$~

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

1.

\+ **ITA 257/2015**

COMMISSIONER OF INCOME TAX-VI ..... Appellant
Through: Mr. Rohit Madan, Senior Standing counsel.

versus

ZEBIAN REAL ESTATE PVT.LTD. ..... Respondent
Through: Ms. Kavita Jha and Ms. Mehak Gupta, Advocates.

AND

2.

\+ **ITA 270/2015**

PR. CIT-7 ..... Appellant
Through: Mr. N. P. Sahni, Senior Standing counsel.

versus

PENTHEA BUILDERS AND DEVELOPERS PVT. LTD. ..... Respondent
Through: Ms. Kavita Jha and Ms. Mehak Gupta, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

O R D E R

% 05.11.2015

1. Both these appeals arise in the background of similar facts and are

accordingly being disposed of by the present common order.

2. ITA No. 257 of 2015 is directed against an order dated 12th April 2013 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA No. 1429/Del/2011 for Assessment Year ('AY') 2007-08. That order is common to two appeals before the ITAT - one appeal was by Zebian Real Estate Pvt. Ltd. ('ZREPL') (in respect of which the appeal has been filed by the Revenue in this Court) and the other by Zanobi Builders & Constructions Pvt. Ltd. ('ZBCPL'). As noticed by this Court in its order dated 20th October 2015, no appeal has been filed by the Revenue as regards the order of the ITAT in the case of ZBCPL. In fact in the present appeal by the Revenue i.e. ITA No. 257 of 2015 there was a mistake as regards the name of the Respondent and that was permitted to be corrected by the order dated 31st August 2015. The net result is that although the impugned order dated 12th April 2013 of the ITAT is common to two appeals of the Assessees both of which were allowed by the ITAT, the Revenue has filed an appeal only in respect of one of the Assessees i.e. ZREPL.

3. In ITA No. 257 of 2015, the question sought to be urged by the Revenue is whether the ITAT has erred in holding that ZREPL was not required to

deduct tax at source under Section 194H of the Income Tax Act, 1961 ('Act') with regard to the payment made by it to Vikram Electric Equipment Pvt. Ltd. ('VEEPL') and in deleting the proportionate disallowance of the amount ordered by the Assessing Officer ('AO'), as confirmed by the Commissioner of Income Tax (Appeals) ['CIT (A)'], under Section 40(a)(ia) of the Act.

4. ITA No. 270 of 2015 is directed against the order dated 17th October 2014 passed by the ITAT in ITA No.1951/Del/2011 for the AY 2007-08. The question sought to be urged by the Revenue in this appeal also concerns the payment by the Assessee Penthea Builders & Developers Pvt. Ltd. ('PBDPL') to the same VEEPL. The case of the Revenue is that the said payment was not allowable under Section 40(a)(ia) of the Act and that in any event there should have been a deduction of tax at source while making the said payment under Section 194H of the Act.

5. The common feature in both orders of the ITAT i.e. the order dated 12th April 2013 in ITA No.1429/Del/2011 (***Zebian Real Estate Pvt. Ltd. v. CIT***) and the order dated 17th October 2014 in ITA No.1951/Del/2011 (***Penthea Builders & Developers Pvt. Ltd. v. CIT***) is that the ITAT has while allowing

the appeals of the Assessees relied upon its earlier order dated 5th October 2011 in ITA No. 2361/Del/2011 ***ITO v. Finian Estates Developers P. Ltd.*** **[2012] 23 taxmann.com 360 (Delhi - Trib.)**.

6. At the outset it requires to be noticed that against the aforementioned order of the ITAT in ***ITO v. Finian Estates Developers P. Ltd.*** although the Revenue did file an appeal in this Court being ITA No. 234 of 2012, the Revenue did not urge a question in that appeal regarding the payment made to VEEPL. The said appeal ITA No. 234 of 2012 filed by the Revenue was dismissed by this Court on 26th August 2015 in terms of the Court's decision dated 15th July 2015 in ITA No. 627 of 2012 and ITA No. 507 of 2013 (***CIT v. DLF Commercial Project Corporation***). As a result, the decision of the ITAT in ***ITO v. Finian Estates Developers P. Ltd.***, including its decision on the payment to VEEPL attained finality.

7. Nevertheless, the attempt by the Revenue in both these appeals is to show that the facts of the present cases are different from the facts in ***ITO v. Finian Estates Developers P. Ltd.*** and, therefore, notwithstanding the fact that the decision of the ITAT in ***ITO v. Finian Estates Developers P. Ltd.*** has attained finality, the Court should nevertheless entertain these appeals.

8. In order to examine the above contention, the Court has perused the orders of the AO, the CIT (A) as well as the ITAT in the case of ***ITO v. Finian Estates Developers P. Ltd.*** Further the Court has also been shown the notes submitted before the AO by the Assessee in the assessment proceedings in that case. The Court has also examined the Memorandum of Understanding ('MoU') entered into between Finian Estates Developers (P). Ltd. and VEEPL as well as MoUs entered into separately between ZREPL and PBDPL with VEEPL.

9. It may briefly be noted that both ZREPL and PBDPL are in the business of acquiring and developing land. They entered into separate development agreements with M/s. DLF Commercial Projects Corporation Ltd. ('DLF'), described as the 'Developer' for purchase of land in Gurgaon. The understanding was that ZREPL and PBDPL would acquire ownership of land and also obtain licenses from the Director, Town & Country Planning, Chandigarh for developing the land. Subsequently, they were to sell the development rights to DLF for consideration. ZREPL and PBDPL in turn appointed VEEPL as a 'Consolidator' to acquire the land. They entered into separate MoUs with VEEPL for that purpose. The understanding was that

payments by way of commission would be made to VEEPL only after it was able to acquire at least 27 acres of land.

10. One of the issues that arose even in the case of Finian Estates Developer (P) Ltd. ('Finian') was the nature of the payments made to VEEPL and whether it is a fee for services rendered which required deduction of tax at source. That question was decided against Finian both by the AO and the CIT (A). The appeal by Finian before the ITAT on the said aspect being ITA No. 1953/Del/2011 came to be allowed in its favour by the order dated 5th October 2011 of the ITAT. The precise question in the appeal by Finian was whether the CIT (A) had erred in upholding the order of the AO disallowing a sum of Rs.1,24,33,326 paid by Finian to VEEPL for transfer of rights under Section 40(a)(ia) of the Act. The corresponding question was whether Finian was required to deduct TDS from that sum under Section 149H of the Act.

11. In its order dated 5th October 2011, the ITAT examined the nature of the MoU between Finian and VEEPL with particular reference to the clauses therein and concluded that Finian was transacting with VEEPL "on a principal to principal basis" and that it could not be said that the payment to

VEEPL was for rendering services. Consequently, it was held that Section 194H of the Act was "not at all applicable". The ITAT noted that in terms of Clause 3.2 of the MoU no sum was due to be paid to VEEPL for the services rendered by it till it procured 27 acres of land. The amount paid to VEEPL was duly reflected by Finian in its purchases and the closing stock and no sales had been made during the year in question. The payment of 2% of the sale amount to VEEPL as consideration for transferring VEEPL's rights in the land was in terms of Clause 3.2 of the MoU and it had not been shown that such payment was not a fair compensation.

12. As already noticed hereinbefore, no appeal was filed by the Revenue in this Court against the decision of the ITAT on the above aspect in the case of Finian.

13. Turning to ITA No. 257 of 2015 filed by the Revenue in the case of ZREPL one of the pleas urged is that although the Consolidator VEEPL was same in both cases, the terms and conditions in the MoU with the 'acquirer' were different. It is submitted that while in the case of Finian the Consolidator invested its own funds for purchasing the land for the 'acquirer' in the present case of ZREPL the acquirer paid from its own

funds. However, learned counsel for the Revenue has been unable to show any difference in the actual clauses of the MoU between ZREPL and VEEPL when compared to the MoU between Finian and VEEPL. In the circumstances, the Court is unable to appreciate on what basis it could be said that the arrangement between ZREPL and VEEPL was not on a 'principal to principal' basis. With the Revenue having accepted the decision of the ITAT in the case of ***ITO v. Finian Estates Developers P. Ltd.***, and with there being nothing to distinguish it in relation to the case of ZREPL, the Court is not inclined to interfere with the impugned order of the ITAT which, in the opinion of the Court, has rightly relied upon its earlier decision in the case of Finian.

14. Turning to ITA No. 270 of 2015 being the Revenue's appeal in the case of PBDPL, an earnest effort was made by Mr. N.P. Sahni, learned Senior Standing counsel for the Revenue, to show that in the assessment proceedings before the AO the payment to VEEPL was not one of the issues considered. However from the written note of submissions by the Assessee before the AO during the assessment proceedings, it is seen that a specific submission was made on the payment to VEEPL. It was urged by the Assessee that the said payment was for transfer of the right in the land

purchased by it and did not attract TDS. It was further urged that "the Assessee company has not taken any such type of service from M/s. Vikram Electric Equipment Pvt. Ltd. which is covered under the provision of Section 40(a) (ia) of the Act." The AO in the assessment order did make a reference to the figure of purchase of lands having been inflated by the Assessee by a sum of Rs.4,20,15,681 being the amount paid to VEEPL. This was disallowed since according to the AO any payment whatsoever made to VEEPL would accrue only when 27 acres of land would be acquired. The AO correspondingly reduced the value of the closing stock by the said sum. When the matter travelled to the CIT (A) by way of PBDPL's appeal, there was an extensive discussion in the order of the CIT (A) with regard to the payment made to VEEPL which was corrected as Rs.1,24,33,326. It was held that "this amount is related to payment of service charge for effecting consolidation of land and is a revenue expense to (be) separately debited to the Profit & Loss account." The CIT (A)) upheld the order of the AO.

15. In the appeal filed by the Revenue before this Court, there is no averment that the ITAT erred in relying on its own decision in Finian. There is no averment that the clauses of the MoU entered into between Finian and VEEPL are different from the MoU between PBDPL and VEEPL. There is

no plea that the earlier decision of the ITAT in Finian is in any manner distinguishable in relation to the facts of PBDPL.

16. Having considered at length the submissions of learned counsel for the Revenue, the pleadings and the documents not only in the case of PBDPL but also in the case of Finian, the Court is unable to find any distinction between the two cases as far as the clauses in the MoU between the parties and VEEPL or the payment made to the latter pursuant thereto. Again, with the Revenue having accepted the decision of the ITAT in the case of Finian, and with the Revenue being unable to bring out any distinguishing feature as far as the case of PBDPL, the Court sees no reason why it should interfere with the impugned order of the ITAT.

17. Consequently, no substantial question of law arises in either appeal. The appeals are dismissed.

S. MURALIDHAR, J

VIBHU BAKHRU, J

NOVEMBER 05, 2015/dn