and by relying on the Explanations 4, 5 and 6 to Section 9(1)(vi) inserted by the Finance Act, 2012, he held that the expression 'process' included internet connectivity also and the assessee was liable to deduct tax at source u/s 194J from the payment of internet connectivity charges of Rs. 17,71,068/- and payment of specialised

line rental amounting to Rs. 25,37,618/- being in the nature of royalty. He accordingly treated the assessee company as the assessee in default u/s 201(1) to the extent of Rs. 4,30,868/- being 10% of the internet connectivity charges and specialised line rental aggregating to Rs. 4,30,868/-

4. As regards the payment made for supply of manpower, the assessee company produced before the A.O. a contract letter with Zealot Industrial & Logistic Services Pvt. Ltd. to show that there was a contract simply for supply of labour for carrying out work and it did not involve providing of any technical, professional or consultancy manpower. It was also pointed out that the supply of manpower was governed by the Minimum Wages Act which was sufficient to substantiate the assessee's case that the contract was for supply of low category personnel and not managerial personnel. This submission of the assessee was not found acceptable by the A.O. According to him, the payment in question was made by the assessee to an outsourcing agency and since the role of the said agency was in the nature of providing managerial services, the payment made to them by the assessee was within the ambit of "fees for technical services". He, therefore, held that the assessee was liable to deduct tax at source @ 10% u/s 194J instead of at 2% u/s 194C from the payment of Rs. 1,39,58,638/- made to Zealot Industrial & Logistic Services Pvt. Ltd. and held the assessee as the assessee in default for the amount deducted short to the extent of Rs. 11,16,691/-.

5. As regards the double benefit allowed to some employees while deducting tax at source on account of deduction for house rent

allowance as well as benefit of interest on self-occupied house property as alleged by the A.O., it was submitted on behalf of the assessee company before the A.O. that there were some employees who had let out their properties to earn rental income and were themselves staying in the rental premises. It was submitted that there was no cap on the amount of interest to be allowed in such cases and accordingly interest paid was entirely allowed as deduction from the rental income while working out the loss under the head income from house property. Simultaneously, deduction u/s 10 was also allowed to the said employees on account of house rent allowance u/s 10 after taking into consideration the rent actually paid by them. This explanation of the assessee was not found acceptable by the A.O. According to him, when their properties were given on rent by the concerned employees, it was not permissible to the assessee company as a deductor to allow the interest portion only. He held that the employees who had been allowed exemption for house rent allowance on the basis of rent paid thus were not entitled to deduction on account of interest on housing loan and the benefit of such interest was allowed by the assessee in excess to the extent of Rs. 43,66,699/- while deducting tax at source. Accordingly the assessee was treated by him as the assessee in default to the extent of Rs. 11,74,088/-. The A.O. thus passed an order dated 31.03.2014 u/s 201(1) / 201(1A) of the Act treating the assessee company as the assessee in default for non-deduction / short deduction of tax at source to the tune of Rs. 27,21,647/- and also levied interest u/s 201(1A) to the extent of Rs. 9,79,792/-.

6. Aggrieved by the order of the A.O. passed u/s 201(1)/201(1A), an appeal was preferred by the assessee before the Ld. CIT(A) and after considering the submissions made by the assessee as well as the material available on record, the Ld. CIT(A) decided the three issues involved in the case of the assessee regarding the alleged non deduction / short deduction of tax at source by the assessee as under:

TDS default in respect of communication charges

> *"3A. The AO has cited Finance Act 2012 to treat the payment towards internet charges and specialized line rental as royalty. The Financial Year concerned being 2011-12 precedes the coming into effect of the Finance Act 2012. Being towards internet/internet connectivity charges and of specialized nature rental cannot be treated as professional services as no human intervention is involved and the service is of a standard description. The internet charges could not be subjected to TDS. However, specialized line rental can also be not treated as royalty for the purpose of section 194J. The AO has no case u/s.194J of the Act. The AO has simply not accepted the submission of the appellant to the effect that Finance Act 2012 Explanations 4, 5 & 6 are only prospective as the amended provisions were to be applicable only from 1.7.2012. No reason has been given by the AO as to why the*
> *appellant's submission has been not accepted, though the AO has reproduced in his order the submissions dated 28.3.2014 and 31.3.2014 in para (i)(a) and (i)(b) of his order under communication charges.*
>
> *3B. In the course of appeal hearing the appellant relied on the cases of Sonata Information Technology Ltd. and Wifi Networks Pvt. Ltd. as discussed above. Going by the judicial decision it is thus apparent that liability to deduct TDS is governed by section 194J and section 9(1)(vi) as it existed before Finance Act 2012.It is difficult to appreciate the AO's view that internet charges represent fees for technical services or royalty. As regards the line charges there is no discussion in the AO's order as to why the said payment should be treated as royalty or liable to section 194J. The said line charges can be treated as rental for the line taken on lease and therefore deduction can possibly be made r-r/s.l94l rather than section 194J. I, therefore, direct the AO to restrict the determination of tax deductable by way of TDS in respect of line charges to 2% or as applicable in case of plants u/s 194J. This ground is therefore partly allowed."*

TDS default in respect of manpower supply charges

"From the AO's observation as reproduced it appears that the AO has treated providing of Security Guard as managing the manpower so supplied. The AO has failed to point out how the supply of labour may be termed as managerial, professional or technical activity u/s 194J. The appellant submission on the point is reproduced as under:

'From the copy of contract as well as confirmation of M/s. Zealot Industrial & Logistics Servies it is crystal clear that the labour (manpower) supplied were mainly for carrying out services of loading/unloading Cargo, Security Guards and House Keeping (sweeping and cleaning). Thus such services squarely falls under the provisions of section 194C for withholding of tax, as already reiterated both in the statement of facts and letter dated 11.01.2016 being in the nature of pure labour contract for carrying out work not involving any technical, professional, consulting or managerial functions.

The contention of the AO that 'the security guard providers are managing the manpower so supplied to the appellant is also based on surmises and conjectures in as much as from the contract it is apparent that:
a) The manpower so supplied will perform the duties as assigned to them by the appellant company.
b) The appellant company has reserved the right to terminate any labour and ask for replacement.
c) The payment of (wages) for each category of labour is fixed as per the Minimum Wages Act.

Thus the contention of the AO has no legal factual legs to stand upon the deserves to quashed.

4C. From the AO's order and submission of the appellant before the AO and in the appeal proceedings it appears that labour was supplied and therefore, the TDS provision applicable is the section 194C. This ground is, therefore, allowed."

TDS default in respect of house property loss

"5B. In my view exemption of House Rent Allowance and benefit of interest on House Loan are two independent provisions. On satisfaction of condition given u/s 24(b) of the Income Tax Act interest on house loan is allowed as deduction whereas u/s 10 House Rent is exempted subject to conditions prescribed. It is not the case of AO that while calculating TDS liability the loss was wrongly computed or exemption of House Rent Allowance was not calculated correctly. The AO is raising the liability on the wrong premises that double benefit of exemption on House Rent Allowance and benefit of interest on House Loan is in violation of the

Income Tax Act. The AO thus has based his decision on wrong premises. The interest and the exemption of HRA are two independent provisions and so the AO's action cannot be sustained. The grounds are therefore allowed."

7. Aggrieved by the order of the Ld. CIT(A), the Revenue and Assessee both are in appeal before the Tribunal on the following grounds:

Grounds raised in the Revenue's appeal

"1. That under the facts and circumstances of the case, the CIT(A) – 24, Kolkata has erred in the case of expenses made under the head "INTERNET EXPENSES AND SPECIALIZED LINE RENT" by observing that the provision was introduced in the Finance Act, 2012, thus TDS is not applicable u/s 194J of the I.T. Act 1961 without considering the fact that explanation below Section 9(1)(vi) was introduced with retrospective effect from 01.07.1976.

2. That under the facts and circumstances of the case, the CIT(A) – 24, Kolkata has erred in holding that in case of deduction of tax at source on salary, the employer can simultaneously allow benefit of exemption of HRA and benefit on loss on account of interest payment on housing loan of self-occupied property as the provisions relating to the same are independent. Actually the employer can allow the benefit of any one of the two, while deducting the tax at source on salary and in case due to some peculiar circumstances, the employee is eligible for both the benefits, he has to file an Income Tax return to claim the benefit. The Assessee deductor failed to furnish any documentary evidences in this regard to prove that the double benefit allowed by the assessee was legitimate."

Ground raised in the Assessee's appeal

"Under the facts and circumstances of the case the Ld. CIT(A) erred in holding that expenditure under the head specialised line rental of Rs. 25,37,618/- taken on lease should be subject to withholding of tax u/s 194I as applicable in case of plants."

8. We have heard the arguments of both the sides and also perused the relevant material available on record. As regards the common issue involved in Ground No. 1 of the revenue's appeal as

well as Ground No. 1 of the assessee's appeal, it is observed that the assessee company was held to be liable to deduct tax at source by the A.O. from the payment of internet connectivity charges and specialised line rental u/s 194J of the Act being in the nature of royalty by relying on Explanations 4, 5 and 6 to section 9(1)(vi) inserted by the Finance Act, 2012 with retrospective effect. The Ld. CIT(A) however did not approve this view of the Assessing Officer by holding that the liability to deduct tax at source was governed by section 9(1)(vi) as it existed before the Finance Act, 2012. As rightly pointed out by the learned counsel for the assessee before us, this view taken by the Ld. CIT(A) is supported by various judicial pronouncements including the decision of Mumbai Bench of this Tribunal in the case of Channel Guide India Ltd. vs ACIT 25 taxmann.com 25 wherein it was held that the assessee cannot be held to be liable to deduct tax at source by relying on the subsequent amendments made in the relevant provision with retrospective effect. As held by the Tribunal in the said case, it was impossible for the assessee to deduct tax in the F.Y. 2003-04 when as per the legal position prevalent in the said F.Y., the obligation to deduct tax was not on the assessee. The Tribunal based its decision on the legal Maxim lex non cogit ad impossiblia meaning thereby that the law cannot be possibly compel a person to do something which is impossible to perform. Respectfully following the said decision of Mumbai Bench of this Tribunal, we uphold the impugned order of the Ld. CIT(A) holding that the assessee was not liable to deduct tax at source from the amount in question paid towards internet connectivity charges and specialised line rental u/s 194J and dismiss Ground No. 1 of the Reveuue's appeal.

9. Having held that the assessee was not liable to deduct tax at source from the amount paid towards internet connectivity charges and specialised line rental u/s 194J, the Ld. CIT(A) held that the amount of specialised line rental paid by the assessee was covered by section 194I and directed the A.O. to treat the assessee company as the assessee in default for its failure to deduct tax at source from the said amount u/s 194I. This decision of the Ld. CIT(A) has been challenged by the assessee in the solitary ground raised in its appeal. As submitted by the learned counsel for the assessee in this regard, the amount in question was paid by the assessee company towards multi protocol label switching, virtual private networks, port rental charges, internet port rental charges, mailing solution charges etc. to Reliance Broadband and other service providers. The said payment thus was made by the assessee company for utilisation of the standard facilities which were provided by the various service providers. In the case of Destimoney Securities Pvt. Ltd. vs ITO (ITA No. 4106/Mum/2014), a similar issue had come up for consideration before Mumbai Bench of this Tribunal. In the said case, it was held by the Ld. CIT(a) that use of broadband, internet was in the nature of providing a right to use lease equipment and the provisions of section 194I, therefore, were attracted. The Tribunal however overruled this decision of the Ld. CIT(A) by holding that the lease line charges were paid by the assessee to the internet service provider for faster internet access on dedicated lease line and as such the said payment had been made for use of telecommunication services / connectivity for transmission of voice / data facility provided by the vendors and not for use of any asset involved in provision of such facility / service covered in section 194I of the Act. The Tribunal held that the

assessee, therefore was not liable to deduct tax at source u/s 194I of the Act and he could not be treated as the assessee in default u/s 201(1)/201(1)A of the Act in respect of failure to deduct tax at source from the payment made towards lease line charges. In our opinion, the decision of the Mumbai Bench of this Tribunal in the case of Destimoney Securities Pvt. Ltd. (supra) as well as other that of the judicial pronouncements is squarely applicable to the issue involved in the present case and respectfully following the same, we hold that the assessee was not liable to deduct tax at source from the payment in question u/s 194I as held by the Ld. CIT(A) and it could not be treated as the assessee in default u/s 201(1)/201(1)A. Ground No. 1 of assessee's appeal is allowed.

10. As regards the issue involved in Ground No. 2 of revenue's appeal, it is observed that the action of the A.O. in considering the house property loss resulting from the deduction on account of interest on housing loan while making deduction of tax at source from the payment of salary to some employees who had also claimed exemption on account of house rent allowance u/s 10 for payment made on account of rent was not accepted by the A.O. as the same according to him resulted in allowing double benefit to the concerned employees which was not permissible. The Ld. CIT(A) however found that these two benefits were governed by two independent provisions and since the concerned employees had satisfied the conditions for claiming the benefits under these two independent provisions, there was no violation on the part of the assessee of the Income Tax Act. At the time of hearing before us, the learned DR has not able to raise any material contentions to reduce or controvert the

decisionrendered by the Ld. CIT(A) on this issue or the reasons given while arriving at the same. We, therefore, find no justifiable reasons to interfere with the order of the Ld. CIT(A) and upholding the same, we dismiss ground no 2 of the revenue's appeal.

11. As regards the remaining appeal of the revenue being ITA No. 712/K/2016, it is observed that the issue involved therein relating to penalty u/s 271C is consequential to the issue of treating the assessee company as the assessee in default for the alleged non-deduction or short deduction of tax at source from the concerned payments. Since the said issue has already been decided by us in the foregoing portion of this order while disposing of the respective appeals of the assessee and revenue holding that the assessee company could not be treated as the assessee in default u/s 201(1)/201(1A) of the Act, the consequential penalty imposed by the A.O. u/s 271C of the Act for the alleged default of the assessee for compliance with the relevant TDS provision is liable to be cancelled. We accordingly uphold the impugned order of the Ld. CIT(A) cancelling the penalty imposed by the A.O. u/s 271C and dismiss this appeal of the revenue.

12. In the result, both the appeals of the revenue are dismissed while the appeal of the assessee is allowed.

Order Pronounced in the Open Court on 12th September, 2018.

Sd/-	Sd/-
(S.S. Viswanethra Ravi)	(P.M. Jagtap)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 12/09/2018
Biswajit, Sr. PS

Copy of order forwarded to:

1. SDV International Logistics Pvt. Ltd., 7, KYD Street, Kolkata – 700 016.

2. ACIT, Circle 3(TDS), Kolkata – 700 071.

3. The CIT(A)

4. The CIT

5. DR

True Copy, By order,

Sr. P.S. / H.O.O.
ITAT, Kolkata