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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-9 to 24

\+ **ITA 73/2005, ITA 75/2005, ITA 77/2005, ITA 78/2005, ITA 79/2005, ITA 80/2005, ITA 81/2005, ITA 82/2005, ITA 86/2005, ITA 100/2005, ITA 113/2005, ITA 123/2005 ITA 200/2005, ITA 561/2005 & CM APPL. Nos. 10469/2005 & 10470/2005, ITA 633/2005, ITA 688/2005 & CM APPL. 11621/2005**

COMMISSIONER OF INCOME TAX ..... Appellant

Through: Mr. Zoheb Hossain, Senior Standing Counsel with Mr. Deepak Anand, Junior Standing Counsel in ITA Nos.73/2005; 75/2005; 77/2005; 78/2005; 79/2005; 80/2005; 81/2005; 82/2005; 86/2005; 100/2005; 113/2005; 123/2005; 200/2005.

Mr. Asheesh Jain, Senior Standing Counsel with Mr. Vikrant A. Maheshwari, Advocate in ITA Nos.561/2005633/2005; 688/2005.

versus

I.T.C. LIMITED .... Respondent

Through: Mr. Ajay Vohra, Senior Advocate with Ms. Kavita Jha & Mr. Bhuwan Dhoopar, Advocates.

CORAM:
JUSTICE S.MURALIDHAR
JUSTICE PRATHIBA M. SINGH

O R D E R

% 04.07.2017

Dr. S. Muralidhar, J.:

1. These are 16 appeals by the Revenue under Section 260A of the Income Tax Act, 1961 ('Act'). 8 of them are quantum appeals and the

remaining 8 are penalty appeals. As far as the quantum appeals are concerned, these are ITA Nos. 73, 75, 77, 78, 82, 86, 113 and 123 of 2005 which are directed against the common order dated 16th March, 2004 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA (T.D.S.) Nos. 31 to 38/Del/2002 for the Financial Years (FYs) 1994-95 to 2001-2002. While admitting these appeals on 24th November, 2005, this Court framed the following questions of law for consideration:

> i. Whether the ITAT was correct in law in holding that the amount paid by the Assessee to the Airport Authority of India for use of lounge premises by way of royalty was not tantamount to rent within the meaning of Section 194-I of the Income Tax Act?
>
> ii. Whether the ITAT was correct in law in holding that the interest under Section 201(1A) of the Act cannot be charged once the payee had paid the tax?

2. As far as the penalty appeals are concerned, these are ITA Nos. 79, 80, 81, 100, 200, 561, 633 and 688 of 2005 which are directed against the common order dated 24th June, 2004 passed by the ITAT in ITA Nos. 548 to 555/Del/2004 for the Assessment Years ('AYs') 1994-95 to 2001-2002. While admitting these appeals the following question of law was framed by this Court:

> Whether the ITAT was correct in law in deleting the penalty under Section 271C of the Income Tax Act, 1961?

3. The facts in brief are that the Respondent/Assessee was awarded the contract for running an Executive Lounge at the Indira Gandhi International Airport, New Delhi ('IGI') by the Airports Authority of India ('AAI'). As explained by the Assessee, the award of the contract was preceded by a bidding process which commenced with a tender being floated by the AAI. The successful bidder had to quote the royalty

amount it was prepared to pay for being granted license to operate the executive lounge. The AAI was to fix the license fee for the space to be provided to the successful bidder for operating the lounge.

4. A License Agreement (LA) was entered into on 23rd October, 1998 between the AAI and the Assessee in terms of which the premises at the first floor of the IGI Airport, referred to as the 'lounge premises', was given on license basis to the Assessee "for the purpose of operating an Executive Lounge to all operating airlines for the benefit of their Transit Passengers in the International Terminal." The period of license was from 1st October, 1998 to 30th September, 2003.

5. As far as the license fee was concerned, Clauses 2(a) and 2(b) of the LA provided as under:

> "2. (a) That the licensee will pay a sum of Rs. 6,25,000.00 (Rupees Six lacs twenty five thousand only) every month in advance by way of Royalty for the first year of the contract, with the provision that the said royalty shall be subject to 10% annual compound escalation in the subsequent years of the contract and shall be paid in Advance on or before the 10th of each month.
>
> (b) In addition to the said royalty, the Licensee shall pay to the authority licencee fee for space allotted for operating the Lounge Premises at the rates as may be fixed from time to time. The licencee fee payable in respect of the Lounge premises shall be AAI and the licensee shall pay such revised licence fee. The area of the lounge premises is 230 sq. meters and the present licence fee is Rs. 402.62 per sq. meter per month."

6. A controversy arose regarding the failure on the Assessee's part to deduct tax at source in terms of Section 194-I of the Act read with Section 201(1) thereof from the payments made by it to AAI under the LA. The stand taken by the Assessee was that the payment was not in

the nature of rent but in the nature of royalty.

7. By an order dated 29th January, 2002, which was common to FYs 1994-95 to 2001-2002, the Assistant Commissioner of Income Tax, Circle 50(1) (hereafter the Assessing Officer - AO) held that there has been a failure by the Assessee to deduct tax at source from the rent payments made to the AAI under the above LA. Accordingly, it was held that the Assessee was deemed to be an Assessee in default to the extent of non-deduction or short deduction of tax under Section 201(1) of the Act. The total short deduction for the aforesaid FYs worked out to Rs. 1,17,39,448. The interest thereon under Section 201(1A) of the Act worked out to Rs. 61,80,971. Thus, the total demand worked out to Rs. 1,79,20,419. It was held that the mere fact that one part of the payment under Clause 2(a) of the LA was termed as royalty "cannot take away the character of payments being rent for the use of land and premises at the Indira Gandhi International Airport in respect of International Terminal."

8. Aggrieved by the above order, the Assessee went in appeal before the Commissioner of Income Tax (Appeals) ['CIT(A)']. The CIT(A) concurred with the Assessing Officer ('AO') as regards the payment made to the AAI being rent under Section 194-I of the Act. As far as the question of payment of interest under Section 201(1A) of the Act was concerned, the CIT(A) was of the view that it required to be verified from the AO who exercised jurisdiction over AAI whether, in fact, taxes in respect of the payments made to it by the Assessee were already remitted by it. In other words, it had to be seen whether the payments had been included in the gross receipts of AAI on which tax had been

paid by AAI. The demand to that extent was deleted by the CIT(A) subject to verification. It was held that the interest under Section 201(1A) of the Act had to be worked out with reference to the delay, if any.

9. In the further appeals filed by the Assessee before the ITAT, the Assessee relied on a certificate dated 28th January, 2004 issued by the AAI wherein it was clarified that the royalty charged was not for the use of building but for the right to carry on the business. Accordingly, it was submitted that since the royalty was not for the use of land and premises but only for the right to operate the lounge, it could not be regarded as rent and there was, thus, no obligation on the Assessee to deduct tax at source therefrom under Section 194-I of the Act.

10. As regards interest levied under Section 201(1A) of the Act was concerned, the Assessee submitted before the ITAT that with AAI having paid taxes on the income by way of royalty, there was no question for levy of interest for the alleged default of non-deduction of tax at source.

11. The Assessee's appeals were allowed by the ITAT by the impugned order for the following reasons:

> "1. Under the Airports Authority Act of India, the AAI is obliged to, *inter alia*, 'establish and maintain hotels, restaurant and restrooms at or near the airport'. The authority is also entitled in law to charge fees or rent from persons who are given by the authority any facility for carrying on any trade or business at any airport, heliport or airstrip'.
>
> 2. The tender floated by AAI required the tenderer to quote royalty amount that the tenderer is offering to pay. The licence

fee which is already fixed by AAI and is mentioned in the tender documents is in addition to the royalty. The successful bidder is one who quotes the highest fixed royalty.

3. The licence fee is determined by AAI having regard to the area made available to the successful bidder and can be unilaterally revised by AAI, whereas the royalty is quoted by the bidder and accepted by AAI and is not open for revision.

4. The royalty is payable 30 days after the area is handed over to the successful bidder while the payment of licence fee commences immediately on such handing over."

12. This Court has heard the submissions of Mr. Zoheb Hossain, learned Senior Standing Counsel for the Revenue in the quantum appeals, Mr. Asheesh Jain, learned Senior Standing Counsel in the penalty appeals and Mr. Ajay Vohra, learned Senior Advocate for the Assessee.

13. The contention of the Revenue as regards question (i) in the quantum appeals is that it stands covered in favour of the Revenue by the judgement of this Court in ***Apeejay Surrendera Park Hotels Limited v. Union of India (2016) 383 ITR 697 (Del)*** where, the Court emphasized the expanded definition of the word 'rent' under Section 194-I of the Act. It is submitted that in the present case when the LA is read as a whole, it is plain that the payment made, although in two parts, is for operating an executive lounge. The non-payment of even one component, as either of royalty or of the fee for the space, would entail the Assessee losing the right to operate the executive lounge. The payment therefore, fell within the ambit of 'rent' under Section 194-I of the Act.

14. As regards Question (ii) in the quantum appeals, Mr. Hossain

pointed out that the CIT (A) himself had remanded the matter to the AO for the proper computation of the interest payable. Mr. Hossain placed reliance on the decision of the Supreme Court in ***Hindustan Coca Cola Beverage (P) Limited v. Commissioner of Income Tax (2007) 8 SCC 463.***

15. In reply, Mr. Ajay Vohra, learned Senior counsel for the Assessee referred to the decision in ***Japan Airlines Co. Limited v. CIT (2013) 377 ITR 372 (SC)*** to draw a distinction between the payment of royalty which was for the right to operate the executive lounge, and which amount was quoted by the Assessee itself, and the amount paid to use the space where lounge was operated which alone could be characterized 'rent'. It was submitted that the intention of the parties had to be gathered from the LA which for that purpose had to be read as a whole. In the present case, in the context in which there was a bidding process preceding the grant of the licence in favour of the Assessee, the fixed royalty payment was in fact spread over the period of licence and therefore, it should be construed as payment of royalty in instalments.

16. Mr Vohra submitted that it was the payment for the use of space alone which could be construed as 'rent' for the purpose of Section 194-I of the Act. He submitted that the payment was for the grant of two different rights. Even where both the rights were granted under the same LA, the payments for each of them had to be treated as two distinct payments. He referred to the certificate issued by the AAI to the effect that both payments were distinct. Reliance was also placed on the decisions in ***CIT v. NIIT Limited (2009) 318 ITR 289 (Del)*** and ***TRIL***

Infopark Limited v. ITO (2016) 385 ITR 465 (Mad). In support of the proposition that the payment of royalty is essentially a payment for the 'right to do business', reliance was placed on the decision in ***Shankar Trading (P) Limited v. CIT 208 Taxman 526 (Del).*** In support of the contention that a term used in the statute should be contextually interpreted, reliance was placed by Mr. Vohra on the decision in ***CIT v. DLF Commercial Developers Limited (2013) 261 CTR 127 (Del).***

17. The relevant clauses in the LA have been extracted hereinabove. Although a plain reading of Clause 2 of the LA might show that the payment by the Assessee to the AI for the operation of the executive lounge at IGI Airport is split into two distinct parts viz., , royalty and the fees for the space, it is in effect a payment for the use of the lounge for the purposes of operating it. If there is a default in payment either of the components of the licence fee the inevitable consequence is that the Assessee loses the right to operate the executive lounge. This position is not even disputed by the Assessee.

18. Clause (i) (b) of the Explanation to Section 194 I of the Act states that the word "rent" for the purposes of that provisions 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 building". In ***Apeejay Surrendera Park Hotels Limited v. Union of India*** (*supra*), while interpreting the word 'rent' in Section 194-I of the Act, this Court summarized the legal position as under:

> "(i) The word 'rent' in Section 194-I of the Act has to be interpreted widely and not confined to payments received towards a 'lease, sub-lease or tenancy' or transactions of such like nature.

(ii) given the context of the said provision which is intended to cover a wide range of transactions as is evident from the words "any other agreement or arrangement" it is evident that the principles of ejusdem generis or noscitur a sociis cannot be invoked to narrow the scope of those words. The words "any payment" occurring in definition of 'rent' in the Explanation to Section 194-I is also indicative of the legislative intent to accord the widest possible meaning to the payment received as a result of any of the underlying transactions envisaged in that provision.

(iii) After the 46th amendment to the Constitution which inserted Article 366 (29A) the 'dominant purpose' test cannot form the sole basis for determining whether the payment received as consideration for the transfer of the right to use or enjoy a property is 'rent'. The context in which the word has been used, the particular statute in which it occurs and the legislative intent has to be taken into consideration in examining a narrower or a wider meaning has to be given to the word.

(iv) Even where the room charges collected by a hotel from its customer is not confined to the use of the space but to a host of facilities and amenities such payment would still fall within the ambit of 'rent' under Section 194-I of the Act."

19.1 In ***Japan Airlines Co. Limited v. CIT*** (*supra*) the above position was reiterated by the Supreme Court. There the question was whether the charges collected by the AAI for landing and parking of aircraft and other services and facilities offered in connection therewith could be characterized as 'rent' within the meaning of Section 194-I of the Act. In paras 14 and 15 of the said decision, the Court observed as under:

"14. From the reading of this Section, it becomes clear that TDS is to be made on the 'rent'. The expression 'rent' is given much wider meaning under this provision than what is normally known in common parlance. In the first instance, it means any payment which is made under any lease, sub-lease, tenancy. Once the payment is made under lease, sub-lease or tenancy, the nomenclature which is given is inconsequential. Such payment

under lease, sub-lease and/or tenancy would be treated as ‘rent’. In the second place, such a payment made even under any other 'agreement or arrangement for the use of any land or any building' would also be treated as 'rent'. Whether or not such building is owned by the payee is not relevant. The expressions 'any payment', by whatever name called and 'any other agreement or arrangement' have the widest import. Likewise, payment made for the 'use of any land or any building' widens the scope of the proviso.

15. In the present case, we find that these Airlines are allowed to land and take-off their Aircrafts at IGIA for which landing fee is charged. Likewise, they are allowed to park their Aircrafts at IGIA for which parking fee is charged. It is done under an agreement and/or arrangement with AAI. The moot question is as to whether landing and take-off facilities on the one hand and parking facility on the other hand, would mean to 'use of the land'.”

19.2 Thereafter in para 18, the Supreme Court observed as under:

> “18. We are convinced that the charges which are fixed by the AAI for landing and take-off services as well as for parking of aircrafts are not for the 'use of the land'. That would be too simplistic an approach, ignoring other relevant details which would amply demonstrate that these charges are for services and facilities offered in connection with the aircraft operation at the airport. To point out at the outset, these services include providing of air traffic services, ground safety services, aeronautical communication facilities, installation and maintenance of navigational aids and meteorological services at the airport.”

19.3. After discussing the various types of facilities that were offered for the payment made, the Court in ***Japan Airlines Co. Limited v. CIT*** (*supra*) held as under:

> “We have emphasised the technological aspects of these runways in some detail to highlight the precision with which designing and engineering goes into making these runways to be fool proof for safety purposes. The purpose is to show that the AAI is providing all these facilities for landing and take-off of an aircraft and in

this whole process, 'use of the land' pails into insignificance. What is important is that the charges payable are for providing of these facilities."

19.4 It was in the above context that the Supreme Court in ***Japan Airlines Co. Limited v. CIT*** (*supra*) reversed the decision of this Court which had held in favour of the Revenue. At the same time, the Supreme Court reiterated that the definition of 'rent' under Section 194-I of the Act had to be given the statute. In para 23 it is observed as under:

"23. At this stage, we would like to make one comment about the judgment of the Madras High Court. Madras High Court has given one more reason in support of its view that the charges paid by the Airlines to the AAI do not come within the definition of the 'rent' as defined under Section 194-I. The High Court has held that the words 'any other agreement or arrangement for the use of any land or any building' have to be read *ejusdem generis* and it should take it colour from the earlier portion of the definition namely "lease, sub-lease and tenancy". Thereby, it has tried to limit the ambit of words 'any other agreement or arrangement'. This reasoning is clearly fallacious. A bare reading of the definition of 'rent' contained in explanation to Section 194-I would make it clear that in the first place, the payment, by whatever name called, under any lease, sub-lease, tenancy which is to be treated as 'rent'. That is rent in traditional sense. However, second part is independent of the first part which gives much wider scope to the term 'rent'. As per this whenever payment is made for use of any land or any building by any other agreement or arrangement, that is also to be treated as 'rent'. Once such a payment is made for use of land or building under any other agreement or arrangement, such agreement or arrangement gives the definition of rent of very wide connotation. To that extent, High Court of Delhi appears to be correct that the scope of definition of rent under this definition is very wide and not limited to what is understood as rent in common parlance. It is a different matter that the High Court of Delhi did not apply this definition correctly to the present case as it failed to notice that in substance the charges paid by these airlines are not for 'use of land' but for other facilities and services wherein use of the land was only

> minor and insignificant aspect. Thus it did not correctly appreciate the nature of charges that are paid by the airlines for landing and parking charges which is not, in substance, for use of land but for various other facilities extended by the AAI to the airlines. Use of land, in the process, become incidental. Once it is held that these charges are not covered by Section 194-I of the Act, it is not necessary to go into the scope of Section 194-C of the Act."

20. The upshot of the above observation is that in each case the agreement in question has to be examined to ascertain if the payment is predominantly for the use of space. In the present case, the Assessee is permitted to operate an executive lounge. The question of being able to operate the lounge without the actual use of the space simply does not arise. The payment for the use of space is inseparable from the payment of royalty for the right to operate the lounge. Therefore, even applying the ratio of ***Japan Airlines Co. Limited v. CIT*** (*supra*) the only conclusion that can be drawn is that the payment of the sum by the Assessee to the AAI under the LA falls within the expanded definition of 'rent' under Section 194-I of the Act. The certificate issued by the AAI stating that the payment of licence fee for the space is different from the payment of royalty will not make a difference to the legal position as regards Section 194 I of the Act.

21. The decisions in ***CIT v. NIIT Limited*** (*supra*) and ***TRIL Infopark Limited v. ITO*** (*supra*) turned on their own facts. In ***TRIL Infopark Limited*** (*supra*) the payment of Rs. 1412 crores by the lessee to the lessor was determined in the competitive bidding that took place even before the joint venture partner in whose favour the lease was to be granted was incorporated. The said amount was to be paid as a lumpsum

to the lessor who in turn was required to make it over to the Government. It was in those circumstances that the Madras High Court held that "once it is understood to be a consideration paid to the Government, the question of deducting tax at source does not arise." The said decision is, therefore, of no of assistance to the Assessee in the present case.

22. In ***CIT v. NIIT Limited*** (*supra*) the question that arose was whether the Assessee was liable to deduct tax at source under Section 194-I of the Act in respect of the payments made to the franchisee under the head 'Infrastructural claims'. It was held on fact that the relationship between the parties was not of a lessor and lessee. The limited purpose was to run an education centre offering NIIT courses as specified in the franchisee agreement. Although the charges were broken up under two heads, viz., as marketing claim and infrastructure claim, there was no payment of 'rent' by the Assessee to the franchisee within the meaning of Section 194-I of the Act. This decision is , therefore, also not helpful to the Assessee here.

23. The Court is satisfied that in the present case, the payment made by the Assessee to AAI under the LA is 'rent' within the meaning of Section 194-I of the Act. Question (i) in the quantum appeals is, therefore, answered in the negative, i.e., in favour of the Revenue and against the Assessee.

24. Turning to the question (ii) both the parties have placed reliance on the decision of the Supreme Court in ***Hindustan Coca Cola Beverage (P) Limited v. Commissioner of Income Tax*** (*supra*). The Supreme

Court in that case referred to Circular dated 29th January 1997 issued by the CBDT which declared as under:

> "no demand visualised under Section 102 (1) of the Income Tax Act should be enforced after the tax deductor 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 under Section 201 (1-A) of the Act till the date of payment of taxes by the deductee assessee or the liability for penalty under Section 271-C of the Income Tax Act."

25. The matter stands already remanded to the AO to apply the aforementioned circular and give appeal effect accordingly. Question (ii) is answered by directing the AO to compute the interest liability in terms of Section 210 (1A) of the Act in terms of the decision in ***Hindustan Coca Cola Beverage (P) Limited v. Commissioner of Income Tax*** (*supra*) and the aforementioned circular dated 29th January 1997 and work out the appeal effect accordingly.

26. Turning now to the penalty appeals, there is merit in the contention of the Assessee that the question whether in the present case the payment of royalty for the right to operate the executive lounge is in fact 'rent' under Section 194-I of the Act, was a debateable issue. The fact that the LA termed this payment as 'royalty' may have given rise to a reasonable doubt whether it should nevertheless to be treated as 'rent'. The Court is of the view that in the circumstances, the Assessee can take advantage of the exemption provided under Section 273 B of the Act by contending that there were bonafide reasonable grounds for the Assessee not to have deducted tax at source from the payment made to AAI under the LA. This was not a case where the Assessee could be said to have deliberately avoided making payment of tax so as to attract penalty

under Section 271 C of the Act. The Court is unable to find any error having been committed by the ITAT in answering the said issue in favour of the Assessee.

27. Accordingly, the sole question framed by this Court in the penalty appeals is answered in the affirmative, i.e., in favour of the Assessee and against the Revenue.

28. The appeals are accordingly disposed of.

S. MURALIDHAR, J

PRATHIBA M. SINGH, J

JULY 04, 2017
b'nesh/Rm