

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'F' NEW DLEHI**

**BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER
AND
SHRI K. NARASIMHA CHARY, JUDICIAL MEMBER**

**ITA No. 1034/Del/2018
Assessment Year: 2011-12**

Perfect Probuild P. Ltd., 2nd Floor, vs. DCIT, Circle 76(1),
Plot No. 2, Commercial Complex, New Delhi.
Dwarka, New Delhi.

PAN : AAACP8053H
(Appellant)

(Respondent)

Appellant by : Sh. Ved Jain, Advocate
Respondent by: Sh. Farhat Khan, Sr. DR

Date of hearing: 07/07/2021
Date of order : 05/08/2021

ORDER

PER K. NARASIMHA CHARY, J.M.

Aggrieved by the order dated 20/03/20178 passed by the Commissioner of Income Tax (Appeals)-41, New Delhi ("Ld. CIT(A)") in the case of Perfect Probuild Pvt. Ltd. ("the assessee"), for the assessment year 2011-12, assessee preferred this appeal.

2. Brief facts of the case are that the assessee is a private limited company engaged in the business of construction. Assessee had a lease agreement with Noida Authority executed on 04/06/2010 whereby the assessee is a lessee and paid lease rent to the tune of Rs.81,56,567/- to the Noida Authority. Assessee did not deduct TDS on such payment made

for annual lease rent on the basis of letter given by the Noida Authority. So also during the year, assessee made certain payments in respect of advertisement expenses to the tune of Rs.9,47,429/- and the assessee deducted TDS at 2% u/s. 194C of the Income-tax Act, 1961 ("the Act").

3. Assessee was issued notice u/s. 201(1)/201(1A) of the Act and was asked to submit the details of TDS deducted in respect of both these payments.

4. In so far as the lease rent is concerned, assessee submitted copy of lease deed as well as copy of letter issued by Noida Authority for non-deduction of tax at source. So also, the assessee pleaded in respect of advertisement expenses that such payment is covered by section 194C and TDS at 2% was proper.

5. Learned Assessing Officer, however, observed that the assessee was required to deduct TDS u/s. 194J of the Act on the payment of Rs.81,56,567/- and on that premise, created a demand of Rs.8,15,656/- on account of non-deduction of tax u/s. 201(1) and Rs.4,81,237/- on account of interest liability in respect of such non-deduction u/s. 201(1A) of the Act.

6. Similarly, in respect of advertisement expense, learned Assessing Officer was of the opinion that the TDS was to be deducted at 10% u/s. 194J, but not at 2% u/s. 194C, inasmuch as there was no contract for providing advertisement services. On that account, he raised a demand of Rs.9,47,429/- u/s. 201(1) and interest at Rs. 5,08,213/- u/s. 201(1A) of the Act, put together at Rs.14,55,642/- for short deduction of TDS on payment of advertisement expenses.

7. When the assessee preferred appeal, learned CIT(A) gave relief to the assessee in part by directing the deletion of the demand on account of non-deduction of tax basing on the decision of Hon'ble Jurisdictional High Court in the case of Rajesh Projects (India) Ltd. vs. CIT (2017) 78 taxmann.com 263 (Delhi). Learned CIT(A), however, confirmed the interest liability u/s. 201(1A) holding that even if the assessee is not to be treated as assessee in default, it does not absolve the assessee from interest liability u/s. 201(1A) of the Act and directed the learned Assessing Officer to re-compute the interest upto the date of filing the return of the deductee. Learned CIT(A), however, confirmed the action of the Assessing Officer in raising the demand for Rs.14,55,642/- u/s. 201(1) and 201(1A) of the Act in respect of advertisement expenses for not deducting TDS at 10% u/s. 194J of the Act. Aggrieved by this action of the Id. CIT(A), assessee preferred this appeal.

8. In so far as the lease rent payment is concerned, facts are not in dispute. By placing reliance on the decision of Hon'ble jurisdictional High Court in the case of Rajesh Projects (India) Ltd. (supra), learned CIT(A) rightly held that the assessee is not liable to be treated as an assessee in default, as the assessee was prevented from deducting TDS by Noida Authority by issue of letter and if the amount of lease rent is accounted for by the Noida Authority in view of first proviso to section 201(1), the said fact was to be verified and the demand to the tune of Rs.8,15,656/- has to be deleted. Since the Revenue does not dispute the correctness of this finding, what remains to be considered by us in this appeal is the interest liability u/s. 201(1A) and the finding of the authority below that

even if the assessee is not to be treated as an assessee in default, it does not absolve the assessee from interest liability u/s. 201(1A) of the Act.

9. Learned AR places reliance on the decision in the case of Prateek Buildtech (India) Pvt. Ltd. v. ACIT, 2020(3) TMI 224-ITAT Delhi and M/s. Skytech Construction Pvt. Ltd. vs. ITO(TDS)- 2019 (12) TMI 601-ITAT Delhi and submitted that the issue is no longer *res integra* and in the above two decisions, the Tribunal noticed the directions of Hon'ble jurisdictional High court in the case of Rajesh Projects (supra) to the effect that GNoida was ensured that the reimbursement is made to compensate the petitioner's excess payments; the income tax authorities shall not pursue any coercive methods for recovery of the amounts, penalty, once the basic liability (with interest to be paid by GNoida) is satisfied and decided the issue in favour of the assessee. Learned DR places reliance on the findings of the authorities below.

10. In Prateek Buildtech (supra), a coordinate Bench of this Tribunal held that when once the basic liability of reimbursement by GNoida is made, the authority shall not pursue any coercive method. Same is the finding in M/s. Skytech Construction (supra). Facts involved in these two cases are similar to the facts involved in the case on hand. Since the issue is covered by the view taken by coordinate Benches in two matters, while respectfully following the same, we restore the issue to the learned Assessing Officer with the direction to verify whether the NOIDA has payments of the basic TDS liability along with the interest; that the assessee shall cooperate and provide relevant information required by the Assessing Officer and if after verification, it is found that the basic TDS liability and interest thereon has already been paid by the NOIDA,

then no such liability shall be raised on the assessee. With these observations, we allow ground No. 3 for statistical purposes.

11. Now coming to the advertisement expenses, a reading of section 194C with Explanation (iv) thereof makes it clear that any person responsible for paying any sum to any resident for carrying out the work of advertising, broadcasting and telecasting shall deduct an amount equivalent to 1% where the payment is being made to an individual and at 2% in other cases. Learned Assessing Officer was of the view that the provisions of section 194J are applicable because there is no contract between the assessee and the advertising agency in this case and therefore, such payments have to be treated as payments by way of fee for professional services.

12. It could be seen that the word "advertising" has been clarified by CBDT in Circular No. 714 dated 03/08/1995 while stating that according to the amended provisions, tax has to be deducted @ 1% in case of advertising and at 2% in other cases. It is further stated in Circular No. 714 that fee for professional or technical services to be formed u/s. 194J would mean the services rendered by a person in the course of carrying on legal, medical, engineering or the profession of accountancy or technical consultancy or interior decoration or advertising or such activity as is notified by the Board for the purpose of section 44AA or section 194J. This circular makes it clear that the tax will be deducted at source u/s. 194J from the payments made for professional services, when advertising agency makes payment for professional services to a film artist such as an actor, a cameraman, a director etc., in which case the tax will be deducted at 5%.

13. Further Circular No. 4 clarifies the distinction between the payments by a person to the advertising agency and the payments made by advertising agency to the television channel or newspaper company etc. A reading of Circular No. 714 and 4 makes it amply clear that when a person makes a payment to advertising agency, such payments are covered by section 194C whereas if the advertising agency makes any payment to a film artist such as an actor, a cameraman, a director etc., it would be covered by section 194J. This distinction is based on the fact that when the advertising agency makes such payments to a film artist, the intellectual property in the contents will be acquired by the advertising agency and the services secured are only broadcast and telecast and nothing more.

14. Further, a contract need not always be in writing and could be implied also. In the circumstances, we find that the payment made by the assessee for advertisement in connection with their business falls within the ambit of section 194C and not section 194J. Ground Nos. 2 & 4 are, accordingly, allowed. Learned Assessing Officer is directed to delete the addition.

15. In the result, the appeal is partly allowed for statistical purposes.

Order pronounced in the open court on this the 5th day of August, 2021.

Sd/-

(R.K. PANDA)
ACCOUNTANT MEMBER

Dated: 05/08/2021

'aks'

Sd/-

(K. NARSIMHA CHARY)
JUDICIAL MEMBER