* **HIGH COURT OF DELHI : NEW DELHI**

\+ **ITA Nos.906/2006 & 909/2006**

COMMISSIONER OF INCOME TAX DEL ..... Appellant
Through: Mr. R. D. Jolly, Advocate.

versus

M/S ADIDAS INDIA MARKETING (PVT.) LTD ..... Respondent
Through: Mr. Asit Kumar and Mr. Soubhagya Agarwal, Advocates.

CORAM:

HON'BLE MR. JUSTICE MADAN B. LOKUR
HON'BLE MR. JUSTICE VIPIN SANGHI

ORDER
10.7.2006

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not? Yes.
3. Whether the judgment should be reported in the Digest?

VIPIN SANGHI, J (Oral)

1. These appeals under Section 260A of the Income Tax Act (for short The `Act') have been preferred by the appellants against the common order passed by the Income Tax Appellate Tribunal (for short

'The Tribunal') in T.D.S No. 117/Del/2004 relevant to the assessmei year 2001-2002 and T.D.S No.68/Delhi/2004 relevant to the assessment year 2000-2001 dated 16.9.2005.

2. The facts relevant for the disposal of the present appeals are that the Respondent-Assessee had taken on lease a premises for the purposes of its Head Office. A separate agreement was entered into for hiring furniture and fixtures provided in the said premises. The Assessee was deducting tax at source and depositing the same in respect of the rent in accordance with Section 194-I of the Act, while tax was being deducted at source (for short TDS) and deposited on the consideration being paid under the agreement for hire of furniture and fixtures under Section 194C of the Act.

3. The aforesaid came to light when the TDS return filed by the Assessee in Form 26-J was examined and upon survey being carried out under Section 133-A of the Act on 17.1.03. Relying upon the explanation to Section 194-I read with Circular No.715 dated 8.8.1995, the Assessing Officer held that the Assessee was liable to deduct tax at source on the hire charges for furniture and fixtures at the rate of 20% under Section 194-I instead of 3.5% under Section 194C, on the ground that the component of hire charges for furniture and fixtures was also liable to be treated as rent. This finding of the Assessing Officer was affirmed by the CIT(Appeals) and the Assessee

has also accepted that position. Consequently, the Assessing Office passed an order under Sections 201(1) and 201(1A) thereby holding the Assessee to be an "Assessee in default" and raising a demand for the shortfall in the amount of deduction of tax and interest thereon. This order of the Assessing Officer dated 19/24.2.2003 was rectified by him under Section 154 on 28.4.2003.

4. The Assessee preferred an appeal before the CIT (Appeals)-IV. Before the CIT (Appeals) the Assessee contended that the deductee having paid the tax on their income, the deductor-assessee could not be treated as an Assessee in default for purposes of recovering the tax. In support of his contention, the Assessee relied upon various decisions of the Tribunal and of the Madhya Pradesh High Court reported as ***CIT Vs. Divisional Manager, New India Assurance Co. Ltd.*** 140 ITR 818 and ***Gwalior Rayon Silk Co. Ltd. Vs. CIT*** 140 ITR 832.

5. The Assessee also produced copies of acknowledgments of Returns of the Hirer to show that they had paid tax on their income. The CIT (Appeals) vide order dated 16.12.2003 (in Appeal No.TR-95/2003-04) held that if tax had already been paid by the recipient/deductee, the same could not be recovered from the Assessee by treating him as an "Assessee in default". The CIT (Appeals) relied upon a CBDT instruction bearing No.275/201/95-IT(B)

dated 29.1.1997, the relevant portion whereof reads as follows:-

> ".... that the Board is of the view that no demand visualized u/s 201(1) of the IT Act should be enforced, after the tax deduction has satisfied the officer in charge of TDS that taxes due have been paid by the deductee assessee. However, this will not alter the liability to charge interest u/s 201 (1A) of the Act till the date of payments of taxes by the deductee-assessee or the liability for penalty u/s 271C of the IT Act".

6. The CIT (Appeals) directed the Assessee to provide the Assessing Officer with necessary evidence to show that tax on the returned income (which included hire charges received from the Assessee) of the hirer had been paid by them. The Assessing Officer was directed to give credit for such payment and re-calculate short deduction of tax, if any. The CIT (Appeals) further went on to record that the Assessee could not escape the liability to pay interest under Section 201 (1A) of the Act on the ground that the tax had been paid by the deductee, and that the levy of interest under Section 201(1A) was mandatory and automatic and that it was compensatory in nature. The CIT (Appeals) relied on various decisions including that of this Court in the case of ***Commissioner of Income Tax vs. Premnath Motors Pvt. Ltd,*** 253 ITR 705. He further held that interest for the period commencing from the date of deductibility of tax till the date of payment thereof by the hirer should be charged under

Section 201(1A) of the Act against the Assessee.

7. Against the aforesaid order of the CIT (Appeals) the Revenue preferred an appeal before the Tribunal. Other appeals pertaining to different assessment years raising the same grievance were also preferred before the Tribunal by the Revenue in respect of the same Assessee. All these appeals have been dismissed by the Tribunal by the common impugned order dated 16.9.2005.

8. The ground of appeal urged by the Revenue before the Tribunal reads as follows:-

> *"On the facts and in circumstances of the case as well as in law the Ld. CIT(A) has erred in directing the AO to charge interest under section 201(1A) from the date of deductibility of tax, (till)(sic) the payment by the deductee as explanation to section 191 inserted by Finance Act, 2003 w.e.f. 1.6.2003 is not applicable to the default committed by the assessee for earlier years."*

9. The Tribunal considered the appeal in the light of a couple of decisions of its Benches and the aforesaid CBDT Circular dated 29.1.1997.

10. The argument of the Revenue before the Tribunal and also before us is that the benefit of the Explanation inserted in Section 191 of the Act would be applicable only w.e.f 1.6.2003. At this stage we may set out the Explanation to Section 191 of the Act as inserted by Finance Act, 2003 w.e.f. 1.6.2003:-

> ***"For the removal of doubts, it is hereby declared*** that if any person referred to in section 200 and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct the whole or any part of the tax and such tax has not been paid by the assessee direct, then, such person, the principal officer and the company shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default as referred to in sub-section (1) of section 201 in respect of such tax." (emphasis supplied)

11. We have heard the counsel for the appellant and having considered the matter we cannot agree with this submission of the Appellant. In our opinion, the Appellant is unnecessarily dragging in the Explanation to Section 191 of the Act as inserted by way of an amendment w.e.f. 1.6.2003 in the facts of this case. Even in the absence of the said explanation, the position in law always was that the Assessee who was obliged to, but had not deducted tax at source, could not be asked to pay the same where the deductee had paid it by showing the amount received by him as his income. This is clear from a perusal of Section 191 of the Act, the relevant portion whereof read as follows:

> "191. In the case of income in respect of which provision is not made under this Chapter for deducting income tax at the time of payment, and ***in any case where income tax has not been deducted in accordance with the provisions of this Chapter, income tax shall be payable by the assessee direct***.

12. A perusal of Section 191 of the Act shows that where income tax has not been deducted in accordance with the provisions of Chapter XVII, income tax is to be paid by the Assessee direct i.e the payee. It is to be borne in the mind that the tax being deducted at source by the Assessee is the tax on the income of the deductee and not on the income of the Assessee-deductor. Therefore, what Section 191 provides for is that in case the deductor fails to make the requisite deduction of tax at source, the deductee would be liable to pay income tax on the amount received by him as income. Section 191 does not cast a dual and simultaneous obligation on both - the deductor and the deductee; to pay tax on the said income in the hands of the deductee. Tax on the said income in the hands of the deductee is to be paid only once; primarily by the deductor and, upon his failure, by the deductee. If the tax is deducted at source and paid by the deductor, the deductee gets credit for it and the amount deducted is treated as his income as per Sections 198 and 199 of the Act.

13. Simply because an explanation has been inserted to Section 191 w.e.f. 1.6.2003, it cannot be argued that by implication the law was any different prior to the insertion of the said explanation. In our opinion the CIT (Appeals) as well as the Tribunal have correctly relied upon the CBDT instruction dated 29.1.1997 as aforesaid by

placing reliance upon the decision of the Hon'ble Supreme Court in th case of ***UCO Bank vs. CIT,*** 237 ITR 889 which holds that CBDT circulars issued to tone down the rigour of law for the benefit of the Assessee will be binding upon the department.

14. Before us the grievance of the Revenue also appears to be that the CIT (Appeals) and the Tribunal have restricted the computation of interest under Section 201(1A) only upto the date on which the deductee paid the tax which ought to have been deducted and deposited by the Assessee. Though it is not clearly set out in the appeal, it appears that the Appellant desired to levy interest under Section 201 (1A) for the period even after the payment of tax by the deductee. In this regard we may refer to the averments contained in the synopsis filed by the appellant with its appeal, which read as follows:

> *"The Tribunal has, however, held that after the date on which the payment has been made by the deductee, the assessee cannot be held to be an 'Assessee in default' and further that interest U/S 201 (1A) also cannot be charged after the said date."*

15. A similar averment is made in para 3(ii) which reads as follows:-

> *"The C.I.T (Appeals), therefore, held that the assessee cannot be held an `Assessee in default' after the period when the deductee has paid the tax*

and as such no interest can be charged for the subsequent period."

16. In our view, firstly, there is no justification for the Revenue to seek to levy interest for any period after the date on which the tax is actually paid. The same is clear from a plain reading of Section 201 (1A). The period for which interest can be claimed under Section 201 (1A) is *"from the date on which such tax was deductible to the date on which such tax is actually paid"*. Consequently no interest beyond the date of actual payment of the tax can be claimed by the department. This Section does not state that the tax should have been paid by the Assessee alone. The tax may actually be paid by the Assessee or the deductee. What is of relevance is the actual payment of the tax. Secondly, the grievance appears to be vague because it is not clear for what further period and upto which date the Revenue considers interest payable, even after payment of the tax. Thirdly, we find that the said issue was not the one raised before the Tribunal. We have already set out the ground of appeal raised before the Tribunal.

17. The second grievance raised by the appellant before us in this appeal is that the Tribunal has held that after the date on which the payment has been made by the deductee, the Assessee cannot be held to be an "Assessee in default".

18. From a reading of the order of the Tribunal we do not find

that the Tribunal has rendered any such finding. All that it has done that the order of the CIT (A) has been upheld which says that if tax has already been paid by the recipient of such income, it cannot be recovered from the assessee by treating it as as "Assessee in default". The issue whether the assessee is an 'Assessee in default' is wholly academic for the purposes of, and in the facts of the present case, since the liability to deduct tax at source and to pay interest thereon for the period from the date of deductability till the date of payment of tax is not in dispute and stands settled. It may be of relevance in case the Revenue initiates penalty proceedings.

19. In view of the aforesaid, we find that no substantial question of law arises for our consideration in the present case. We also find that the decision of the Tribunal is well reasoned and does not call for any interference.

20. Dismissed.

VIPIN SANGHI
JUDGE

MADAN B. LOKUR
JUDGE

July 10, 2006
as/ak