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

% **Judgment reserved on: 15 January 2024**
Judgment pronounced on: 13 February 2024

\+ W.P.(C) 9483/2019 & CM APPL 39041/2019

PURI CONSTRUCTIONS PRIVATE LIMITED ..... Petitioner
Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh & Mr. Chetan Kumar, Advs.

versus

ADDITIONAL COMMISSIONER OF INCOME TAX & ORS. .... Respondents
Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary, Mr. Aditya Gupta & Mr. Navin Rohila, Advs.

\+ W.P.(C) 11232/2019 & CM APPL. 46219/2019

NATUREVILLE PROMOTERS PRIVATE LIMITED ..... Petitioner
Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 3850/2021

RPS INFRASTRUCTURE LIMITED ..... Petitioner
Through: Mr. Ved Jain, Mr. Nischay Kantoor & Mr. Soniya Dodeja, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-78, TDS-02 ..... Respondent

Through: Mr. Sanjay Kumar, Ms. Easha & Ms. Hemlata Rawat, Advs.

\+ W.P.(C) 4909/2023

M/S RAMPRASTHA ESTATES PVT. LTD ..... Petitioner
Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Ms. Bakshi Vinita, SPC for R-1/ UOI.

\+ W.P.(C) 4097/2021 & CM APPLs. 21620/2021, 21621/2021

NOVA REALTORS PVT LTD ..... Petitioner
Through: Mr. Satyen Sethi & Mr. Arta Trana Panda, Advs.

versus

INCOME TAX OFFICER ..... Respondent
Through: Mr. Sanjay Kumar, Ms. Easha & Ms. Hemlata Rawat, Advs.

\+ W.P.(C) 4281/2021 & CM APPL. 47286/2021

M/S ALPHA CORP DEVELOPMENT PVT LTD ..... Petitioner
Through: Mr. Debesh Panda & Mr. Kanishk Aggrawal, Advs.

versus

ASSISTANT COMMISISONER OF INCOME TAX & ANR. ..... Respondents
Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, Advs. for Income Tax.
Mr. Hemant Gupta, Ms. Shivang Jain & Ms. Swati Tiwari, Advs. for R-2.

\+ W.P.(C) 11552/2021 & CM APPL. 35649/2021

M/S VIPUL SEZ DEVELOPERS PVT. LTD. ..... Petitioner
Through: Mr. Sumit K. Batra, Mr. Manish Khurana, Ms. Priyanka Jindal, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Asheesh Jain, CGSC with Mr. Gaurav Jain, Adv. for R-1.
Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 4778/2021 & CM APPLs. 14735/2021, 22303/2021

M/S ALPHA CORP DEVELOPMENT PVT. LTD. ..... Petitioner
Through: Mr. Debesh Panda & Mr. Kanishk Aggrawal, Advs.

versus

INCOME TAX OFFICER & ANR. ..... Respondent
Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, Advs. for Income Tax.
Mr. Hemant Gupta, Ms. Shivang Jain & Ms. Swati Tiwari, Advs. for R-2.

\+ W.P.(C) 5319/2021 & CM APPL. 16386/2021

COUNTRYWIDE PROMOTERS PVT. LTD. ..... Petitioner
Through: Mr. Piyush Kaushik, Adv.

versus

COMMISSIONER OF INCOME TAX (TDS)-1, DELHI & ANR. ..... Respondents
Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, Advs. for Income Tax.

\+ W.P.(C) 5683/2021 & CM APPL. 17766/2021

M/S RAMPRASTHA ESTATES PVT. LTD. ..... Petitioner
Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ravi Prakash, CGSC with Ms. Usha Jamnal, Adv. for Resp./UOI.
Mr. Sunil Agarwal, Sr. SC with Mr. Shivansh Pandya, Mr. Utkarsh Tiwari, Advs.

\+ W.P.(C) 5715/2021 & CM APPL. 17894/2021

M/S FLORENTINE ESTATES OF INDIA LTD. ..... Petitioner
Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Ravi Prakash, CGSC with Ms. Usha Jamnal, Adv. for Resp./UOI.
Mr. Sunil Agarwal, Sr. SC with Mr. Shivansh Pandya, Mr. Utkarsh Tiwari, Advs.

\+ W.P.(C) 11531/2021 & CM APPL. 35542/2021

M/S VIPUL SEZ DEVELOPERS PVT. LTD. ..... Petitioner
Through: Mr. Sumit Batra, Mr. Manish Khurana, Ms. Priyanka Jindal, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents
Through: Mr. Asheesh Jain, CGSC with Mr. Gaurav Jain, Adv. for R-1.
Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 299/2022 & CM APPL. 848/2022

RAHEJA DEVELOPERS LIMITED ..... Petitioner
Through: Mr. Pratyush Raj & Ms. Riddhi Jain, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 78(1) DELHI AND ORS. ..... Respondents
Through: Ms. Akanksha Kaul, Ms. Versha Singh, Advs. for UOI.
Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 4033/2022 & CM APPL. 12047/2022

RAHEJA DEVELOPERS LIMITED ..... Petitioner
Through: Mr. Pratyush Raj & Ms. Riddhi Jain, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ORS. ..... Respondents
Through: Ms. Akanksha Kaul, Ms. Versha Singh, Advs. for UOI.
Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 4498/2022 & CM APPL. 13457-13458/2022

BENCHMARK INFOTECH PVT LTD ..... Petitioner
Through: Mr. Satyen Sethi & Mr. Arta Trana Panda, Advs.

versus

INCOME TAX OFFICER TDS WARD73(3) ..... Respondent
Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, Advs. for Income Tax.

\+ W.P.(C) 4554/2022 & CM APPL. 13664-13665/2022

RPS INFRASTRUCTURE LIMITED ..... Petitioner

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Mr. Soniya Dodeja, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE-78-1 & ANR. ..... Respondents

Through: Mr. Sanjay Kumar, Ms. Easha & Ms. Hemlata Rawat, Advs.

\+ W.P.(C) 4647/2022 & CM APPL. 13960/2022

RPS INFRASTRUCTURE LIMITED ..... Petitioner

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Mr. Soniya Dodeja, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE- 78-1 & ANR. ..... Respondents

Through: Mr. Sanjay Kumar, Ms. Easha & Ms. Hemlata Rawat, Advs.

\+ W.P.(C) 5365/2022 & CM APPL. 16059/2022

ONE POINT REALITY PVT LTD ..... Petitioner

Through: Mr. Salil Kapoor, Ms. Ananya Kapoor, Mr. Utkarsh Kumar Gupta, Mr. Tarun Chanana & Mr. Sumit Lalchandani, Advs.

versus

INCOME TAX OFFICER, WARD 76(2) & ANR. ..... Respondents

Through: Mr. Kamal Kant Jha, Sr. PC with Mr. Avinash Singh, Adv. for UOI.
Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 5367/2022 & CM APPL. 16062/2022

ONE HEIGHT COLONIZERS PVT. LTD. ..... Petitioner
Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

versus

INCOME TAX OFFICER, WARD 76(2) & ANR. ..... Respondents
Through: Mr. Sanjay Kumar, Ms. Easha & Ms. Hemlata Rawat, Advs.

\+ W.P.(C) 6552/2022 & CM APPL. 19907-19908/2022

JAGRAN DEVELOPERS PVT. LTD. ..... Petitioner
Through: Ms. Ananya Kapoor & Mr. Utkarsh Kumar Gupta, Advs.

versus

NATIONAL FACELESS ASSESSMENT CENTRE ..... Respondent
Through: None

\+ W.P.(C) 6558/2022 & CM APPL. 19924-19925/2022

JAGRAN DEVELOPERS PVT. LTD. ..... Petitioner
Through: Ms. Ananya Kapoor & Mr. Utkarsh Kumar Gupta, Advs.

versus

NATIONAL FACELESS ASSESSMENT CENTRE ..... Respondent
Through: None

\+ W.P.(C) 6631/2022 & CM APPL. 20143-20144/2022

ANSAL PROPERTIES AND INFRASTRUCTURE LTD ..... Petitioner
Through: Mr. Tapas Ram Mishra, Adv.

versus

DY COMMISSIONER OF INCOME
TAX CIRCLE 73(1) ..... Respondent

Through: Mr. Aseem Chawla, Sr. SC with Ms. Pratishtha Chaudhary, Mr. Aditya Gupta, Mr. Navin Rohila, Advs. for Revenue.

\+ W.P.(C) 6694/2022 & CM APPL. 20332-20333/2022

M/S FLORENTINE ESTATES OF INDIA LTD. ..... Petitioner

Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Ravi Prakash, CGSC with Ms. Usha Jamnal, Adv. for Resp./UOI.
Mr. Sunil Agarwal, Sr. SC with Mr. Shivansh Pandya, Mr. Utkarsh Tiwari, Advs.

\+ W.P.(C) 6737/2022 & CM APPL. 20450-20451/2022

ACTIVE PROMOTERS PRIVATE LIMITED ..... Petitioner

Through: Mr. Salil Kapoor, Ms. Ananya Kapoor, Mr. Utkarsh Kumar Gupta, Mr. Tarun Chanana & Mr. Sumit Lalchandani, Advs.

versus

INCOME TAX OFFICER WARD
73(1), DELHI ..... Respondent

Through: Mr. Aseem Chawla, Sr. SC with Ms. Pratishtha Chaudhary, Mr. Aditya Gupta, Mr. Navin Rohila, Advs. for Revenue.

\+ W.P.(C) 6893/2022 & CM APPL. 21015/2022

M/S OMAXE LTD ..... Petitioner

Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ORS. ..... Respondents

Through: Mr. Vipul Agrawal, SSC with Mr. Gibran Naushad & Ms. Sakshi Shairwal, Adv. for R- 1 & R-3.

\+ W.P.(C) 7978/2022 & CM APPLs. 24381/2022, 36849/2022

RAHEJA DEVELOPERS LIMITED ..... Petitioner

Through: Mr. Pratyush Raj & Ms. Riddhi Jain, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ORS. ..... Respondents

Through: Ms. Akanksha Kaul, Ms. Versha Singh, Advs. for UOI.
Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 9236/2022 & CM APPL. 27686/2022

M/S TS REALTECH PVT. LTD ..... Petitioner

Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Gigi C. George & Mr. Dheeraj Singh, Advs. for Resp./UOI.
Mr. Aseem Chawla, Sr. SC with Ms. Pratishtha Chaudhary, Mr.

Aditya Gupta, Mr. Navin Rohila, Advs. for Revenue.

\+ W.P.(C) 11184/2022 & CM APPL. 32877/2022

M/S ONE POINT REALITY PRIVATE LIMITED ..... Petitioner

Through: Mr. Salil Kapoor, Ms. Ananya Kapoor, Mr. Utkarsh Kumar Gupta, Mr. Tarun Chanana & Mr. Sumit Lalchandani, Advs.

versus

INCOME TAX OFFICER WARD 76(2), DELHI .. Respondent

Through: Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 11220/2022 & CM APPL. 32975/2022

M/S ONE POINT REALITY PRIVATE LIMITED ..... Petitioner

Through: Mr. Salil Kapoor, Ms. Ananya Kapoor, Mr. Utkarsh Kumar Gupta, Mr. Tarun Chanana & Mr. Sumit Lalchandani, Advs.

versus

INCOME TAX OFFICER WARD 76(2), DELHI ..... Respondent

Through: Mr. Zoheb Hossain, SSC with Mr. Sanjeev Menon, JSC.

\+ W.P.(C) 11706/2022 & CM APPL. 34819/2022 (Ex.)

M/S PURI CONSTRUCTION LIMITED ..... Petitioner

Through: Mr. Puneet Agarwal, Mr. Yuvraj Singh, Mr. Chetan Kumar, Advs.

versus

UNION OF INDIA & ORS. ..... Respondents

Through: Mr. Bhagwan Swaroop Shukla,

CGSC with Mr. Vinay Shukla & Mr. Sharvan Kumar Shukla, Advs. for Resp./UOI.
Mr. Kunal Sharma, Ms. Zehra Khan, SSCs with Mr. Shubhendu Bhattacharyya, Adv.

\+ W.P.(C) 4920/2023 & CM APPL. 19028-19029/2023

BRAHMA CITY PRIVATE LIMITED ..... Petitioner
Through: Mr. Salil Kapoor, Ms. Ananya Kapoor, Mr. Utkarsh Kumar Gupta, Mr. Tarun Chanana & Mr. Sumit Lalchandani, Advs.

versus

INCOME TAX OFFICER WARD 73 3 DELHI & ANR. ..... Respondents
Through: Mr. Puneet Rai, Mr. Ashvini Kumar, Mr. Rishabh Nangia, Advs. for Income Tax
Mr. Bhagwan Swaroop Shukla, CGSC with Mr. Vinay Shukla & Mr. Sharvan Kumar Shukla, Advs. for Resp./UOI.

\+ W.P.(C) 5313/2023 & CM APPL 20713/2023

CHINTELS INDIA PVT LTD. ..... Petitioner
Through: Mr. Kapil Goel & Mr. Sandeep Goel, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE 73(1), DELHI ..... Respondent
Through: Mr. Aseem Chawla, SSC with Ms. Pratishtha Chaudhary, Mr. Aditya Gupta & Mr. Navin Rohila, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

J U D G M E N T

YASHWANT VARMA, J.

1. This batch of writ petitions assail the action initiated by the respondents predicated upon a purported failure on the part of the writ petitioners to deduct tax on payments made to the **Haryana Shahari Vikas Pradhikaran**[1] (earlier known as the Haryana Urban Development Authority, for short "HUDA") under Section 194C of the **Income Tax Act, 1961**[2]. The respondents assert that the **External Development Charges**[3] which were paid by the writ petitioners to HSVP albeit on the directions of the Director General, **Department of Town and Country Planning**[4], Haryana, a department functioning under the Government of Haryana, would clearly fall within the ambit of Section 194C of the Act and as a consequence of default, the petitioners are liable to be proceeded under Section 201 as also to answer why penalty be not levied in terms of Section 271C of the Act.

2. We at the outset deem it appropriate to note and observe that we have heard learned counsels for respective sides solely on the question of whether the payment of EDC would fall within the ambit of Section 194C of the Act and whether the writ petitioners can be held liable to have deducted tax at source in terms of that provision. We thus propose to principally answer the primary question and consequentially leave it open for the writ petitioners as well as the respondents to proceed further in respect of notices that may have been issued referable to

[1] HSVP
[2] The Act
[3] EDC
[4] DTCP

Sections 201 and Section 271C of the Act in accordance with the present judgment.

3. Since the questions raised were found to be common, we propose to briefly notice the salient facts as they obtain in W.P.(C) 11232/2019 and W.P.(C) 3850/2021. It may also be noted that the facts of each writ petition forming part of this batch and the status of individual cases has been gleaned from a detailed chart which was placed by the respondents and forms part of the record.

4. **Natureville Promoters Private Limited**[5] has preferred the aforenoted writ petition seeking the following reliefs:-

> "(a) Quash and set aside the CIRCULAR F. NO. 370133/37/2017 - TPL Dated 23.12.2017 (Annexure -12);
>
> (b) Quash and set aside the Notices issued under Section 201(1)/ Section 201(1A) of the Income Tax Act dated 22.03.2017, 31.03.2017, 10.08.2017 and 19.07.2019 [(Annexure 3, 4, 8 (colly) and 16 (colly)].
>
> (c) Quash and set aside the provisions of Section 4(1), and Section 2(31)(vi) being violative of the Article 289 of the Constitution of India imposing tax on income of State;
>
> (d) Declare that the EDC is not leviable to Income tax, and there is no liability to deduct TDS on the same under the Income Tax Act, 1961;
>
> (e) Prohibit and restrain the respondents from proceeding further with the matter;
>
> Pass such other order(s) or further orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the case, for which act of kindness the Petitioner as is duty bound shall ever pray."

5. It must at the outset be noted that although a challenge to the validity of Sections 4(1), Section 2(31)(vi) of the Act also appears to form part of the writ petition, no arguments on that score were

[5] Natureville Promoters

addressed before us. **RPS Infrastructure Limited**[6] raises a similar challenge as would be evident from the reliefs which are sought in the petition:

> "A. Issuance of writ in the nature of Certiorari, Mandamus, Prohibition or any other appropriate writ, order or direction for quashing the impugned show cause notice dated 12.03.2021 issued by the Respondent being illegal, arbitrary and not legally sustainable in the eyes of law;
>
> B. Issuance of a writ, order and/or directions in the nature of certiorari, prohibition, mandamus or any other appropriate writ, order or direction staying the operation of the impugned show cause notice dated 12.03.2021 issued by the Respondent.
>
> C. Issuance of a writ, order and/or directions in the nature of certiorari, prohibition, mandamus or any other appropriate writ, order or direction staying all consequential proceedings, that may be initiated pursuant to the impugned notice under challenge issued under section 201(1)/201(1A) by the Respondent in the case of Petitioner for FY 2013-14.
>
> D. Grant an ad-interim ex parte stay in terms of prayers (a), (b) and (c) above;
>
> E. Issuance of a writ in the nature of mandamus or any other writ, order or direction, as deemed fit and proper in the facts and circumstances of the present case.
>
> It is further prayed that during the pendency of the present writ petition, the further proceeding before the Respondent may kindly be stayed in the interest of justice and equity."

6. Natureville Promoters is stated to be engaged in the business of construction, promotion and development of land and real estate. It was granted license no. 99 of 2010 in Form LC-V dated 30 November 2010 under the provisions of the **Haryana Development and Regulation of Urban Areas Act, 1975**[7] for carrying out a development project in collaboration with Puri Constructions Pvt. Ltd. It also appears to have entered into a bilateral agreement in Form LC-IV with the DTCP in

[6] RPS Infrastructure

[7] HDRUA

connection with the aforesaid project. On 22 March 2017, a notice came to be issued by the Income Tax authorities calling upon Natureville Promoters to explain why TDS had not been deducted on EDC payments made to HSVP. That EDC payments were made directly to HSVP is not questioned by the writ petitioners. Their challenge essentially stems from the fact that the said payment was made on the directions of the DTCP. Whether this aspect would have any material bearing on their alleged liability to deduct tax is one which we propose to deal with in the subsequent parts of this decision.

7. Reverting to the narration of facts, we note that the petitioner upon receiving the aforesaid notice appears to have approached the office of the DTCP seeking clarifications. The DTCP was asked by Natureville Promoters to clarify whether TDS provisions were applicable to payments made to HSVP. The aforesaid communication was followed by a further letter addressed by the petitioner to DTCP dated 31 July 2017 asking the concerned authority to clarify whether developers are required to deduct TDS on EDC payments that have been made. In the meanwhile, the Income Tax authorities issued yet another notice dated 10 August 2017 calling for further information from the writ petitioner. The DTCP on 06 October 2017 replied to the collaborator of Natureville Promoters, Puri Constructions, stating that EDC is a charge levied by the Government for carrying out external development works and that the same is deposited in the receipt head of the DTCP and would thus constitute Government receipt. It was further stated that no tax is being deducted thereon since it was Government receipt.

8. In the meanwhile, the **Central Board of Direct Taxes**[8] appears to have been approached by the Finance Secretary of the Government of Haryana and called upon to clarify the position. In terms of an **Office Memorandum**[9] dated 23 December 2017, the CBDT took the following position:-

"**F. No.370133/372017-TPL**
Government of India
Ministry of Finance
Department of Revenue
(Central Board of Direct Taxes)
TPL Division
****

New Delhi, 23rd December, 2017

OFFICE MEMORANDUM

Sub: Recommendations for relief from applicability of TDS provisions on External Development Charges (EDC) payable to Directorate of Town & Country Planning (DTCP) State Government of Haryana-regarding.

Kindly refer to your letter dated 21st November, 2017 addressed to the Finance Secretary, along with the enclosures on the captioned subject.

2. In this regard it is submitted that provisions of non-deduction of tax under Section 196 of the Income-tax Act, 1961, is applicable to the Government and to the other authorities as mentioned under the Section. Accordingly, External Development Charges (EDC) if paid to Government of Haryana would be exempt from TDS provisions. However, in the instant case, it appears that the developer has made the payment in the nature of External Development Charges (EDC) not to the Government but to HUDA [Haryana Urban Development Authority) which is a development authority of State Government of Haryana and is a taxable entity under the income-tax Act, 1961. Hence, TDS provisions would be applicable on EDC payable by the developer to HUDA

3. It may be mentioned here that section 194 of the Income as Act, 1961 provides for non- deduction of tax in suitable cases. The

[8] CBDT
[9] OM

HUDA may resort to aforesaid provision for exemption of TDS with regard to payment of EDC

4. This issues with the approval of Finance Secretary.

(Dr. Rishi Kumar)
DCIT (OSD) (TPL-III)

Shri Praveen Jain
Vice Chairman
National Real Estate Development Council
First Floor, 8, Community Centre,
East of Kailash, New Delhi-110065
Tele:01126225795, 01141608570
Fax:01126225796"

9. Insofar as the DTCP is concerned, it vide its communication of 19 June 2018 while clarifying the position with respect to HSVP took the following stand:-

"DIRECTORATE OF TOWN & COUNTRY PLANNING
HARYANA
SCO No. 71-75, Sector-17 /C, Chandigarh, Website
www.topharyana. gov .in
0172-2549347, E-mail: aohq.tep@gmail.com

To
The Chief Administrator,
Haryana Shahri Vikas Pradhikaran,
Panchkula,

Memo No. DTCP /ACCTTS/AO(HQ)/CA0/2894/2018 Dated: 19.06.2018

Subject: Clarification on TDS Deductions on EDC Payments. Please refer to the matter cited as subject above.

1. Section 2(g) of the Haryana Development and Regulation of Urban Areas Act, 1975 defines that external development works (hereinafter referred as EDW) shall includes any or all infrastructure development works like water supply, sewerage, drains, provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid complex, fire stations, grid sub-stations etc and/or any other work which the Director may specify to be executed in the periphery of or outside colony/area for the benefit of the colony/area.
2. As per Section 3(3)(ii), license holder has to pay proportionate

development charges if the external development works as defined in clause (g) of section 2 are to be carried out by the Government or any other local authority. The proportion in which and the time within which, such payment is to be made, shall be determined by the Director.

3. Presently, external development works in the periphery of or outside colony/area for the benefit of the colony/area are being executed by Haryana Shahri Vikas Pradhikaran (hereafter HSVP) which is the Development Authority of State govt. Earlier upto 31.03.2017, Department of Town & Country Planning used to collect the external development charges from the colonizer to whom licences have been granted under Act No.8 of 1975 and the persons to whom permission for change of Land use have been granted under Act No. 41 of 1963, in the shape of bank draft drawn in favour of CA, HSVP and sent the same to CA, HSVP.

4. As the receipt on account of EDC was not sufficient to carry out the all development works under EDC for the urban estate as per approved development plans, therefore, to meet out the shortfall, a new scheme Swaran Jayanti Haryana Urban Infrastructure Development Scheme (renamed as Mangal Nagar Vikas Yojana was approved by the State Govt. and appropriate budget provision for execution of development works has been made in the said scheme. From Financial Year 2017-18, the receipts on account of EDC is being deposited in the consolidated fund of the State under Major Receipt Head 0217 receipts and all license / CLU holders have also been directed vide order dated 12.05.2017 that payment of EDC in respect of license/ CLU granted by TCP Deptt. May be made online through e-payment gateway or in shape of demand drafts favouring Director, Town & Country Planning, Haryana. Required funds for execution of development works are released to HSVP after granting the sanction from the Finance Department.

It is, therefore, clarified that HSVP is only an executing agency working for and on behalf of State Govt. for carrying out EDW for which funds are given to HSVP by the Govt. through TCP Deptt. Since, payment for EDC has been made to TCP Deptt. Of State Govt., no TDS was/is to be deducted out of payment made to Govt. for EDW.

Endst No. DTCP/ ACCTTS/ AO(HQ)/CA0/2903-04/20 18

Dated: 19.06.2018

A copy with reference to representation on the subject cited matter is forwarded to CREDAI, Haryana, 12A, First Floor, Omaxe Square Building, District Center jasola, New Delhi-110044 & Satya Developers Pvt. Ltd., 34, Babar Lane, Bengali Market, New Delhi- 110004 for information please.

Accounts Officer (HQ)
For: Director, Town & Country Planning
Haryana, Chandigarh"

10. In the meanwhile and taking note of the controversy which had arisen, DLF Utilities Limited, is stated to have approached the Punjab and Haryana High Court by way of CWP No. 1866/2018. While entertaining that writ petition, the High Court on 29 January 2018 passed the following interim order:-

> "Issue notice of motion returnable on 27.03.2017.
>
> One of the questions that arises is whether the petitioner is at all liable to deduct tax at source. This in turn raises a question as to whether the external development charges are payable by the petitioner under the Haryana Development and Regulation of Urban Areas Act, 1975 to the Government of Haryana or to any other party. If it is to the Government of Haryana, it is possible that the exemption under Section 196 of the Income Tax Act, 1961 would apply.
>
> The petitioner states it entered into the agreements in Forms IV and LC-IV A.
>
> Prima facie, the agreements are with the Governor of Haryana.
>
> In these circumstances, petitioner shall pursuant to the impugned notice dated 22.01.2018 appear before the officer. Till further orders, the order, if any, however, shall not be given effect to."

11. Writ petitions thereafter came to be filed before this Court including W.P. (C) 9483/2019 by the collaborator of Natureville Promoters and where upon taking note of the orders passed by the Punjab and Haryana High Court in DLF Utilities Limited, interim orders were passed providing that while proceedings may go on, any orders adverse to the petitioner, if passed, would not be given effect to. Similar orders operate on the various writ petitions forming part of this

batch. It is this interim order which has continued on all the writ petitions forming part of this batch.

12. The sequence of events insofar as RPS Infrastructure is concerned follow a similar chronology. A notice under Section 201 and Section 201(1A) of the Act came to be issued against that writ petitioner on 16 December 2020. The charge in that notice was identical to that laid against Natureville Promoters, namely, the liability to deduct tax on EDC payments made to HSVP.

13. Responding to the aforesaid notice, RSP Infrastructure took the position that TDS was not liable to be deducted and prayed for the proceedings being dropped. Ultimately and by an order dated 12 March 2021, the Income Tax Department issued a final notice holding that HSVP was a taxable entity and consequently there was an evident failure on the part of RSP Infrastructure to deduct tax in accordance with the provisions made in Chapter XVII-B of the Act.

14. It becomes pertinent to note that the present litigation stems from the stand taken by the Income Tax Department that tax was liable to be deducted by virtue of the provisions made in Section 194C. It would further appear from the record that earlier also notices under Section 148 of the Act and based on a failure to deduct tax in respect of EDC payments had been issued against various entities and at which stage the respondents had taken the position that tax was liable to be deducted under Section 194 of the Act. One of those notices came to be challenged in **BPTP Limited v. Principal Commissioner of Income Tax (Central) – III & Anr.**[10] The Court in *BPTP* upheld that challenge holding that no liability to deduct tax under Section 194 or 194I would

[10] (2020) 421 ITR 59

arise. We deem it apposite to extract the following passages from *BPTP*:-

> "**26.** The Assessing Officer in paragraph 2 of the recorded reasons quotes that "External development charges is covered by the provisions of section 194 of the Income-tax Act, 1961. The assessee has failed to deduct tax at source on the payments made to the Haryana Urban Development Authority". There is no explanation or rationale for the aforesaid observation made by the Assessing Officer. We, therefore, cannot understand as to how the payment of external development charges being in the nature of statutory fees, could be subject to withholding tax under section 194 of the Act, a provision that is applicable to dividends. The nature of dividend payment is intrinsically different from external development charges and, therefore, the apparent reason for reopening seems to be erroneous, irrational and fallacious. The subsequent observation in paragraph 2 "as per the provisions of section 40(a)(ia) of the Income-tax Act, any sum payable on which tax is deductible at source under Chapter XVII-B but the same has not been deducted" appears to be based on the understanding that the provisions of section 194 are attracted to external development charges and, therefore, it is subject to withholding tax and consequently the provisions of section 40(a)(ia) of the Act would be attracted. Even if one were to ignore the provision of law quoted and relied upon by the Assessing Officer, and we were to agree with the contention of Revenue that while exercising the power, the source may not be specifically referred to or if wrongly mentioned to, it would not render the exercise of such power to be invalid, yet, we are unable to fathom as to how the Assessing Officer has arrived at the conclusion that the external development charges payment was subject to tax deduction at source. The Revenue in its counter-affidavit has sought to elaborate on the aforesaid reasons by contending that the external development charges payment is akin to rent. However, we are not impressed with this submission. Firstly, such an understanding is not borne out from the recorded reasons and, secondly, the Department cannot by way of a counter-affidavit supplement the recorded reasons by introducing such legal submissions. The source of the power in this case, as sought to be argued, is not discernible.
>
> **27.** If the Assessing Officer harboured a reason to believe that the payment of external development charges requires deduction of tax at source under the provisions of the Income-tax Act, it ought to have disclosed the basis for such a view. The entire reasoning disclosed in the recorded reasons, for initiating the proceedings is completely silent on this aspect. It merely states that "Since, external development charges has income character, therefore it

should have been subjected to tax deducted at source by assessee". The Assessing Officer has further proceeded to observe since the assessee is a development authority of State Government of Haryana and is a taxable entity, deduction of tax at source provisions could be applicable on external development charges payable by the assessee through Haryana Urban Development Authority. Apart from making aforenoted observations and referring to section 194 and section 40(a)(ia), there is no apparent rationale for assumption of jurisdiction by the Assessing Officer. The judgment in Greater Mohali Area (supra) is of no assistance to the Revenue as the same is distinguishable on facts. In the said case, the petitioner who was recipient of external development charges had approached the court seeking quashing of the order disposing of its objections to the reasons recorded for reopening the assessment under sections 147 and 148 of the Act. In the assessment under section 143 (3) of the Act, the effect of external development charges upon petitioner's income was not referred to, the Assessing Officer sought to reopen the assessment on the basis of reason to believe that income on account of external development charges had escaped assessment. In these circumstances, since, the assessment order, did not deal with the character of the income of external development charges or its effect on petitioner's income, the court upheld the action of reopening on the ground that the issue had not been considered at the time of the assessment. Likewise, the other judgment relied upon by the Revenue in the case of New Okhla Industrial Development Authority (supra) is also distinct on facts. In the said case, the court was examining as to whether Greater Noida and Noida Authorities were local authorities within the meaning of section 10(20) of the Income-tax Act and whether their income was exempt from Income-tax. Deciding this question, the court held that the Noida and Greater Noida are not local authorities for the purpose of the Act. Therefore, the aforesaid decision has no relevance to the facts of the present case.

28. We would also like to reflect on section 194-1 and its Explanation which deals with rent and has been relied upon by the Revenue to contend that the definition of "rent" is broad and would also envisage the payment of external development charges and is subject to withholding tax. In support of this provision, the Revenue has relied upon the observations of the Supreme Court in New Okhla Industrial Development Authority (No. 2) v. CIT (Appeals) (2018) 406 ITR 209 (SC), the relevant portion whereof is reproduced herein below (page 218 of 406 ITR):

"The definition of rent as contained in the Explanation is a very wide definition. The Explanation states that 'rent' means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any

land. The High Court has read the relevant clauses of the lease deed and has rightly come to the conclusion that payment which is to be made as annual rent is rent within the meaning of section 194-1, we do not find any infirmity in the aforesaid conclusion of the High Court. The High Court has rightly held that tax deducted at source shall be deducted on the payment of the lease rent to the Greater Noida as per section 194-1. Reliance on circular dated January 30, 1995 has been placed by the Noida/Greater Noida. A perusal of the circular dated January 30, 1995 indicate that the query which has been answered in the above circular is 'Whether requirement of deduction of Income-tax at source under section 194-1 applies in case of payment by way of rent to the Government, statutory authorities referred to in section 10(20A) and local authorities whose income under the head 'Income from house property' or 'Income from other sources' is exempt from Income-tax."

29. We are unable to see as to how the above provision and decision is of any assistance to the Revenue. It can be seen from the quoted portion of the said judgment that in the said case, the payment of annual rent was considered to be falling within the ambit of section 194 -I , a conclusion drawn by the court on a reading of the relevant clauses of the lease deed. In the present case, the external development charges, on the aforesaid rationality, cannot be subjected to section 194-1 of the Act. Moreover, if such was the understanding of the Revenue, it should have been well founded and disclosed in the reasons recorded by the Assessing Officer. Deduction of tax at source is dealt with under Chapter XVII of the Income- tax Act. The provisions enumerated thereunder, stipulate requirement of deduction of tax at source. The Revenue is unable to point out any specific provision which deals with external development charges payment except for alluding to section 194-1. We need not delve into this question any further as we do not find this to be a ground spelt out in the reasons for reopening the assessment under section 147 of the Act. The statutory orders containing reasons have to be judged on the basis of what is apparent and not what is explained later. The Revenue cannot be permitted to improve the same by offering better explanation during the course of the proceedings. On this issue we would like to refer the view of the Supreme Court in Mohinder Singh Gill v. Chief Election Commissioner (1978) 1 SCC 405 where it has been held "The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise."

15. Yet another challenge thereafter came to be laid before this Court in **DLF Homes Panchkula Pvt. Ltd. vs. Joint Commissioner of Income Tax**[11] with the respondents this time taking the position that TDS on EDC was liable to be deducted by virtue of Section 194I. This stand came to be negatived with our Court holding that EDC could not be termed as *'rent'* so as to fall within the ambit of Section 194I.

16. The writ petitioners have also referred to the views expressed by different benches of the **Income Tax Appellate Tribunal**[12] while dealing with penalty proceedings. However, insofar as RPS Infrastructure is concerned, it appears to have been placed on notice with respect to a levy of penalty under Section 271C for **Financial Years**[13] 2013-14, 2014-15 and 2015-16. While dealing with the aforesaid issue the Additional Commissioner of Income Tax in terms of an order made on 15 January 2018 took the following stand:-

> **"4.1. HUDA was constituted under Haryana Urban Development Authority Act, 1977. The functions of HUDA are:**
>
> a. To promote and secure development of urban areas with the power to acquire. sell and dispose off property, both movable and immovable.
> b To acquire develop and dispose off land for residential. Industrial. commercial and institutional purposes.
> c To make available developed land to Haryana Housing board and other bodies for providing houses to Economically Weaker Sections of the society, and
> d To undertake building works and other engineering works.
>
> 4.1 1 HUDA is developer of urban areas. It develops urban infrastructure. It is doing business of development of large real estate projects. During survey of HUDA, statement of Sh. Ram Kumar. Sr. AO. HUDA. and relevant representative documents showing entire gamut of business activities of HUDA were found and taken on record. HUDA is the entity which is acquiring land,

[11] 2023:DHC:2401-DB
[12] ITAT
[13] FY

developing and finally handing it over to consumers for a price. Lands developed by HUDA is though identified and acquired by the Urban Estate Department, Haryana Government yet the ownership and possession of land is transferred to HUDA for consideration paid by HUDA.

A) land to be developed is identified and surveyed by the Director General Town & Country Planning Haryana the land so identified and surveyed is ready for acquisition by LAO (Land Acquisition Officer) of the Urban Estate Department Haryana The relevant portion of the statement of Sh. Ram Kumar was is as under:

"Q. Please explain the process by land ultimately comes to HUDA for development starting from the point at identification at land?

Ans In the first phase, Town & Country Planning survey of the land which is required to be acquired. After survey concerned land acquisition start, acquisition process as per land Acquisition Act, and send the case file to the Government of Haryana for its approval. After approval, HUDA authorized the bank in the name at concerned LAO, who make the payment to land owners on behalf of HUDA. At the time of announcement at award, he make the agreement with concerned state officers HUDA for said land. Sample copy at Government approval and bank authorization is submitted to. After making payment HUDA start process for development at land and thereafter start the process for development at land And thereafter start the process at floatation. After inviting applications from the applicants. Copy of scheme branches and allotment letter is submitted as Annexure-C and D.

B) LAO requests its superior authority, Director General Urban Estate Department Haryana for administrative approval for acquiring the land.

C) The urban Estate Department. Haryana conveys administrative approval for acquisition of land to Director General Urban Estate Department, Haryana. It asks LAO to acquire land in question as per law. A copy of this approval is marked to HUDA.

D) HUDA authorizes its bank to disburse payment for award for land to the LAO.

E) LAO transfers the ownership and possession of land to HUDA.

4.2 Basis/Rationale for charging of EDC by HUDA-

4.2. 1 External Development Work (hereafter EDW) is defined in the Haryana Development and Regulation of Urban Area Act. 1975 (hereafter HDRUA). Definition of EDW is given in section 2(g) of this Act It is as follows:
'External Development works include water supply. sewerage, drains. necessary provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works. solid waste management and disposal slaughter houses, colleges, hospitals, stadium/sports complex. fire stations grid sub-stations etc and any other work which the directory may specify to the executed in the periphery of or outside colony/area for the benefit of the colony/area'

4.2.2 HUDA charges EDC as per section 3(3)(a)(ii) of HDRUA, which reads as under:

'To pay proportionate development charges if the external development works as defined in clause (g) of Section 2 are to be carried out by the Government or any other local authority The proportion in which and the time within which such payment is to be made, shall be determined by the Director'

4.2.3 HUDA charges EDC for EDWs by issuing letters/circulars which are documented from time to time:

Sr. No.	Subject/ Description	Dispatch No.	Date of Issue
a	Fixation of development charges of released land and cases of change of land use in the Urban Estate/ Controlled area of the state	22860-72	14.08.2002
b	Fixation of EDC in cases of released/change of land use	851-76	15.01.2022
c	Fixation of External Development Charges in cases of released/change of land	16493-16518	08.07.2002

	use		
d	Fixation of External Development Charges in cases of released land	33580-608	25.09.2009

4.2.4 The gist of these letters/circulars is that EDC are levied as per Section 2(g) for EDW on the beneficiaries to whom the change of land use permission is granted for various purposes in the Agricultural/Rural Zone and who are also availing the benefits of the EDW like the town level facilities of major circulation roads, stadiums, hospitals colleges, crematoriums town parks etc. being provided by HUDA in the nearby urbanisable areas. Since the change of land use holders avail the parts of the EDW, they should also proportionately contribute towards the expenditure incurred on EDW by HUDA This proportionate contribution is called EDC.

4.2.5 The rationale for EDC received/charged by HUDA is further strengthened by a noteworthy point Mentioned in the 'Notes to The Accounts Forming Part of The Balance Sheet As on 31. 03 2016' having significant bearing on the nature EDC is as under:

> 2 (ii) other liabilities also include external developmental charges received through DGTCP department Haryana for execution of various EDC works. The expenditure against which have been booked Development Work in Progress, Enhancement compensation and Land cost.'

4.3 Determination of EDC to be paid by participating private persons/builders, colonizers etc.-

4.3.1 A participating private builder is required to pay EDC as provided in the license for setting up a commercial colony on urbanisable land held by it in vicinity of land owned and developed (EDWs) by HUDA The license is issued by the Directorate of Town and Country Planning, Haryana, subject to the undertaking as per the relevant conditions mention below:

To submit an undertaking to the effect that you shall make arrangement for water supply, sewerage, drainage ere to the satisfaction of DGTCP till these services are made available from external infrastructure to be laid by HUDA "

4.3.2 Computation of External Development Charges (EDC) is made as under:
A) Charges for Commercial area =Rs. X Lakhs
(@ Rs. Y lakhs/Acre)

B) Total cost of Development = Rs. X Lakhs
C) 25% bank guarantee required = Rs. 0.25 X Lakhs

iv) The demand drafts of EDC amounts are drawn in favour of the Chief Administrator, HUDA though routed through the Director General Town and Country Planning, Sector 18, Chandigarh. This state of affairs as for as the EDC is concerned is stated by HUDA in the 'Notes to The Accounts Forming Part of The Balance Sheet As on 31.03.2016' filed with the return of income. It reads as under:

> "2(i) Other liabilities also include external developmental charges received through DGTCP Department Haryana for execution of various EDC works. The expenditure against whtch have been booked in Development Work in Progress. Enhancement compensation and Land cost.

(iv) This establish the fact that the land is owned and developed by HUDA which receives EDC as return/income on the money invested in the EDWs. There is specific quid pro quo for EDC. EDC would never be returnable and would never be returned because it is a consideration paid by EDW users.

4. 3.3 EDC is worked out for a particular urban estate on the basis of the cost of external development services such as master water supply. Master Sewage, Master Roaos, Master Storm Water Drainage, Master Horticulture. Master Community building and other services is determined on the basis of a price index of a particular year in respect of a particular urban estate. The cost is determined by the Engineering Wing of HUDA keeping in view the requirement of development plan of an urban estate. EDC is charged from sectors floated by HUDA or the license granted by the Town & Country Planning Department to the developers. To say that there is no element of profit in EDC because EDC varies depending upon requirement of development in each urban estate. Therefore it is in the nature of liabilities is incorrect because the payers of EDC are allowed to use EDWs for payment of fees worked out On the basis of investments in EDWs. EDC is charged from colonizers for using the developed urban infrastructure in urban estates wherein they are allowed to establish their commercial set ups The EDC IS a usar fee charged by HUDA from colonizers.

4.3.4 The 1ncome nature of EDC would not change even though it is received through DGTCP department Haryana The method of accounting of payment EDC by private colonizer like M/s. XYZ Pvt. Ltd. in its books of accounts as Current assets would also not change the income nature of EDC in the hands of HUDA.

4.3.5 Showng EDC as current liability by HUDA is incorrect for the reasons narrated in the foregoing paras, based on specific nature and flow of transactions, supported by specific evidences in form of sample letters/documents, Therefore. EDC is a revenue receipt having character of income of HUOA. This is also a finding of assessing officer of HUDA which stands confirmed by CIT(A) too. Therefore, ought to have been subjected to TDS by payer of EDC.

4.4 Reasons for Applicability of TDS provisions on EDC paid to HUDA:

i) HUDA is a taxable entity carrying out business activities to acquire, develop and dispose off land for residential, industrial, commercial and institutional purposes in urban estates so developed in state of Haryana its business income is taxed by 1ncome tax department which includes EDC.

ii) In the Circular No. 681 dated 8.3.94 issued by the CBDT it has been stated that a work done by one person is service rendered to another. One of the dictionary meanings of the word 'service· is work {Associate Cement Co. Ltd. Vs. CIT, 120 ITR 444 (Patna)]. The Circular at para (v) states that the ·service contract would be covered by the provisions of this section since service means doing any work. It further states at para (i) that 'the provisions of section 194C shall apply to all types of contracts for carrying out any work including transport contracts, service contracts. "

The relevant port1on of Circular No. 681 of CBDT dated 8/3/94 is as under:

> **" .... 3. Section 194C was introduced with effect from 1st April, 1972. Shortly after its introduction, the Board Issued Circulars No. 86, dated 29th May, 1972 (F.No. 275/9/72-ITJ), No. 93, dated 26 September, 1972 (F.No. 275/100/72-ITJ), and No. 108, dated 20 March, 1973 (F.No. 131(9)/73- TPL), in this regard.**
>
> **4. Some of the issues raised in the above-mentioned circulars need to be reviewed in the light of the judgment dated March 23, 1993, delivered by the Supreme Court of India in Civil Appeal No. 2860(NT) of 1979· Associated Cement Co. Ltd. Vs. CIT1993] 201 ITR 435.**
>
> **5. The Supreme Court has held that " ... there is nothing in the sub-.section which could make us hold that the contract to carry out a work or the contract to supply labour to carry out a work should be confined to 'works contract'.... Their Lordships have further held that 'Any**

work' means; any work and not a 'work contract', which has a special connotation in the tax law ... 'Work' envisaged in the sub-section, therefore, has a wide import and covers 'any work' which one or the other of the organizations specified ln the sub-section can get carried out through a contractor under a contract and further it includes obtaining by any of such organizations supply of labour under a contact with a contractor for carrying out its work which would have fallen outside the 'work' but for its specific inclusion in the sub-section."

6. It may be pointed out that this appeal before the Supreme Court was by virtue of a special leave petition against the judgment in Writ Petition No. 2909 of 1978 of the Patna High Court in the case of Associated Cement Co. Ltd. Vs. CIT [1979} 120 ITR 444. The Patna High Court, while dismissing the writ petition of the aforesaid company, observed that "In a very broad sense, a work done by one person is service rendered to another and indeed one of the dictionary meanings of the word 'service' is work".

7. The conclusion flowing from the aforesaid judgments of the supreme Court and the Patna High Court is that the provisions of section 194C would apply to all types of contracts including transport contacts, labour contracts, service contracts, etc. In the light of these judgments, the Board have decided to withdraw their above mentioned Circulars Nos. 86 and 93 and para 11 of Circular No 108 and issue the following guidelines in regard to the applicability of the provisions of section 194C:-

(i) The provisions of section 194C shall apply to all types of contracts for carrying out any work including transport contracts, service contracts, advertisement contracts, broadcasting contracts. Telecasting contracts, labour contracts, materials contracts and works contracts ..... "

4.5 Payments received as EDC are for EDWs like water supply, sewerage, drains, necessary provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal slaughter houses colleges. Hospitals, stadium/sports complex, fire stations, grid sub-stations etc. and any other work which the Director may specify to the executed in the periphery of or outside colony/area for the benefit of the colony/area.

> 4.6 EDC is worked out for a particular urban estate on the basis of the cost of external development services such as Master Water Supply, Master Sewage, Master Roads. Master Storm Water Drainage Master Horticulture. Master Community building and other services is determined on the basis of a price index of a particular year in respect of a particular urban estate. The cost is determined by the Engineering Wing of HUDA keeping in view the requirement of development plan of an urban estate. EDC is charged from the sectors floated by HUDA or the license granted by the Town & Country Planning Department to the developers. EDC is charged from colonizers for using the developed urban infrastructure in urban estates wherein they are allowed to establish their commercial set ups. The EDC is arising out of an agreement which is in the nature of service contract wherein colonizers pay EDC to HUDA is rendering a service to colonizers for which EDC is paid EDC is charged for development work received by HUOA from private builders and the work carried out is civil work in nature for providing amenities. The work is for creating/maintaining and strengthening of infrastructure created for urban areas in order to make it suitable for urban habitations. EOWs enhance value of property and the value additions fetch higher price from prospective customers. Thus EDC payments made by the builders to HUDA are covered under service contract Therefore, a private builder is liable to deduct tax at source on such payments under the provisions of Section 194C of Income tax Act Hence EDC ought be subjected to TDS by payers @ 2 % u/s 194C of the Income tax Act."

17. RPS Infrastructure challenged the aforesaid order before the Tribunal and which by its order of 23 July 2019 ultimately allowed the appeals holding that there was reasonable cause underlying failure on the part of RPS Infrastructure to deduct TDS and in the absence of any contumacious conduct, the penalty was liable to be deleted.

18. Mr. Jain, who led submissions on behalf of RPS Infrastructure Ltd. took us in great detail through the relevant provisions of the HDRUA. He referred firstly to the following definitions as set out in Section 2:-

> "(g) "**external development works**" shall include any or all infrastructure development works like water supply, sewerage,

drains, provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal, slaughter houses, colleges, hospitals, stadium/sports complex, fire stations, grid sub-stations etc. and/or any other work which the Director may specify to be executed in the periphery of or outside colony/area for the benefit of the colony/area;]

(h) "**Government**" means the government of the State of Haryana;

(hha) "**infrastructure development charges**" include the cost of development of major infrastructure projects;}

(i) "**internal development works**" means-

(i) metalling of roads and paving of footpaths;
(ii) turfing and plantation with trees of open spaces;
(iii) street lighting;
(iv) adequate and wholesome water supply;
(v) sewers and drains both for storm and sullage water and necessary provision for their treatment and disposal; and
(vi) any other work that the Director may think necessary in the interest of proper development of a colony;

(j) "**local authority**" means a Municipal Committee or Municipal Council or municipal Corporation;"

19. Our attention was also drawn to Sections 3, 3A and 3AC of the HDRUA which are reproduced hereinbelow:-

"**3. Application for licence**— [(1) Any owner desiring to convert his land into a colony shall, unless exempted under section 9, make an application to the Director, for the grant of license to develop a colony in the prescribed form and pay for it such fee and conversion charges as may be prescribed: [xxx];

Provided that if the conversion charges have already been paid under the provisions of the Punjab Scheduled Roads and Controlled Areas Restriction of Unregulated Development Act, 1963 (41 of 1963), no such charges shall be payable under this section [Provided further that owner may enter into an agreement jointly or severally with a developer for pooling of land for grant of licence [Provided further that in case of migration of licence, the colonizer shall pay the outstanding renewal fee with interest accrued upto the date of payment. However, the external development charges including interest paid thereon for the area under migration shall be adjusted in the licence and the colonizer shall not be liable to deposit the unpaid interest amount on external development charges and infrastructure development charges of the existing project.

The conversion charges, licence fee, infrastructure development charges already paid shall be adjusted in case the amount to be paid for migration at the current rate is more than the earlier paid in case of existing project [Provided further that for such colonies located in such land use zones of various notified development plans, where in the opinion of the Government, the licences are to be issued after invitation of bids or following an auction procedure in pursuance of the policy framed by the Government in this regard from time to time, such application shall be considered to be valid only if it is filed in response to a notice of the Director and fulfils the prescribed terms and conditions] [(1A) All such applications received in response to the notice issued by the Director against policy for auction of licences that are considered to be in order by the Director shall, in addition to the prescribed requirements, also be liable for payment of location premium, as determined through the bidding/auction process, in such manner and in such time frame as conveyed by the Director. The amount received against location premium shall be utilised for provision, maintenance and augmentation of external development works and shall be recovered in addition to the prescribed rates of development charges received against external development works from a colonizer]

(2) On receipt of the application under sub section (1), the Director shall, among other things, enquire into the following matters, namely :-

(a) title to the land;

(b) extent and situation of the land;

(c) capacity to develop a colony;

(d) the layout of a colony;

(e) plan regarding the development works to be executed in a colony; and

(f) conformity of the development schemes of the colony land to those of the neighboring areas

(3) After the enquiry under sub section (2), the Director, by an order in writing, shall —

(a) grant a licence in the prescribed form, after the applicant has furnished to the Director a bank guarantee equal to twenty five per centum of the [estimated cost of development works in case of area of land divided or proposed to be divided into plots or flats for residential, commercial or industrial purposes and a bank guarantee equal to thirty-seven and a half per centum of the estimated cost of development works in case of cyber city or cyber park purposes] as certified by the director and has undertaken–

(i) to enter into an agreement in the prescribed form for carrying out and completion of development works in accordance with licence granted;

(ii) to pay proportionate development charges if the external development works as defined in clause (g) of section 2 are to be carried out by the Government or any other local authority. The proportion in which and the time within which, such payment is to be made, shall be determined by the Director.

(iii) the responsibility for the maintenance and upkeep of all roads, open spaces, public park and public health services for a period of five years from the date of issue of the completion certificate unless earlier relieved of this responsibility and thereupon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be;

(iv) to construct at his own cost, or get constructed by any other institution or individual at its cost, schools, hospitals, community centres and other community buildings on the lands set apart for this purpose, in a period as may be specified, and failing which the land shall vest with the Government after such specified period, free of cost, in which case the Government shall be at liberty to transfer such land to any person or institution including a local authority, for the said purposes, on such terms and conditions, as it may deem fit:

Provided that in case of licenses issued prior to the notification of the Haryana Development and Regulation of Urban Areas (Amendment and Validation) Act, 2012, the licensee, the purchaser or the person claiming through him shall construct the school, hospital, community centres and other community buildings on the land set apart for this purpose, within a period of four years, extendable by the Director by another period of two years, for reasons to be recorded in writing, from the notification of the Haryana Development and Regulation of Urban Area (Amendment and Validation) Act, 2012:

Provided further that at the end of the period as specified under the proviso, if the site is not utilised for the purpose, it was meant for, the land shall vest with the Government and in which case, the Government shall be at liberty to transfer such land to any person or institution including a local authority, for the said purposes, on such terms and conditions, as it may deem fit:

Provided further that a show cause notice and an opportunity of hearing shall be issued before vesting the land in the Government

{Provided further that the applicant shall be exempted from the provisions of this clause where compliance of clause (iv-b) is sought by the Director.}

[(iv-a) to pay proportionate cost of construction of such percentage of sites of such school, hospital, community centre and other community buildings and at such rates as specified by the Director;]

[(iv-b) to hand-over the possession and transfer the ownership of such land, as demarcated and identified in the approved layout plan, in such form and manner, as may be specified by the Director and such land shall vest with the Government to achieve the objective of creation of community buildings, housing, commercial and other physical and social urban infrastructure, in such colonies where a condition to this effect is imposed by the Director, before grant of licence;]

(v) to permit the Director or any other officer authorised by him to inspect the execution of the layout and the development works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted;

[(vi) to fulfill such terms and conditions as may be specified by the Director at the time of grant of licence through bilateral agreement as may be prescribed:]

Provided that the Director, having regard to the amenities which exist or are proposed to be provided in the locality, is of the opinion that it is not necessary or possible to provide one or more such amenities, may exempt the licensee from providing such amenities either wholly or in part [Provided further that the applicant shall have an option to mortgage a part of the land for which licence has been granted or being granted in lieu of submission of bank guarantee against cost of internal development works and external development works.]

(b) refuse to grant a licence, by means of speaking order, after affording the applicant an opportunity of being heard.

(4) The license so granted shall be valid for a period of 44 [five years], and will be renewable from time to time for a period of [two years], on payment of prescribed fee:

[Provided that in the licensed colony permitted as a special project by the Government, the license shall be valid for a maximum period of five years and shall be renewable for a period of as decided by the Government.]

(5) Each colony may comprise of one or more licences with contiguous land pockets.

(6) After the coloniser has laid out the colony in accordance with the approved layout plan and executed the internal development works in accordance with the approved design and specifications, he may apply to the Director for grant of completion or part-completion certificate. The Director may enquire into such matters, as he deems necessary before granting such certificate.

(7) After enquiry under sub-section (6), the Director may, by an order in writing, grant completion or part-completion certificate on such terms and conditions and after recovery of infrastructure augmentation charges, as may be prescribed:

Provided that where in the agreement executed to set up a colony, a condition was incorporated for deposit of surplus amount beyond maximum net profit @ 15% of the total project cost and the coloniser has not taken the completion certificate of the said project, then notwithstanding the said condition in the agreement, the coloniser shall have the option either to deposit the infrastructure augmentation charges as applicable from time to time at any stage before the grant of such completion certificate and get the exemption of the restriction of net profit beyond 15% or deposit the amount as per terms of the agreement.

3A. Establishment of Fund— (1) Any colonizer to whom a license has been given under this Act shall deposit as 50{infrastructure development charges} a sum, 51{at such rate as may be prescribed by the Government from time to time, per square metres of the gross area and of the covered area of all the floors in case of flats proposed to be developed by him into a colony} in two equal installments. The first installment shall be deposited within 60 days from the date of grant of the license and the second installment to be deposited within six months from the date of grant of license.

(2) The Haryana Urban Development Authority {local authorities, firms, undertakings of Government and other authorities involved in land development} shall also be liable to deposit the {infrastructure development charges} and shall be deemed to be {colonizers}for this purpose only. The date of first inviting applications for sale of plots in any colony by it shall be deemed to be the date of granting of license under this Act for the purpose of deposit of {infrastructure development charges}.

(3) The {infrastructure development charges} shall be deposited by the colonizer with such officer or person as may be appointed by the government in this behalf.

(4) The colonizer shall in turn be entitled to pass on the {infrastructure development charges} paid by him to the plot holder.

(5) The amount of {infrastructure development charges} if not paid within the prescribed period shall be recoverable as arrears of land revenue.

[(6) The amount of infrastructure development charges so deposited by the colonizer shall constitute a fund called the Fund, for stimulating socio-economic growth and development of major infrastructure projects for the benefit of the State of Haryana (hereinafter referred to as the Fund)].

[(7) The Fund shall be collected and managed by the Director and passed on for the purpose of its further utilisation to the Board to be constituted by the Government for this purpose.]

(8) The amount of infrastructure development charges {and infrastructure augmentation charges} deposited by the colonizers, loans and grants from the Central/State Government or the local authority, or loans and grant from national/international financial

institutions and any other money from such source as the state Government may decided, shall be credited to the fund.

[(9) The Fund shall be utilized for stimulating socio-economic growth and development of major infrastructure projects for the benefit of the state of Haryana. The Fund may also be utilized to meet the cost of administering the Fund.]}

(10) [XXX.]

3AC. Functions and Powers of Board.—(1) The Board shall be the apex body for overall planning and development of infrastructure sector and infrastructure projects for the benefit of State of Haryana, subject to the limitations specified in sub-section (3).

(2) The Board shall-

(i) act as a nodal agency to co-ordinate all efforts of the Government regarding the development and implementation of infrastructure sectors and infrastructure projects for the benefit of State of Haryana, involving private participation and funding from sources other than those provided by State budget and shall,-

(a) identify infrastructure projects for private participation;

(b) promote competitiveness and progressively involve private participation while ensuring fair deal to the end-users;

(c) identify and promote technology initiatives in urban development and infrastructure development sector for improving efficiency in the system;

(d) identify bottlenecks in the infrastructure sectors and recommend to the Government policy initiatives to rectify the same;

(e) select, prioritise and determine sequencing of infrastructure projects;

(f) formulate clear and transparent policies related to the infrastructure sectors so as to ensure that project risks are clearly identified and allocated between the stakeholders; and

(g) identify the sectoral concessions to be offered to concessionaires to attract private participation and secure availability of viable infrastructure facilities to the consumers;

Provided that where participation is sought by any person by participating in disinvestment process, the provisions of this Act shall not apply:

Provided further that any authority or body, constituted to implement such disinvestment, may seek assistance from the Board;

(ii) prepare internally or through external consultants or service providers engaged for the purpose, all necessary documents including the bid or tender documents, draft contracts including the various contractual arrangements and incentives to be offered by the Government;

(iii) assist public infrastructure agencies and concessionaires in obtaining statutory and other approvals;

(iv) recommend the grant of concessions to a public infrastructure agency in accordance with the provisions of this Act, the rules and the bye-laws made there under;

(v) assist in determining the level and structuring of investments of the Government and public bodies into infrastructure projects with private participation including holding the investment or part thereof;

(vi) create a special purpose vehicle for implementation of any infrastructure project in co-ordination with the Government or public infrastructure agencies; and

(vii) administer the Fund and projects under this Act.

(3) The Board shall not play any role in the infrastructure projects undertaken by the Government exclusively through its budgetary provisions.

(4) In order to carry out its functions consistent with the provisions of this Act, the Board shall have the powers to do all or any of the following, namely:-

(i) acquire, hold, develop or construct such property, both movable and immovable, as the Board may deem necessary for the performance of any of its activities related to the development of infrastructure sectors or infrastructure projects;

(ii) advise or recommend to the Government acquisition of land under the Land Acquisition Act, 1894 for the purposes of infrastructure projects;

(iii) lease, sell, exchange, or otherwise make allotments of the property referred to in clause (i) to concessionaire and to modify or rescind allotments, including the right and power to evict the allottees concerned on breach of any of the terms or conditions of such allotment;

(iv) borrow and raise money in such manner as the Board may think fit and to secure the repayment of any money borrowed, raised or owing by mortgage, charge, standard security, lien or other security upon the whole or any part of the Board's property or assets (whether present or future), and also by a similar mortgage,

charge, standard security, lien or security to secure and guarantee the performance by the Board of any obligation or liability, it may have undertaken or which may become binding on it;

(v) constitute a professional multi-disciplinary Project Management Team and one or more Advisory Committee or Committees or Sectoral Sub-Committee or Project Implementation Sub-Committee, or engage suitable service providers or advisors or consultants to advise the Board for the efficient discharge of its functions;

(vi) enter into and perform all such contracts as it may think necessary or expedient for performing any of its functions; and

(vii) do such other things and perform such other acts as it may think necessary or expedient for the proper conduct of its functions and for carrying into effect the purposes of creation of the Board, as contained in this Act."

20. The principal submission of Mr. Jain was that there exists no privity of contract between the petitioners and HSVP. According to learned counsel, a reading of the aforesaid provisions would clearly establish that the application for permission and for development is examined and evaluated only by the DTCP and that the HDRUA does not contemplate any intervention or involvement of the HSVP. According to learned counsel even the power to cancel a license for development which may have been granted vests solely with the Director as would be evident from Section 8 of the Act. That provision reads thus:-

> "**8. Cancellation of license.—** (1) A license granted under this Act, shall be liable to be cancelled by the Director if the colonizer contravenes any of the conditions of the license or the provisions of the Act or the rules made thereunder; provided that before such cancellation the coloniser shall be given an opportunity of being heard.
>
> [(2) After cancellation of the licence, the Director may himself, carry out or cause to be carried out, the development works in the colony and recover such charges as the Director may have to incur on the said development works from the colonizer and the plot-holders in the manner prescribed as arrears of land revenue.
>
> (3) The liability of the colonizer for payment of such charges shall not exceed the amount the colonizer has actually recovered from the plot-holders less the amount actually spent on such developments works, and that of the plot-holders shall not exceed the amount which they would have to pay to the colonizer towards the expenses of the said development works under the terms of the agreement of sale or transfer entered into between them:
>
> Provided that Director may, recover from the plot holders with their consent, an amount in excess of what may be admissible under the aforesaid terms of agreement of sale or transfer.
>
> (4) Notwithstanding anything contained in this Act after the colony has been fully developed under sub-section (2), the Director may, with a view to enabling the colonizer, to transfer the possession of and the title to the land to the plot-holders within a specified time, authorize the colonizer by an order to receive the balance amount, if any, due from the plot holders,

after adjustment of the amount which may have been recovered by the Director towards the cost of the development works and also transfer the possession of or the title to the land to the plot-holder within aforesaid time. If the colonizer fails to do so, the Director shall on behalf of the colonizer transfer the possession of and the title to the land to the plot-holders on receipt of the amount which was due from them.

(5) After meeting the expenses on development works under sub-section (2), the balance amount shall be payable to the colonizer."

21. Mr. Jain further underlined the fact that even the imposition of penalties is a subject which is regulated by the Director in the office of the DTCP. He in this regard drew our attention to Section 10 of the HDRUA which is reproduced hereinbelow:-

"**10. Penalties**.— (1) Any person who contravenes any of the provisions of this Act or the rules made thereunder or any of the conditions of a licence granted under section 3 shall be punishable with imprisonment of either description for a term which may extend to three years and shall also be liable to fine:

Provided that where only of the provisions of section 9 are contravened the punishment of imprisonment shall not exceed six months. 84[(2) Without prejudice to the provisions of sub-section (1), the Director or any other officer authorized in writing by him in this behalf may, by notice, served by post and if a person avoids service, or is not available for service of notice, or refuses to accept service, then by affixing a copy of it on the outer door or some other conspicuous part of such premises, or in such other manner as may be prescribed, call upon any person who has committed a breach of the provisions referred to in the said sub-section to stop further construction and to appear and show cause why he should not be ordered to restore to its original state or to bring it in conformity with the provisions of this Act or the rules framed thereunder, as the case may be, any building or land in respect of which a contravention such as is described in the said subsection has been committed and if such person fails to show cause to the satisfaction of the Director or such authorized officer within a period of seven days, the Director or such authorized officer may pass an order requiring him to restore such land or building to its original state or to bring it in conformity with the provisions of this Act or the rules framed there-under, as the case may be, within a further period of seven day.

(3) If the order made under sub-section (2) is not carried out within a specified period, the Director, or any other officer

authorized in writing by him in this behalf may, himself at the expiry of the specified period, take such measures, as may appear necessary to give effect to the order and the cost of such measure shall, if effect to the order and the cost of such measure shall, if not paid on demand being made to him, be recoverable from such person as arrears of land revenue:

Provided that even before the expiry of the period mentioned in the order under subsection (2), if the Director or such authorized officer is satisfied that instead of stopping the construction, the person continues with the contravention, the Director or such authorized officer may himself take such measures, as may appear necessary, to give effect to the order and the cost of such measures shall if not paid on demand being made to him, be recoverable from such person as arrears of land revenue.]"

22. Mr. Jain then took us through the **Haryana Development and Regulation of Urban Area Rules, 1976**[14] and more particularly Rules 3, 8, 9, 10 and 11 which are reproduced hereunder:-

"**3. Application for licence [sections 3 and 24].—** (1) Any owner of land desirous of setting up a colony shall make an application in writing to the Director in form LC-I and shall furnish therewith;—

[(a) a demand draft for licence fee at the rates (given in the Schedule to these rules) for the plotted colony, group housing colony and commercial/office complexes in residential sectors and for industrial colony;]

(b) income tax clearance certificate;

(c) particulars of experience as colonizer showing number and details of colonies already established or being established;

(d) particulars about financial position [so as to determine the capacity to develop the colony for which he is applying]; and

(e) the following plans and documents in triplicate ;—

(i) copy or copies of all title deeds and other documents showing the interest of the applicant in the land under the colony, along with a list of such deeds and documents;

(ii) a copy of the Shajra Plan showing the location of the colony along with the names of revenue estate, Khasra number and area of each field;

[14] HDRUA Rules

(iii) a guide map on a scale of not less than 10 centimetre to 1 Kilometre showing the location of the colony in relation to surrounding geographical features to enable the identification of the land;

(iv) a survey plan of the land under the proposed colony on a scale of 1 centimetre to 10 metres showing the spot levels at a distance of 30 metres and where necessary, contour plans. The survey will also show the boundaries, and dimensions of the said land, the location of streets, buildings, and premises within a distance of at least 30 metres of the said land and existing means of access to it from existing roads;

(v) layout plan of the colony on a scale of 1 centimetre to 10 metres showing the existing and proposed means of access to the colony the width of streets, sizes and types of plots, sites reserved for open spaces, community buildings and schools with area under each and proposed building lines on the front and sides of plots;

(vi) an explanatory note explaining the salient feature of the colony, in particular the sources of wholesome water supply arrangement and site for disposal and treatment of storm and sullage water;

(vii) plans showing the cross-sections of the proposed roads indicating in particular the width of the proposed carriage ways cycle tracks and footpaths, green verges, position of electric poles and of any other works connected with such roads;

(viii) plans as required under sub-clause (vii) indicating, in addition the position of sewers, storm water channels, water supply and any other public health services;

(ix) detailed specifications and designs of road works shown under sub-clause (vii) and estimated costs thereof;

(x) detailed specifications and designs of sewerage, storm, water and water supply schemes with estimated costs of each;

(xi) detailed specification and designs for disposal and treatment of storm and sullage water and estimated costs of works;

(xii) detailed specification and designs for electric supply including street lighting. (2) The triplicate plans mentioned in clause (e) of sub-rule (1) shall be clear and legible A0 prints with one set mounted on cloth.

(3) If the applicant wants to be exempted from providing any one or more of the amenities in a colony he shall furnish detailed explanatory note in triplicate along with application if necessary, indicating the reasons as to why the said amenity or amenities need not or cannot be provided

8. Enquiry by Director [Section 3(2)].— (1) On receipt of application in the prescribed form and complete in all respects, the Director shall enquire into the following matters and such other matters as he may consider necessary;

(a) title to land;

(b) extent and situation of the land;

(c) capacity to develop the colony;

(d) layout plan of the colony;

(e) plan regarding the development works to be executed in the colony;

(f) conformity with the development scheme of the land in question and the neighbouring areas; and

[(g) conformity with the development plan.]

[(2) Before making enquiries under sub-rule (1), the Director shall, by an order in writing, require the applicant {except industrial colonies of Haryana Urban Development Authority and Haryana State Industrial Development Corporation} to furnish, within a period of thirty days from the date of service, of such order, a scrutiny fee at the rate of [twenty rupees per square meter, calculated for the gross area of the land, under low-density eco-friendly colony] {ten rupees per square metre}, calculated for the gross area of the land under low-density eco-friendly, {ten rupees per square metre}, calculated for the gross area of the land under the plotted colony, and 3{ten rupees per square metre} calculated on the covered area of all the floors in a group housing colony, in the form of a demand draft in favor of the Director, Town and Country Planning, Haryana and drawn on any scheduled bank {:}] [Provided that the scrutiny fee for the projects under Transit Oriented Development shall be charged on pro-rata basis for increased FAR from 1.5/1.75 to 2.5/3.5:

Provided further that the scrutiny fee under the New Integrated Licensing Policy, 2016 shall be applicable on per square metre basis for the permissible covered area.]

(3) If the applicant fails to furnish the requisite fee as provided in sub-rule (2) above, the Director shall reject the application.

9. Rejection of application [Section 3].— The Director may after making inquiry as mentioned in sub-rule(1) of rule 8 and after giving reasonable opportunity of being heard to the applicant by an order in writing reject the application to grant licence in [form LC II], if—

(a) it does not conform to the inquirements of rule 3,4, and 5 and 8;

(b) the plants and designs of the development works submitted with the application are not technically sound and workable; or

(c) the estimated expenditure on water-supply mains or extramural and outfall sewers is not commensurate with the size of the colony.

10. Applicant to be called upon to fulfill certain conditions for grant of licence [Section 3 (3)].—(1) If after scrutiny for the plans and other necessary inquiries which the Director may deem fit, he is satisfied that the application is not for the grant of licence, he shall before granting licence, call upon the applicant to fulfill conditions laid down in rule 11 within a period of thirty days from the date of the service of notice in form LC-III:

Provided that on an application within the aforesaid period, for the extension of time limit, the Director, if satisfied of the reasons given therein extend such time up to thirty days: [Provided further that on the request of the applicant, for the extension of time limit for submission of Bank guarantees under clause (a) of sub-rule (1) of rule 11, the Director, if satisfied that the reasons for delay in submission of the bank guarantee are beyond the control of the applicant, extend such time upto further ninety days period.]

(2) If the applicant fails to fulfill the conditions under sub-rule (1) within the specified orextended period, the grant of licence shall be refused.

11. Conditions required to be fulfilled by applicant [Section 3(3)]— (1) the applicant shall:—

[(a) furnish to the Director either a bank guarantee equal to twenty-five percent of the estimated cost of the development works or mortgage a part of the licenced land, as determined by the Director and enter into an agreement in form LC-IV for carrying out and completion of development works in accordance with the licence finally granted:

Provided that in case of affordable plotted residential colony under Deen Dayal Jan Awas Yojana, the coloniser shall have option to deposit the cost of internal development works with the concerned municipal authority as per mutually agreed rates or in the alternative, shall have option to mortgage fifteen percent of the total area under all residential plots, in favour of the Director, in lieu of depositing bank guarantee equal to twenty-five percent of the estimated cost of development works.]

(b) undertake to deposit thirty percent of the amount to be realized by him from the plot-holders, from time to time,

within ten days of its realization in a separate account to be maintained in a scheduled bank and this amount shall only be utilized towards meeting the cost of internal development works in the colony;

(c) undertake to pay proportionate development charges if the main lines of roads, drainage, sewerage, water supply and electricity are to be laid out and constructed by the Government or any other local authority. The proportion in which and the time within which such payment is to be made shall be determined by the Director;

(d) undertake responsibility for the maintenance and upkeep of all roads, open spaces, public parks and public health services for a period of five years from the date of issue of the completion certificate under rule 16 unless earlier relieved of this responsibility and there upon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be;

(e) undertake to construct at his own cost, or get constructed by any other institution or individual at its cost, schools, hospitals, community centers and other community buildings on the land set apart for this purpose, within a period of four years from the date of grant of licence extendable by the Director for another period of two years, for reasons to be recorded in writing, failing which the land shall vest with the Government after such specified period, free of cost, in which case the Government shall be at liberty to transfer such land to any person or institution including a local authority, for the said purposes, on such terms and conditions, as it may deem fit; Provided that a show cause notice and opportunity for hearing shall be given before vesting the land in the Government;]

(f) undertake to permit the Director or any other officer authorized by him to inspect the execution of the layout and the development works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted.

(g) pay such development charges including the cost of development of State/ National Highways, Transport, Irrigation and Power facilities as determined by Director (given in the {Schedule-A}to these rules); and

(h) execute bilateral agreement in Form LC-IV-A for group housing colony, in Form LC-IV-B for plotted colony, in

Form LC-IV-C for industrial colony and in Form LC-IV-D for commercial colony.]

(2) If the Director, having regard to the amenities which exist or are proposed to be provided in the locality, decides that it is not necessary or possible to provide such amenity or amenities, the applicant will be informed thereof and clauses (c), (d) and (e) of sub-rule (1) shall be deemed to have been modified to that extent.

(3)In case of an application for grant of licence for low-density eco-friendly colony, the applicant shall additionally undertake to-

(a) install solar farms aiming for meeting energy requirements of the colony through solar energy, in accordance with the technical parameters specified by the Director, on at least five percent of the area of the colony that shall be in addition to the five percent area reserved for open spaces;

(b) provide integrated facility for storage, purification, distribution and recycling of storm-water aiming for no external source of water supply, minimum ground water extraction and zero run-off. Independent distribution system for separately fulfilling the farming, flushing and domestic water requirements shall also be provided;

(c) install a bio-gas plant aimed at fulfilling requirements for cooking gas and a compost plant for utilizing and recycling of all bio-degradable waste, in accordance with the technical parameters specified by the Director; and,

(d) restrict the residential density of the colony to a maximum of twenty five persons per acre.]"

23. The submission essentially was that the application for development is examined and regulated solely by the office of the DTCP and nowhere contemplates the involvement of HSVP. It was submitted that the bilateral agreements, templates of which are embodied in Forms LC IV-A and LC IV-B, would also indicate that the agreement is essentially between the owner/developer on the one hand and the Director, DTCP on the other. It was his submission that this supports the contention of the writ petitioner that the contractual arrangement is only between the owner/developer and DTCP. Our

attention was also drawn to Form LC IV-D as appended to the Rules and which incorporates the following provisions:-

> "
>
> **FORM LC-IV-D**
>
> [See Rule 11(1)(h)]
>
> **Bilateral Agreement by owner of land intending to set up a Commercial Colony**
>
> This agreement made on _____ day of_____ between Shri/M/s _____ s/o Shri_____ resident of _____ (hereinafter called the "owner") of the one part and the Governor of Haryana, acting through the Director, Town and Country Planning, Haryana (hereinafter referred to as the "Director") of the other part.
>
> Whereas in additional to agreement executed in pursuance of the provisions of rule-11 of the Haryana Development and Regulation of Urban Areas Rules, 1976 (hereinafter referred to as the "Rules") and the conditions laid down therein for grant of licence, the owner shall enter into a bilateral agreement with the Director for carrying out and completion of the development works in accordance with the licence finally granted for setting up of a Commercial colony on the land measuring _____acres _____falling in the revenue estate of village_____ district_____.
>
> AND WHEREAS the bilateral agreement mutually agreed upon and executed between the parties shall be binding on the owner:-
>
> NOW THIS DEED OF BILATERAL AGREEMENT WITNESSETH AS FOLLOWS:
>
> 1. In consideration of the Director agreeing to grant licence to the owner to set up the said colony on the land mentioned in Annexure hereto on the fulfillment of the conditions of this bilateral agreement, the owner, his partners, legal representatives, authorized agents, assignees, executers etc. shall be bound by the terms and conditions of this bilateral agreement executed by the owner hereunder covenanted by him as follows:
>
> (i) That the owner undertakes to pay proportionate external development charges as per rate, schedule, terms and conditions hereunder:-
>
> (ii) That the owner shall pay the proportionate external development charges at the tentative rate of Rs._____ lacs per gross acre for commercial colony. These charges shall be payable to Haryana Urban Development Authority through the Director, Town and Country Planning, Haryana either in lumpsum within thirty days from the date of grant of licence or in eight equal quarterly installments of 12.5% each in the following manner:-

(a) First installment shall be payable within a period of thirty days from the date of grant of licence.
(b) Balance 87.5% in seven equal quarterly installments along with interest at the rate of 15% per annum which shall be charged on unpaid portion of the amount worked out at the tentative rate of Rs. _____ lacs per gross acre.
(c) The owner shall furnish bank guarantee equal to 25% of the amount worked out at the tentative rate of Rs._____ lacs per gross acre.

(iii) The external development charges rates are under finalization. In the event of increase tentative external development charges rates, the owner shall pay the enhanced amount of external development charges and the interest on installment, if any, from the date of grant of licence.

(iv) For grant of completion certificate, the payment of external development charges shall be pre-requisite along with valid licence and bank guarantee.

(v) The unpaid amount of external development charges would carry an interest at a rate of 15% per annum and in case of any delay in the payment of installments on the due date an additional penal interest of 3% per annum (making the total payable interest 18% simple per annum) would be chargeable upto a period of three months and an additional three months with the permission of Director.

(vi) That the owner shall derive maximum net profit @ 15% of the total project cost of development of the above noted industrial colony after making provisions of statutory taxes. In case, the net profit exceeds 15% after completion of the project period, surplus amount shall be deposited, within two months in the State Government Treasury by the Owner.

(vii) The owner shall submit the certificate to the Director within thirty days of the full and final completion of the project from a Chartered Accountant that the overall net profits (after making provisions for the payment of taxes) have not exceeded 15% of the total project cost of the scheme.

(viii) In case Haryana Urban Development Authority executes external development works before final payment of external development charges, the Director, shall be empowered to call upon the owner to pay the balance amount of external development charges in lumpsum even before the completion of licence period and the owner shall be bound to make the payment within the period so specified.

(a) Enhanced compensation on land cost, if any, shall be payable extra as decided by Director from time to time.

(b) The owner shall arrange the electric connection from the outside source for electrification of their colony from Haryana Vidhyut Parsaran Nigam. If the owner fails to seek electric connection from Haryana Vidhyut Parsaran Nigam the Director, shall recover the cost of from the owner and deposit the same with Haryana Vidhyut Parsaran Nigam. However, the installation of internal electricity distribution infrastructure as per the peak load requirement of the colony shall be the responsibility of the colonizer, for which the colonizer will be required to get the "electric (distribution) services plan/estimates" approved from the agency responsible for installation of "external electrical services" i.e. Haryana Vidhyut Parsaran Nigam/Uttari Haryana Vidhyut Nigam Limited/Dakshin Haryana Bijlee Vitran Nigam Limited, Haryana and complete the same before obtaining completion certificate for the colony.

(c) That the rates, schedule and terms and conditions of external development charges may be revised by the Director during the period of licence as and when necessary and owner shall be bound to pay the balance enhanced charges, if any, in accordance with the rates, schedule and terms and conditions so determined by the Director.

(d) That the owner shall be responsible for the maintenance and upkeep of the colony for a period of five years from the date of issue of completion certificate under rule16 of the Rules, unless earlier relieved of this responsibility.

(e) That the owner shall be individually as well as jointly be responsible for the development of commercial colony.

(f) That the owner shall complete the internal development works within one year of the grant of the licence.

(g) That the owner shall deposit service charges @ Rs. 10/- square meters of the total covered area of the colony in two equal installments. The first instalment of the service charges would be deposited by the owner within sixty days from the date of grant of licence and the second instilment within six months from the date of grant of the licence. The unpaid amount of service charges shall carry an interest @ 18% (simple) per annum for the delay in the payment of installments.

(h) That the owner shall carry out at his own expenses any other works which the Director may think necessary and reasonable in the interest of proper development of the colony.

(i) That the owner shall permit the Director or any other officer authorized by him in his behalf to inspect the execution of the development works and the owner shall carry out all direction issued to him for ensuring due compliance of the execution of the development works in accordance with the licence granted.
(j) That without prejudice to anything contained in this agreement, all provisions contained in the Act and the Rules shall be binding on the owner.
(k) That the owner shall make his own arrangement for disposal of sewerage till the external sewerage system is provided by Haryana Urban Development Authority and the same is made functional.

2. Provided always and it is hereby agreed that if the owner commits any breach of the terms and conditions of this bilateral agreement or violate any provisions of the Act or the Rules, then and in any such cases notwithstanding the waiver of any previous clause or right, the Director, may cancel the licence granted to the owner.
3. Upon cancellation of the licence under clause2 above, action shall be taken as provided in the Haryana Development and Regulation of Urban Areas Act, 1975 and the Haryana Development and Regulation of Urban Areas Rules, 1976, as amended up to date, the bank guarantee in that event shall stand forfeited in favour of the Director.
4. The Stamp duty and registration charges on this deed shall be borne by the owner.
5. After the layout plans and development in respect of the commercial colony have been completed by owner in accordance with the approved plans and specifications and a completion certificate in respect thereof issued, the Director may, on an application in this behalf, from the owner, release she bank guarantee or part thereof as the case may be, provided that the bank guarantee equivalent to 1/5th amount thereof shall be kept unreleased to ensure upkeep and maintenance of the colony for a period of 5 years from the date of issue of the completion certificate under rule16 or earlier in case the owner is relieved of the responsibility in this behalf by the Government. However, the bank guarantee regarding the external development charges shall be released by the Director in proportion to the payment of the external development charges received from the owner.
6. That any other condition which the Director may think necessary in public interest can be imposed."

24. It was submitted by Mr. Jain that although the aforesaid bilateral agreement requires EDC payment being made over to HSVP, the said

agreement itself indicates that it is a payment which is liable to be routed through the DTCP. According to learned counsel, this aspect reinforces the stand of the petitioners of a contractual relationship existing only between the owner/developer and DTCP. According to learned counsel, since all aspects relating to the proposed development and the carrying out of external development under the HDRUA and the HDRUA Rules is regulated by the DTCP and the payment to HSVP is merely routed through that department of the Government of Haryana, the invocation of Section 194C is clearly misconceived.

25. It was then submitted that EDC is liable to be acknowledged as being a statutory levy since in case of a default in payment thereof, it is open to the DTCP to recover the same as areas of land revenue. Our attention in this respect was drawn to Section 10A of the HDRUA which reads as follows:-

> "**10A. Recovery of dues**.—All dues payable under the Act, which have not been deposited within the time specified, shall be recovered as arrears of land revenue."

26. According to learned counsel since EDC is a payment which is imbued with statutory character, no tax is liable to be deducted thereon. Mr. Jain relied upon the following observations as appearing in the decision of the Calcutta High Court in **Star Paper Mills Ltd. vs. Commissioner of Income Tax**[15]**:**

> **"14.** Now it brings us to the issue whether the royalty payable by the assessee in pursuance of the order dated April 30, 1979, is a statutory liability. To consider this issue first we would like to refer to some observations, decisions, relevant to the issue.
>
> **15.** In the case of *CIT* v. *Gorelal Dubey*, [1998] 232 ITR 246 the issue before the Madhya Pradesh High Court was whether royalty is a tax. Following the decision of their Lordships in *India*

[15] 2001 SCC OnLine Cal 851

Cement Ltd. v. *State of Tamil Nadu*, [1991] 188 ITR 690 (SC), the Madhya Pradesh High Court has taken the view that royalty is a tax.

The Madhya Pradesh High Court has observed at page 248 as under:

> "In paragraph 31 (at page 707 of 188 ITR) of the judgment, their Lordships, after referring to the views expressed by the Rajasthan, Punjab, Gujarat and Orissa High Courts that the royalty cannot be said to be a tax because this is something which is being paid in lieu of minerals extracted, in paragraph 34 (at page 707 of 188 ITR), concluded by saying that the royalty is a tax and thus the decisions of the High Courts cannot hold good."

16. When the royalty is treated as a tax that cannot be a contractual liability. The view taken by the Madhya Pradesh High Court in *Gorelal's case*, [1998] 232 ITR 246 has been affirmed by their Lordships of the Supreme Court reported in *Gorelal Dubey* v. *CIT*, [2001] 248 ITR 3. Their Lordships in para. 3 observed that the Constitution Bench judgment in *India Cement Ltd.'s case*, [1991] 188 ITR 690 lays down the law, namely, that royalty is tax, and it is a tax for all purposes including section 43B of the Income-tax Act, 1961.

17. While considering the provisions of sections 82 and 83 of the Forest Act, the Madhya Pradesh High Court has held in the case of *Dulichand Agarwal* v. *State of M.P.*, [1980] MPLJ 465, that section 82 of the Forest Act as substituted by the Madhya Pradesh Act No. 9 of 1965 creates a statutory liability for recovery of the amount payable to the Government under terms of a notice relating to the sale of forest produce by auction. The statutory liability can be enforced even though there is no contract as envisaged under article 299 of the Constitution of India. The relevant discussion whether section 82 creates a statutory liability the court has discussed at page 470. The relevant observations read as under:

> "It was argued by learned counsel for the petitioner that section 82 does not create a new liability and that is only provides for a procedure for enforcing a liability and that in the absence of any contract in the manner provided in article 299(1) there could be no liability to pay the deficiency. In our opinion, this argument cannot be accepted. Section 82 properly construed creates a statutory liability for recovery of the amount payable to the Government under the terms of a notice relating to the sale of forest produce by auction. This statutory liability can be enforced even though there is

> no contract as envisaged under article 299 of the Constitution. This construction of section 82 is strongly supported by the decision of the Supreme Court in *A. Damodaran* v. *State of Kerala*, (1976) 3 SCC 61 : AIR 1976 SC 1533."
>
> **18.** Now the question is when the Madhya Pradesh High Court has taken a view that section 82 of the Forest Act creates a statutory liability and their Lordships of the Supreme Court have taken the view in the case of *Gorelal*, [2001] 248 ITR 3 that royalty is a tax, how it can be said that royalty liability is not a statutory liability.
>
> **19.** Once a particular status is conferred to the nature of liability that cannot be changed unless otherwise warranted under the provisions of the Act. In the case of contractual liability, if the liability is disputed that cannot be recovered as land revenue or to enforce the terms of the agreement, for that one has to approach the court. If it is a statutory liability like royalty in this case that royalty liability which is fixed by the Government can be recovered as land revenue without approaching the court."

In view of the above, according to Mr. Jain, the payment of EDC is liable to be viewed as a payment to the Government of Haryana itself and consequently being exempted in terms of Section 196 of the Act.

27. While reiterating the submissions addressed by Mr. Jain, Mr. Agarwal appearing in Natureville Promoters additionally addressed the following submissions. It was firstly contended that Section 196 of the Act is liable to be read alongside Article 289 of the Constitution and thus the Court declaring that payments made to HSVP would clearly be exempt from TDS. Mr. Agarwal took us through the LC- I, II, III, IV, IV-D and V formats and submitted that the application by a developer is made to the DTCP and which is the solitary authority empowered to either accept or refuse the grant of a licence. It was further submitted that once the DTCP comes to form a provisional opinion that a grant of licence would be merited, it calls upon the owner to fulfil various conditions laid down in Rule 11. Rule 11 is extracted hereinbelow:

"**11. Conditions required to be fulfilled by applicant [Section 3(3)**]— (1) the applicant shall:—

(a) furnish to the Director either a bank guarantee equal to twenty-five percent of the estimated cost of the development works or mortgage a part of the licenced land, as determined by the Director and enter into an agreement in form LC-IV for carrying out and completion of development works in accordance with the licence finally granted:

Provided that in case of affordable plotted residential colony under Deen Dayal Jan Awas Yojana, the coloniser shall have option to deposit the cost of internal development works with the concerned municipal authority as per mutually agreed rates or in the alternative, shall have option to mortgage fifteen percent of the total area under all residential plots, in favour of the Director, in lieu of depositing bank guarantee equal to twenty-five percent of the estimated cost of development works.]

(b) undertake to deposit thirty percent of the amount to be realized by him from the plot-holders, from time to time, within ten days of its realization in a separate account to be maintained in a scheduled bank and this amount shall only be utilized towards meeting the cost of internal development works in the colony;

(c) undertake to pay proportionate development charges if the main lines of roads, drainage, sewerage, water supply and electricity are to be laid out and constructed by the Government or any other local authority. The proportion in which and the time within which such payment is to be made shall be determined by the Director;

(d) undertake responsibility for the maintenance and upkeep of all roads, open spaces, public parks and public health services for a period of five years from the date of issue of the completion certificate under rule 16 unless earlier relieved of this responsibility and there upon to transfer all such roads, open spaces, public parks and public health services free of cost to the Government or the local authority, as the case may be;

(e) undertake to construct at his own cost, or get constructed by any other institution or individual at its cost, schools, hospitals, community centers and other community buildings on the land set apart for this purpose, within a period of four years from the date of grant of licence extendable by the Director for another period of two years, for reasons to be recorded in writing, failing which the land shall vest with the Government after such specified period, free of cost, in which case the Government

shall be at liberty to transfer such land to any person or institution including a local authority, for the said purposes, on such terms and conditions, as it may deem fit;

Provided that a show cause notice and opportunity for hearing shall be given before vesting the land in the Government;]

(f) undertake to permit the Director or any other officer authorized by him to inspect the execution of the layout and the development works in the colony and to carry out all directions issued by him for ensuring due compliance of the execution of the layout and development works in accordance with the licence granted.

(g) pay such development charges including the cost of development of State/National Highways, Transport, Irrigation and Power facilities as determined by Director (given in the 128{Schedule-A}to these rules); and

(h) execute bilateral agreement in Form LC-IV-A for group housing colony, in Form LC-IV-B for plotted colony, in Form LC-IV-C for industrial colony and in Form LC-IV-D for commercial colony.]

(2) If the Director, having regard to the amenities which exist or are proposed to be provided in the locality, decides that it is not necessary or possible to provide such amenity or amenities, the applicant will be informed thereof and clauses (c), (d) and (e) of sub-rule (1) shall be deemed to have been modified to that extent.

(3)In case of an application for grant of licence for low-density eco-friendly colony, the applicant shall additionally undertake to-

(a) install solar farms aiming for meeting energy requirements of the colony through solar energy, in accordance with the technical parameters specified by the Director, on at least five percent of the area of the colony that shall be in addition to the five percent area reserved for open spaces;

(b) provide integrated facility for storage, purification, distribution and recycling of storm-water aiming for no external source of water supply, minimum ground water extraction and zero run-off. Independent distribution system for separately fulfilling the farming, flushing and domestic water requirements shall also be provided;

(c) install a bio-gas plant aimed at fulfilling requirements for cooking gas and a compost plant for utilizing and recycling of all bio-degradable waste, in accordance with the technical parameters specified by the Director; and,

(d) restrict the residential density of the colony to a maximum of twenty five persons per acre."

28. Mr. Agarwal laid emphasis on the fact that even this provision does not obligate the owner to make any payments to HSVP. Learned counsel submitted that a reading of the bilateral agreement which ultimately comes to be executed in Form LC IV-D clearly places the onus of paying EDC upon the owner. It was pointed out that the payment of an EDC is envisaged to be made to HSVP through the DTCP. Taking us through the various clauses of the bilateral agreement, Mr. Agarwal highlighted the clauses which, according to him, establish that the rate of EDC, schedule of payment, and all other terms and conditions in connection therewith are regulated by the Director. It was submitted that even if the owner were to seek condonation of delay in the payment of EDC, permission in that respect is to be obtained from the Director. It was further submitted that the Bank Guarantee equivalent to 25% of EDC is made out in favour of the Governor of Haryana. Mr. Agarwal further contended that the LC-V format would unerringly point towards the substance of the agreement being one between the owner and the DTCP.

29. It was pointed out that although the demand drafts representing EDC liability were drawn in the name of HSVP, they were physically furnished to the DTCP, Haryana. According to learned counsel when the contract is viewed in its entirety, it would be apparent that the owner is under no contractual or other obligation towards HSVP. It was submitted that while EDC payments may be forwarded to the HSVP, the said authority is not empowered in law to take any steps against the owner in case of default.

30. It was then submitted that the communications issued by the DTCP and HSVP would themselves establish that the payments made to HSVP would fall within the ambit of Section 196. Our attention was specifically drawn to the Memo dated 06 October 2017 in which the DTCP had disclosed that EDC is a charge levied by the Government for carrying out external development works. Mr. Agarwal also took us through the reply of HSVP dated 20 November 2017 in terms of which its Accounts Officer had categorically averred that it is not receiving any EDC payments. Reliance was also placed on the Memo dated 19 June 2018 issued by DTCP and where it had clarified that HSVP is only an executing agency working for and on behalf of the State Government. According to learned counsel, once the aforesaid facts are cumulatively taken into consideration, it would be apparent that EDC is a payment made to the Government.

31. Mr. Agarwal also placed reliance on the judgment of the Supreme Court in **New Delhi Municipal Corporation v. State of Punjab and Ors.**[16] wherein it was held income earned or received by a State as a Government, cannot be subjected to tax by virtue of Article 289 of the Constitution. It was his submission that principles laid down in *New Delhi Municipal Corporation* are squarely applicable in the present case as the EDC charges have been received by the DTCP and the same is income of the State and thus not taxable.

32. According to Mr. Agarwal, factors such as the foundational agreement being between the owner and the developer, the licence having been issued by the Government, fixation and enhancement of EDC rates by the Government, the furnishing of a Bank Guarantee in the name of the Government of Haryana, powers of its invocation and

[16] (1997) 7 SCC 339

release vesting in that Government, all clearly evidence the fulcrum of the contract being between the owner and the Government of Haryana. It was in that backdrop that Mr. Agarwal contended that EDC is liable to be viewed as an amount which was payable to the Government and consequently the case squarely falling within the scope of Section 196.

33. Proceeding to deconstruct Section 194C, Mr. Agarwal submitted that the said provision would be attracted only if there be a person responsible for paying a sum to any resident for carrying out work in pursuance of a contract between the contractor and a specified person. According to learned counsel, the petitioner is not responsible to pay any sums to HSVP who would be liable to be viewed as the contractor in terms of Section 194C. Emphasis was laid on the fact that there is no contractual relationship between the petitioner and the HSVP. According to Mr. Agarwal merely because the sum is routed to the HSVP through the DTCP, the same would be insufficient to attract the provisions of Section 194C.

34. It was further contended by Mr. Agarwal that in some of the cases the respondents had also sought to invoke Section 194I of the Act. According to learned counsel, Section 194I on its plain reading would be wholly inapplicable. Learned counsel pointed out that the said provision is concerned with income earned by way of rent. According to learned counsel undisputedly the land over which the development is to be undertaken belonged to the petitioner and, therefore, there was no question of an aspect of rent arising in connection therewith. It was submitted that in any case since the land neither vested in HSVP nor was it taken on rent from that authority, Section 194I would clearly not stand attracted. In any event according to Mr. Agarwal this issue stands

concluded in favour of the petitioners in light of the decision of the Court rendered in *DLF Homes Panchkula*.

35. Insofar as the OM dated 23 December 2017 is concerned, Mr. Agarwal submitted that the same incorrectly proceeds on the basis that EDC is an amount payable to HSVP and thus the provisions of Section 194C being attracted. Learned counsel pointed out that Section 194C is not founded on an amount being payable to a person. It was contended that as per the provision itself, tax is liable to be deducted either at the time of credit of such sum to the account of the contractor or at the time of its payment in cash. It was in the aforesaid light that learned counsel argued that Section 194C pre-supposes a sum being paid to a contractor as opposed to amounts being payable to an authority.

36. It was further submitted by Mr. Agarwal that the provisions of Section 201 of the Act cannot be invoked since it would be wholly incorrect to treat the petitioners as being an assessee in default. Learned counsel argued that it is well settled that where an issue is debatable or even arguable, Section 201 would be inapplicable. In support of his aforenoted submission, learned counsel relied upon the following decisions:

(I) **CIT v. British Airways**[17]

> **"3.** Having heard the learned counsel on both sides, we are of the view that, on the facts and circumstances of these cases, the question on the point of limitation formulated by the Income Tax Appellate Tribunal in the present cases need not be gone into for the simple reason that, at the relevant time, there was a debate on the question as to whether TDS was deductible under the Income Tax Act, 1961, on foreign salary payment as a component of the total salary paid to an expatriate working in India. This controversy came to an end vide judgment of this Court

[17] (2010) 13 SCC 44

in *CIT* v. *Eli Lilly & Co. (India) (P) Ltd.* [(2009) 15 SCC 1 : (2009) 312 ITR 225] The question on limitation has become academic in these cases because, even assuming that the Department is right on the issue of limitation still the question would arise whether on such debatable points, the assessee(s) could be declared as assessee(s) in default under Section 192 read with Section 201 of the Income Tax Act, 1961."

(II) **Chennai Port Trust Rajaji Salai Chennai v. The Income Tax Officer**[18]

"**12.** The Supreme Court observed that till the decision of the Apex Court reported in (2009) 312 ITR 225 (*CIT* v. *Eli Lilly & Company (India) (P) Ltd.*), there was a debate on the question as to whether TDS was deductible on foreign salary payment as a component of total salary paid to an expatriate working in India. In the face of such debatable issue, the assessee could not be declared as an assessee in default under Section 192 read with Section 201 of the Income Tax Act. Further, the Apex Court pointed out that since the foreign company-assessees therein had paid the differential tax and the interest and had further undertook not to claim refund for the amount paid, the Supreme Court held that the orders passed under Section 201(1) and 201(1A) could not be upheld. Applying the decision of the Apex Court to the case on hand, which we had already narrated in the preceding paragraph, with the debate on the status of the assessee existing at least till 2000 and the assessee not having any information as regards the order passed by the Advance Ruling Authority, we have no hesitation in accepting the plea of the assessee that the assessee herein could not be declared as an assessee in default for the purpose of interest under Section 201(1A) of the Income Tax Act. It may be of relevance to note herein that the assessee had deducted tax at 2%. The foreign company had paid tax under Section 44BBB at 4.8% and sought for a refund. Taking note of the decision of the Apex Court reported in (2009) 312 ITR 225 (*CIT* v. *Eli Lilly & Company (India) (P) Ltd.*) and the object underlying Section 201 to recover the taxes where there is a shortfall, it is but necessary to find out whether the foreign company had already remitted the tax as per Section 44BBB."

37. In any case, and without prejudice to the above, Mr. Agarwal submitted that the respondents are yet to ascertain and clarify whether

[18] 2012 SCC OnLine Mad 2272

HSVP has shown EDC as its income and has been assessed to tax on the same. It was on the aforesaid basis that learned counsel contended that if ultimately upon assessment it is shown that EDC was treated as income and had been so assessed to tax, then by virtue of the First Proviso to Section 201 the petitioner cannot be treated to be an assessee in default. It was argued by Mr. Agarwal that the ITAT itself has in various decisions held that TDS provisions are inapplicable on payment of EDC. Our attention was drawn to the following judgments rendered by the ITAT:-

(I) **Santur Infrastructure Pvt. Ltd. Vs Assistant Commissioner of Income Tax, Range 77, New Delhi**[19].

> **"5.** Undisputedly, demand drafts for payment of EDC were issued in the name of Chief Administrator, HUDA for an amount of Rs. 10,11,00,000/- for the year under assessment. It is also not in dispute that HUDA has shown EDC as current liability in the balance sheet but, in the notice of accounts forming part of the balance sheet, it has shown that the EDC has been received for execution of various external development works, as and when the development works are carried out the EDC liabilities are reduced accordingly. It is also not in dispute that HUDA is engaged in acquiring land, developing it and finally handing over to the customers for a price. It is also not in dispute that EDC are fixed by HUDA from time to time by issuing letters/circulars. It is also not in dispute that the assessee has not credited the amount of EDC paid to Shri Vardhman Infra Heights Pvt. Ltd. in its P & L account. It is also not in dispute that Agreement between the land owners intended to set up a Group Housing Society dated 30.11.2010 was entered into between M/s. Dial Softech Pvt. Ltd., Shri Tek Ram, Smt. Saroj Singhal, Smt. Luxmi Devi and Smt. Sunehra Devi c/o M/s. Santur Infrastructure Pvt. Ltd. and the Governor of Haryana acting through the Director, Town & Country Planning (DTCP), Haryana, whereby owner undertakes to pay proportionate EDC as per rate, schedule, terms and conditions contained in the Agreement.

[19] 2019 SCC OnLine ITAT 24457

6. When we examine the question "*as to whether TDS on payment of EDC to HUDA was not to be deducted by assessee because levy is made by DTCP having control over the EDC and not HUDA as contended by the ld. AR for the assessee*" in the light of the aforesaid undisputed facts, we are of the considered view that the assessee has no liability to deduct TDS in respect of the payment made to a Government Department, DTCP in this case, u/s 196 of the Act as the payment was made to HUDA on behalf of DTCP only

xxxx xxxx xxxx

9. We are of the considered view that when payment of EDC has been made by the assessee in accordance with licence granted by the DTCP, the payment made to HUDA was not made in pursuance of any work contract or under statutory obligation meaning thereby that when the assessee has no privity of contract with HUDA rather the assessee has privity of contract with DTCP, a Government Department of Haryana, as per Agreement (supra) and the HUDA has merely received the payment for and on behalf of DTCP, the assessee was not required to deduct the TDS."

(II) Satya Developers Pvt. Ltd. Vs Joint Commissioner Of Income Tax, Range-77 New Delhi[20]

"**2.** As per Section 3(3)(ii), license holder has to pay proportionate development charges if the external development works as defined in clause (g) of section 2 are to be carried out by the Government or any other local authority. The proportion in which and the time within which, such payment is to be made, shall be determined by the Director.

3. Presently, external development works in the periphery of or outside colony/area for the benefit of the colony/area are being executed by Haryana Shahari Vikas Pradhikaran thereafter HSVP) which is the Development Authority or state Govt. Earlier upto 31.03.2017, Department of Town 8t Country Planning used to collect the external development charges from the colonizer to whom licences have been granted under Act No. 8 of 1975 and the persons to whom permission for change of land use have been granted under Act No. 41 of 1963, in the shape of bank draft drawn in favour of CA, HSVP and send the same to CA, HSVP."

[20] 2022 (6) TMI 687 ITAT Delhi

(III) Spaze Tower Pvt. Ltd. Versus JCIT, Range-77, New Delhi[21].

"**6.** We have carefully considered the rival submissions. The Assessing Officer/JCIT levied penalty of Rs.6,14,460/- under Section 271C for short deduction/non deduction of tax at source alleging default committed by the assessee under Section 194C on payment of External Development Charges (EDC) to Haryana Urban Development Authority (HUDA). With the assistance of the ld. counsel, we find that the Directorate of Town and Country Planning, Haryana (Haryana Government) has issued clarification on TDS deduction on EDC payments vide letter dated 19.06.2018 which is self explanatory and thus reproduced herein for ready reference:

"To

The Chief Administrator,
Haryana Shahari Vikas Pradhikaran,
Panchkula,
Memo No.DTCP/ACCTTS/Assessing Officer (HQ)/CAO/ 2894/2018 Date: 19.6.2018

Subject: Clarification on TDS Deductions on EDC Payments.

Please refer to the matter cited as subject above.

1. Section 2(g) of the Haryana Development and Regulation of Urban Areas Act, 1975 defines that external development works (hereinafter referred as EDW) shall includes any or all infrastructure development works like water supply, sewerage, drains, provisions of treatment and disposal of sewage, sullage and storm water, roads, electrical works, solid waste management and disposal, slaughter houses, colleges, hospitals, stadium/sports complex, fire stations, grid sub-stations etc. and/or any other work which the Director may specify to be executed in the periphery of or outside colony/area for the benefit of the colony/area.

2- As per Section 3(3)(ii), license holder has to pay proportionate development charges if the external development works as defined in clause (g) of section 2 are to be carried out by the Government or any other local authority. The proportion in which and the time within which, such payment is to be made, shall be determined by the Director.

[21] 2022 (5) TMI 1344 ITAT Delhi

3. Presently, external development works in the periphery of or outside colony/area for the benefit of the colony/area are being executed by Haryana Shahari Vikas Pradhikaran thereafter HSVP) which is the Development Authority or state Govt. Earlier upto 31.03.2017, Department of Town 8t Country Planning used to collect the external development charges from the colonizer to whom licences have been granted under Act No. 8 of 1975 and the persons to whom permission for change of land use have been granted under Act No. 41 of 1963, in the shape of bank draft drawn in favour of CA, HSVP and send the same to CA, HSVP.

4. As the receipt on account of EDC was not sufficient to carry out the all development works under EDC for the urban estate as per approved development plans, therefore to meet out the shortfall, a new scheme Swaran Jayanti Haryana Urban Infrastructure Development Scheme (renamed as Mangal Nagar Vikas Yojana was approved by the State Govt. and appropriate budget provision for execution of development works has been made in the said scheme. From Financial Year 2017-18, the receipts on account of EDC is being deposited in the consolidated fund of the State under Major Receipt Head-0217 receipts and all license/CLU holders have also been directed vide order dated 12.05,2017 that payment of EDC in respect of license/CLU granted by TCP Deptt. may be made online through epayment gateway or in shape of demand drafts favouring Director, Town 6 Country Planning, Haryana. Required funds for execution of development works are released to HSVP after granting the sanction from the Finance Department.

It is, therefore, clarified that HSVP is only an executing agency for and on behalf of State Govt. For carrying out EDW for which funds are given to HSVP by the Govt. through TCP Deptt. Since, payment for EDC has been made to TCP Deptt. of State Govt., no TDS was/is to be deducted out of payment made to Govt. for EDW.

Accounts officer (HO)
For: Director Town & Country Planning
Haryana, Chandigarh

7. On the basis of the aforesaid clarification, the assessee contends that the payment to HUDA is, in effect, payment to State Government and therefore such payment is exempt from obligations to deduct TDS in view of Section 196 of the Act."

(IV) M/S Perfect Constech Pvt. Ltd. Versus Addl. CIT[22]

"**5.0** We have heard the rival submissions and have also perused the material on record. It is seen that in Para 4.3.2, subparagraph (iv) of the order passed u/s 271C of the Act, the AO has himself noted that the demanddraft of the EDC amounts are drawn in favour of the Chief Administrator, HUDA though routed through the Director General, Town and Country Planning, Sector-18, Chandigarh. He has also referred to the notes to accounts to the financial statements of HUDA wherein it has been stated that "other liabilities also include external development charges received through DGTCP, Department of Haryana for execution of various EDC works. The expenditure against which have been booked in Development Work in Progress, Enhancement compensation and Land cost." Undisputedly, the payment of EDC was issued in the name of Chief Administrator, HUDA. It is also not in dispute that HUDA has shown EDC as current liability in the balance sheet, but in the 'Notes' to the Accounts Forming part of the Balance Sheet, it has been shown that EDC has been received for execution of various external development works and as and when the development works are carried out, the EDC's liabilities are reduced accordingly. It is also not in dispute that HUDA is engaged in acquiring land, developing it and finally handing it over for a price. It is also not in dispute that EDC is fixed by HUDA from time to time. However, the fact of the matter remains that payment has been made to HUDA through DTCP which is a Government Department and the same is not in pursuance to any contract between the assessee and HUDA. Thus, the payment of EDC is not for carrying out any specific work to be done by HUDA for and on behalf of the assessee but rather DTCP which is a Government Department which levies these charges for carrying out external development and engages the services of HUDA for execution of the work. Therefore, it is our considered view that the assessee was not required to deduct tax at source at the time of payment of EDC as the same was not out of any statutory or contractual liability towards HUDA and, therefore, the impugned penalty was not leviable. We note that similar view has been taken by the Co-ordinate Benches of ITAT Delhi in the cases of Santur Infrastructure Pvt. Ltd. vs. ACIT in ITA 6844/Del/2019 vide order dated 18.12.2019, Sarv Estate Pvt. Ltd. vs. JCIT in ITA No.5337 & 5338/Del/2019 vide order dated 13.09.2019 and Shiv Sai Infrastructure (Pvt.) Ltd. vs. ACIT in ITA No.5713/Del/2019 vide order dated 11.09.2019. A similar view was also taken by the Co-ordinate Bench of ITAT Delhi in case of R.P.S Infrastructure Ltd. vs. ACIT in 5805, 5806 & 5349/Del/2019 vide order dated 23.07.2019. Therefore, on an

[22] 2020 (12) TMI 1158 ITAT Delhi

> identical facts and respectfully following the orders of the Co-ordinate Benches as aforesaid, we hold that the impugned penalty u/s 271C of the Act is not sustainable. The order of the Ld. CIT (A) is set aside and the penalty is directed to be deleted.
>
> **6.0** In the final result, the appeal of the assessee stands allowed."

38. Leading submissions on behalf of the respondents, Mr. Zoheb Hossain firstly submitted that payments made to HSVP cannot be equated with payments made to the Government. Mr. Hossain pointed out that HSVP has come to be constituted by virtue of the provisions of the **Haryana Urban Development Authority Act, 1977**[23], a State legislation, and thus clearly placing that authority outside the ambit of Section 196 of the Act. It was his submission that authorities constituted under State legislations cannot claim coverage under Section 196, since the same is confined to sums payable to either the Government, the Reserve Bank or a corporation established by or under a Central Act. Mr. Hossain cited for our consideration the decision of the Supreme Court in **Adityapur Industrial Area Development Authority v. Union of India**[24] where a contention that an authority constituted under a State Legislation would be exempt from taxation by virtue of Article 289 of the Constitution, came to be negatived in unequivocal terms. Mr. Hossain laid emphasis on the following passages from that decision:

> **"11.** It is true, as submitted by Shri Venugopal, that clause (2) of Article 289 empowers Parliament to make a law imposing a tax on income earned only from trade or business of any kind carried by or on behalf of the State. It does not authorise Parliament to impose a tax on the income of a State if such income is not earned in the manner contemplated by clause (2) of Article 289. This, to our mind, does not answer the question which arises for our consideration in this appeal. Clause (2) of Article 289 presupposes that the income sought to be taxed by the Union is

[23] 1977 Act

[24] (2006) SCC OnLine SC 530

the income of the State, but the question to be answered at the threshold is whether in terms of clause (1) of Article 289, the income of the appellant Authority is the income of the State. Having regard to the provisions of the Bihar Industrial Area Development Authority Act, 1974, particularly Section 17 thereof, we have no manner of doubt that the income of the appellant Authority constituted under the said Act is its own income and that the appellant Authority manages its own funds. It has its own assets and liabilities. It can sue or be sued in its own name. Even though, it does not carry on any trade or business within the contemplation of clause (2) of Article 289, it still is an authority constituted under an Act of the legislature of the State having a distinct legal personality, being a body corporate, as distinct from the State. Section 17 of the Act further clarifies that only upon its dissolution its assets, funds and liabilities devolve upon the State Government. Necessarily therefore, before its dissolution, its assets, funds and liabilities are its own. It is, therefore, futile to contend that the income of the appellant Authority is the income of the State Government, even though the Authority is constituted under an Act enacted by the State Legislature by issuance of a notification by the Government thereunder.

12. According to *Basu's Commentary on the Constitution of India*, (6th Edn., p. 50, Vol. 'L') Articles 285 and 289 are analogous to each other inasmuch as while Article 285 exempts the Union property from State taxation, Article 289 exempts the State property from Union taxation. While clause (1) of Article 289 exempts from Union taxation any income of a State, derived from governmental or non-governmental activities, clause (2) provides an exception, namely, that income derived by a State from trade or business will be taxable, provided a law is made by Parliament in that behalf. Clause (3) of Article 289 is an exception of the exception prescribed by clause (2) of Article 289 and it provides that income derived from particular trade or business may be made immune from Union taxation *if Parliament declares such trade or business as incidental to the ordinary functions of the Government* (emphasis supplied). The reason is obvious. Under the Constitution, the State has no power to tax any income other than agricultural income. Under the Constitution, power to tax "income" is vested only in the Union. Therefore, while any property of the Union is immune from State taxation under Article 285(1), income derived by the State from business, as distinguished from governmental purposes, shall not have exemption from Union taxation *unless Parliament declares such trade or business as incidental to the ordinary functions of the Government of the State* [*see* Article 289(3)]

(emphasis supplied)

xxxx xxxx xxxx

14. In *A.P. SRTC* v. *ITO* [(1964) 7 SCR 17 : AIR 1964 SC 1486] the question arose as to whether the income derived from trading activity by the Andhra Pradesh Road Transport Corporation established under the Road Transport Corporation Act, 1950 was not the income of the State of Andhra Pradesh within the meaning of Article 289(1) of the Constitution and hence exempted from Union taxation. This Court considered the scheme of Article 289 and observed as follows: (SCR p. 25)

> "The scheme of Article 289 appears to be that ordinarily, the income derived by a State both from governmental and non-governmental or commercial activities shall be immune from income tax levied by the Union, provided, of course, the income in question can be said to be the income of the State. This general proposition flows from clause (1).
>
> Clause (2) then provides an exception and authorises the Union to impose a tax in respect of the income derived by the Government of a State from trade or business carried on by it, or on its behalf; that is to say, the income from trade or business carried on by the Government of a State or on its behalf which would not have been taxable under clause (1), can be taxed, provided a law is made by Parliament in that behalf. If clause (1) had stood by itself, it may not have been easy to include within its purview income derived by a State from commercial activities, but since clause (2), in terms, empowers Parliament to make a law levying a tax on commercial activities carried on by or on behalf of a State, the conclusion is inescapable that these activities were deemed to have been included in clause (1) and that alone can be the justification for the words in which clause (2) has been adopted by the Constitution. It is plain that clause (2) proceeds on the basis that but for its provision, the trading activity which is covered by it would have claimed exemption from Union taxation under clause (1). That is the result of reading clauses (1) and (2) together.
>
> Clause (3) then empowers Parliament to declare by law that any trade or business would be taken out of the purview of clause (2) and restored to the area covered by clause (1) by declaring that the said trade or business is incidental to the ordinary functions of the Government. In other words, clause (3) is an exception to the exception prescribed by clause (2). Whatever trade or business is declared to be incidental to the ordinary functions of the Government, would cease to be governed by clause (2)

> and would then be exempt from Union taxation. That, broadly stated, appears to be the result of the scheme adopted by the three clauses of Article 289."

15. Reading these three clauses together this Court held that the property as well as the income in respect of which exemption is claimed under clause (1) must be the property and income of the State, and thus the crucial question to be answered is: "Is the income derived by the State from its transport activities the income of the State?" It was observed that if a trade or business is carried on by a State departmentally or through its agents appointed exclusively for that purpose, there would be no difficulty in holding that the income made from such trade or business is the income of the State. Difficulties arise when one is dealing with trade or business carried on by a corporation established by a State by issuing a notification under the relevant provisions of the Act. In this context, the Court observed: (SCR p. 26)

> "The corporation, though statutory, has a personality of its own and this personality is distinct from that of the State or other shareholders. It cannot be said that a shareholder owns the property of the corporation or carries on the business with which the corporation is concerned. The doctrine that a corporation has a separate legal entity of its own is so firmly rooted in our notions derived from common law that it is hardly necessary to deal with it elaborately; and so, prima facie, the income derived by the appellant from its trading activity cannot be claimed by the State which is one of the shareholders of the corporation."

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17. Considerable reliance was placed on the principles laid down in the aforesaid decision by learned counsel appearing for the Union of India. He submitted that having regard to the provisions of the Act under which the appellant Authority is established, the same conclusion may be reached. In particular, emphasising the fact that as in *A.P. SRTC case* [(1964) 7 SCR 17 : AIR 1964 SC 1486] so in the instant case as well, Section 17 of the Act provides that upon dissolution of the appellant Authority, the properties, funds and dues realisable by the Authority along with its liabilities shall devolve upon the State Government. Impliedly, therefore, such properties, funds and dues vest in the Authority till its dissolution, and only thereafter it vests in the State Government. He also referred to various other provisions of the Act and submitted that there was nothing in the Act which attempted to lift the veil from the face of the Corporation. Even though the

> Authority was created under an Act of the Legislature, it was still an authority which had a distinct personality of its own, having perpetual succession and a common seal, with powers to acquire, hold and dispose of property, and to contract, and could sue and be sued in its own name. Shri Venugopal, on the other hand, tried to distinguish the judgment on the ground that the Andhra Pradesh Road Transport Corporation is being run on business lines, and a corporation that runs on business lines is distinguishable and different from a corporation which is not run on those lines. Even if such a distinction is drawn, that will not have the effect of making the income of the Corporation the income of the State Government having regard to the other features noticed above.
>
> xxxx xxxx xxx
>
> **20.** Similarly, the decision in *New Delhi Municipal Council* v. *State of Punjab* [(1997) 7 SCC 339] does not advance the case of the appellant. It was held that the property/municipal taxes levied by the New Delhi Municipal Council under the relevant Act constituted Union taxation within the meaning of clause (1) of Article 289 of the Constitution. The levy of property taxes under the aforesaid enactments on lands or buildings belonging to the State Government was invalid and incompetent by virtue of the mandate contained in clause (1) of Article 289. However, if any land or building is used or occupied for the purpose of any trade or business, meaning thereby a trade or business carried on with profit motive, by or on behalf of the State Government, such land or building shall be subject to the levy of the property taxes levied by the said enactments. In other words, State property exempted under clause (1) means such property as is used for the purpose of the Government and not for the purpose of trade or business. That was a case where the question arose in relation to the levy of property tax on lands and buildings owned by the State Governments which was "property of the State Government". In the instant case, we are concerned with the income of the appellant Authority and the same principles apply. The exemption can be claimed only if the income can be said to be the income of the State Government. In the facts of this case, it is not possible to hold that the income of the appellant Authority is the income of the State Government."

39. According to learned counsel, the statutory scheme in the context of which *Adityapur Industrial Area* came to be rendered, is similar to that which underlies the 1977 Act. Mr. Hossain laid emphasis on the right of HSVP to manage its own funds, its right to independently own

assets, as well as the right to sue/ be sued in its own name. According to learned counsel, all of the above would tend to establish and evidence the conferral of a distinct legal personality upon HSVP. It was additionally pointed out that in terms of the 1977 Act in case HSVP were to be dissolved, its assets, funds and liabilities would devolve upon the State Government. According to learned counsel, all of the above places HSVP in a position identical to *Adityapur Industrial Area*. In view of the above, according to Mr. Hossain, the submission that the income of HSVP would be exempt by virtue of Article 289 of the Constitution deserves outright rejection.

40. Mr. Hossain also submitted that while considering the applicability of the provisions of the 1977 Act, the nature of functions that may be performed or discharged by HSVP is wholly irrelevant. According to learned counsel taxability is not dependent upon the functions or duties that may be discharged by an authority. According to Mr. Hossain even if the functions performed by HSVP were to be viewed as being akin to basic governmental functions, the same would have no bearing on the question of taxability.

41. It was submitted that the petitioners also incorrectly assert HSVP to be a local authority. This argument, according to Mr. Hossain, is liable to be turned down on the plain language of Section 10(20) of the Act and which defines a "*local authority*" as under:

> "**10. Incomes not included in total income**
>
> (20) the income of a local authority which is chargeable under the head, "Income from house property", "Capital gains", or "Income from other sources" or from a trade or business carried on by it which accrues or arises from the supply of a commodity or service (not being water or electricity) within its own jurisdictional area or from the supply of water or electricity within or outside its own jurisdictional area;

[*Explanation.*—For the purposes of this clause, the expression "local authority" means—

(*i*) *Panchayat as referred to in clause* (*d*) *of Article 243 of the Constitution*; *or*

(*ii*) *Municipality as referred to in clause* (*e*) *of Article 243-P of the Constitution*; *or*

(*iii*) *Municipal Committee and District Board, legally entitled to, or entrusted by the Government with, the control or management of a Municipal or local fund*; *or*

(*iv*) *Cantonment Board as defined in Section 3 of the Cantonments Act, 1924*;]"

42. According to learned counsel, a plain reading of Section 10(20) of the Act would establish that HSVP cannot be treated to be a local authority. In any case according to Mr. Hossain this aspect stands conclusively settled and answered against the writ petitioners by the Supreme Court in terms of its decision rendered in **New Okhla Industrial Development Authority v. CIT**[25]. Mr. Hossain relied upon the following observations as rendered in that judgment:

"**27.** The *KishansingTomar* v. *Municipal Corpn., Ahmedabad* [*Kishansing Tomar* v. *Municipal Corpn., Ahmedabad*, (2006) 8 SCC 352] , noticing the object and purpose of the Constitution (74th Amendment) Act, 1992, stated the following: (SCC p. 358, para 12)

"*12*. It may be noted that Part IX-A was inserted in the Constitution by virtue of the Constitution (Seventy-fourth) Amendment Act, 1992. The object of introducing these provisions was that in many States the local bodies were not working properly and the timely elections were not being held and the nominated bodies were continuing for long periods. Elections had been irregular and many times unnecessarily delayed or postponed and the elected bodies had been superseded or suspended without adequate justification at the whims and fancies of the State authorities. These views were expressed by the then Minister of State for Urban Development while introducing the Constitution Amendment Bill before Parliament and

[25] (2018) 9 SCC 351

> thus the new provisions were added in the Constitution with a view to restore the rightful place in political governance for local bodies. It was considered necessary to provide a constitutional status to such bodies and to ensure regular and fair conduct of elections. In the Statement of Objects and Reasons in the Constitution Amendment Bill relating to urban local bodies, it was stated…."

28. The constitutional provisions as contained in Part IX-A delineate that the Constitution itself provided for constitution of Municipalities, duration of Municipalities, powers of Authorities and responsibilities of the Municipalities. The Municipalities are created as vibrant democratic units of self-government. The duration of Municipality was provided for five years contemplating regular election for electing representatives to represent the Municipality. The special features of the Municipality as was contemplated by the constitutional provisions contained in Part IX-A cannot be said to be present in the Authority as delineated by the statutory scheme of the 1976 Act. It is true that various municipal functions are also being performed by the Authority as per the 1976 Act but the mere facts that certain municipal functions were also performed by the authority it cannot acquire the essential features of the Municipality which are contemplated by Part IX-A of the Constitution. The main thrust of the argument of the learned counsel for the appellant that the High Court having not adverted to the Notification dated 24-12-2001 issued under the proviso to Article 243-Q(1) the judgments relied on by the High Court for dismissing the writ petition are not sustainable. We thus have to focus on the proviso to Article 243-Q(1). For the purpose and object of the industrial township referred to therein whether industrial township mentioned therein can be equated with Municipality as defined under Article 243-P(*e*). Article 243-P(*e*) provides that the "Municipality" means an institution of self-government constituted under Article 243-Q. Whether the appellant is an institution of self-government constituted under Article 243-Q is the main question to be answered? Clause (1) of Article 243-Q provides that there shall be constituted in every State, a Nagar Panchayat, a Municipal Council and a Municipal Corporation, in accordance with the provisions of this Part. The proviso to clause (1) provides that:

> "Provided that a Municipality under this clause may not be constituted in such urban area or part thereof as the Governor may, having regard to the size of the area and the municipal services being provided or proposed to be provided by an industrial establishment in that area and such other factors as he may deem fit, by public notification, specify to be an industrial township."

29. Thus, the proviso does not contemplate constitution of an industrial establishment as a Municipality rather clarifies an exception where Municipality under clause (1) of Article 243-Q may not be constituted in an urban area. The proviso is an exception to the constitution of Municipality as contemplated by clause (1) of Article 243-Q. No other interpretation of the proviso conforms to the constitution scheme.

30. A Constitution Bench of this Court had noticed the principles of statutory interpretation of a proviso in *S. Sundaram Pillai* v. *V.R. Pattabiraman* [*S. Sundaram Pillai* v. *V.R. Pattabiraman*, (1985) 1 SCC 591] . The following has been laid down by this Court in paras 37 to 43: (SCC pp. 609-10)

> "*37*. In short, generally speaking, a proviso is intended to limit the enacted provision so as to except something which would have otherwise been within it or in some measure to modify the enacting clause. Sometimes a proviso may be embedded in the main provision and becomes an integral part of it so as to amount to a substantive provision itself.
>
> *38*. Apart from the authorities referred to above, this Court has in a long course of decisions explained and adumbrated the various shades, aspects and elements of a proviso. In *State of Rajasthan* v. *Leela Jain* [*State of Rajasthan* v. *Leela Jain*, AIR 1965 SC 1296] , the following observations were made: (AIR p. 1300, para 14)
>
> > '*14*. … So far as a general principle of construction of a proviso is concerned, it has been broadly stated that the function of a proviso is to limit the main part of the section and carve out something which but for the proviso would have been within the operative part.'
>
> *39*. In *STO* v. *Hanuman Prasad* [*STO* v. *Hanuman Prasad*, AIR 1967 SC 565], Bhargava, J. observed thus: (AIR p. 567, para 5)
>
> > '*5*. … It is well recognised that a proviso is added to a principal clause primarily with the object of taking out of the scope of that principal clause what is included in it and what the legislature desires should be excluded.'
>
> 40. In *CCT* v. *Ramkishan Shri kishan Jhaver* [*CCT* v. *Ramkishan Shrikishan Jhaver*, AIR 1968 SC 59] , this Court made the following observations: (AIR p. 63, para 8)

'*8*. … Generally speaking, it is true that the proviso is an exception to the main part of the section; but it is recognised that in exceptional cases a proviso may be a substantive provision itself.'

41. In *Dwarka Prasad* v. *Dwarka Das Saraf* [*Dwarka Prasad* v. *Dwarka Das Saraf*, (1976) 1 SCC 128] Krishna Iyer, J. speaking for the Court observed thus: (SCC pp. 136-37, paras 16 & 18)

'*16*. There is some validity in this submission but if, on a fair construction, the principal provision is clear, a proviso cannot expand or limit it. Sometimes a proviso is engrafted by an apprehensive draftsman to remove possible doubts, to make matters plain, to light up ambiguous edges. Here, such is the case.

***

18. … If the rule of construction is that prima facie a proviso should be limited in its operation to the subject-matter of the enacting clause, the stand we have taken is sound. To expand the enacting clause, inflated by the proviso, sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. A proviso ordinarily is but a proviso, although the golden rule is to read the whole section, inclusive of the proviso, in such manner that they mutually throw light on each other and result in a harmonious construction.'

42. In *Hiralal Rattanlal* v. *State of U.P.* [*Hiralal Rattanlal* v. *State of U.P.*, (1973) 1 SCC 216 : 1973 SCC (Tax) 307 : AIR 1973 SC 1034] , this Court made the following observations: [SCC p. 224, para 22: SCC (Tax) p. 315]

'*22*. … Ordinarily a proviso to a section is intended to take out a part of the main section for special treatment. It is not expected to enlarge the scope of the main section. But cases have arisen in which this Court has held that despite the fact that a provision is called proviso, it is really a separate provision and the so-called proviso has substantially altered the main section.'

43. We need not multiply authorities after authorities on this point because the legal position seems to be clearly

and manifestly well established. To sum up, a proviso may serve four different purposes:

> (*1*) qualifying or excepting certain provisions from the main enactment;
>
> (*2*) it may entirely change the very concept of the intendment of the enactment by insisting on certain mandatory conditions to be fulfilled in order to make the enactment workable;
>
> (*3*) it may be so embedded in the Act itself as to become an integral part of the enactment and thus acquire the tenor and colour of the substantive enactment itself; and
>
> (*4*) it may be used merely to act as an optional addenda to the enactment with the sole object of explaining the real intendment of the statutory provision."

31. Applying the rules of interpretation as laid down by this Court, it is clear that the proviso is an exception to the constitutional provisions which provide that there shall be constituted in every State a Nagar Panchayat, a Municipal Council and a Municipal Corporation. Exception is covered by the proviso that where an industrial township is providing municipal services the Governor having regard to the size of the area and the municipal services either being provided or proposed to be provided by an industrial establishment specify it to be an industrial township. The words "industrial township" have been used in contradiction of a Nagar Panchayat, a Municipal Council and a Municipal Corporation. The object of issuance of notification is to relieve the mandatory requirement of constitution of a Municipality in a State in the circumstances as mentioned in the proviso but exemption from constituting Municipality does not lead to mean that the industrial establishment which is providing municipal services to an industrial township is same as Municipality as defined in Article 243-P(*e*). We have already noticed that Article 243-P(*e*) defines "Municipality" as an institution of self-government constituted under Article 243-Q, the word "constituted" used under Article 243-P(*e*) read with Article 243-Q clearly refers to the constitution in every State of a Nagar Panchayat, a Municipal Council or a Municipal Corporation. Further, the words in the proviso "a Municipality under this clause may not be constituted" clearly means that the words "may not be constituted" used in the proviso are clearly in contradistinction with the word "constituted" as used in Article 243-P(*e*) and Article 243-Q. Thus, notification

under the proviso to Article 243-Q(1) is not akin to constitution of Municipality. We, thus, are clear in our mind that industrial township as specified under the Notification dated 24-12-2001 is not akin to Municipality as contemplated under Article 243-Q.

32. At this juncture, we may also notice the two judgments as relied on by the High Court and three more judgments where Article 243-Q came for consideration. The first judgment which needs to be noticed is *Adityapur Industrial Area Development Authority* [*Adityapur Industrial Area Development Authority* v. *Union of India*, (2006) 5 SCC 100] . The Adityapur Industrial Development Authority was constituted under the Bihar Industrial Area Development Authority Act, 1974. In para 2 of the judgment the constitution of the authority was noticed which is to the following effect: (SCC p. 103)

> "*2*. The appellant Authority has been constituted under the Bihar Industrial Area Development Authority Act, 1974 to provide for planned development of industrial area, for promotion of industries and matters appurtenant thereto. The appellant Authority is a body corporate having perpetual succession and a common seal with power to acquire, hold and dispose of properties, both movable and immovable, to contract, and by the said name sue or be sued. The Authority consists of a Chairman, a Managing Director and five other Directors appointed by the State Government. The Authority is responsible for the planned development of the industrial area including preparation of the master plan of the area and promotion of industries in the area and other amenities incidental thereto. The Authority has its own establishment for which it is authorised to frame regulations with prior approval of the State Government. The State Government is authorised to entrust the Authority from time to time with any work connected with planned development, or maintenance of the industrial area and its amenities and matters connected thereto. Section 7 of the Act obliges the Authority to maintain its own fund to which shall be credited monies received by the Authority from the State Government by way of grants, loans, advances or otherwise, all fees, rents, charges, levies and fines received by the Authority under the Act, all monies received by the Authority from disposal of its movable or immovable assets and all monies received by the Authority by way of loan from financial and other institutions and debentures floated for the execution of a scheme or schemes of the Authority duly approved by the State Government. Unless the State Government directs otherwise, all monies received by the Authority shall be credited to its funds which shall be kept

with State Bank of India and/or one or more of the nationalised banks and drawn as and when required by the Authority."

33. On the question as to whether the Adityapur Industrial Area Development Authority was covered within the meaning of local authority as per Section 10(20) as amended by the Finance Act, 2002, the High Court held that the appellant Authority could not have claimed benefit under the provisions after 1-4-2003. In paras 6 and 7, the following was held: (*Adityapur Industrial Area Development Authority case* [*Adityapur Industrial Area Development Authority* v. *Union of India*, (2006) 5 SCC 100] , SCC pp. 104-05)

"*6.* It would thus be seen that the income of a local authority chargeable under the head "Income from house property", "Capital gains" or "Income from other sources" or from a trade or business carried on by it was earlier excluded in computing the total income of the Authority of a previous year. However, in view of the amendment, with effect from 1-4-2003 the Explanation "local authority" was defined to include only the authorities enumerated in the Explanation, which does not include an authority such as the appellant. At the same time Section 10(20-A) which related to income of an authority constituted in India by or under any law enacted for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, which before the amendment was not included in computing the total income, was omitted. Consequently, the benefit conferred by clause (20-A) on such an authority was taken away.

7. The High Court by its impugned judgment [*Adityapur Industrial Area Development Authority* v. *Union of India*, 2003 SCC OnLineJhar 227 : 2003 AIR Jhar R 876] and order held that in view of the fact that Section 10(20-A) was omitted and an Explanation was added to Section 10(20) enumerating the "local authorities" contemplated by Section 10(20), the appellant Authority could not claim any benefit under those provisions after 1-4-2003. It further held that the exemption under Article 289(1) was also not available to the appellant Authority as it was a distinct legal entity, and its income could not be said to be the income of the State so as to be exempt from Union taxation. The said decision of the High Court is impugned in this appeal."

38. The Court further held that the Explanation under Section 10(20) provides an exhaustive definition and the tests laid down by this Court in an earlier case i.e. *Union of India* v. *R.C. Jain* [*Union of India* v. *R.C. Jain*, (1981) 2 SCC 308 : 1981 SCC (L&S) 323] , are no longer applicable. In para 35 the following was stated: (*Agricultural Produce Market Committee case* [*Agricultural Produce Market Committee* v. *CIT*, (2008) 9 SCC 434] , SCC p. 451)

> "*35*. One more aspect needs to be mentioned. In *R.C. Jain* [*Union of India* v. *R.C. Jain*, (1981) 2 SCC 308 : 1981 SCC (L&S) 323] the test of "like nature" was adopted as the words "other authority" came after the words "Municipal Committee, District Board, Body of Port Commissioners". Therefore, the words "other authority" in Section 3(31) took colour from the earlier words, namely, "Municipal Committee, District Board or Body of Port Commissioners". This is how the functional test is evolved in *R.C. Jain* [*Union of India* v. *R.C. Jain*, (1981) 2 SCC 308 : 1981 SCC (L&S) 323] . However, as stated earlier, Parliament in its legislative wisdom has omitted the words "other authority" from the said Explanation to Section 10(20) of the 1961 Act. The said Explanation to Section 10(20) provides a definition to the word "local authority". It is an exhaustive definition. It is not an inclusive definition. The words "other authority" do not find place in the said Explanation. Even, according to the appellant(s), AMC(s) is neither a Municipal Committee nor a District Board nor a Municipal Committee nor a panchayat. Therefore, in our view functional test and the test of incorporation as laid down in *R.C. Jain* [*Union of India* v. *R.C. Jain*, (1981) 2 SCC 308 : 1981 SCC (L&S) 323] is no more applicable to the Explanation to Section 10(20) of the 1961 Act. Therefore, in our view the judgment of this Court in *R.C. Jain* [*Union of India* v. *R.C. Jain*, (1981) 2 SCC 308 : 1981 SCC (L&S) 323] followed by judgments of various High Courts on the status and character of AMC(s) is no more applicable to the provisions of Section 10(20) after the insertion of the Explanation/definition clause to that sub-section vide the Finance Act, 2002."

B. *Section 10(20) as amended by the Finance Act, 2002*

44. We have already noticed that by the Finance Act, 2002 an Explanation has been added to Section 10(20) of the 1961 IT Act and Section 10(20-A) has been omitted. Prior to the Finance Act, 2002 there being no definition of "local authority" under the IT Act, the provisions of Section 3(31) of the General Clauses Act,

1897 were pressed into service while interpreting the extent and meaning of local authority. The Explanation having now contained the exhaustive definition of local authority, the definition of local authority as contained in Section 3(31) of the General Clauses Act, 1897 is no more applicable. Section 3 of the General Clauses Act begins with the words "In this Act, and in all Central Acts and Regulations made after the commencement of this Act, unless there is anything repugnant in the subject or context…". The definition given of the local authority under Section 3(31) does not now govern the field in view of the express omission of the expression "all other authority". This Court has already in *Agricultural Produce Market Committee* [*Agricultural Produce Market Committee* v. *CIT*, (2008) 9 SCC 434] held that the definition under Section 3(31) of the General Clauses Act is now no more applicable to interpret local authority under Section 10(20) of the IT Act. Before we proceed further it shall be useful to notice certain well-settled principles of statutory interpretation of fiscal statutes.

45. This Court in *A.V. Fernandez* v. *State of Kerala* [*A.V. Fernandez* v. *State of Kerala*, AIR 1957 SC 657] laid down the following: (AIR p. 661, para 29)

> "*29.* It is no doubt true that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of the law and not merely to the spirit of the statute or the substance of the law. If the Revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter. We must of necessity, therefore, have regard to the actual provisions of the Act and the rules made thereunder before we can come to the conclusion that the appellant was liable to assessment as contended by the Sales Tax Authorities."

46. This Court in *Rajasthan Rajya SahakariSpg. & Ginning Mills Federation Ltd.* v. *CIT* [*Rajasthan Rajya SahakariSpg. & Ginning Mills Federation Ltd.* v. *CIT*, (2014) 11 SCC 672] again reiterated that there has to be strict interpretation of taxing statutes and further the fact that one class of legal entities is given some benefit which is specifically stated in the Act does not mean that the legal entities not referred to in the Act would also get the same benefit. The following was laid down in para 23: (SCC p. 678)

> "*23*. We are also of the view that in all the tax matters one has to interpret the taxation statute strictly. Simply because one class of legal entities are given some benefit which is specifically stated in the Act does not mean that the legal entities not referred to in the Act would also get the same benefit. As stated by this Court on several occasions, there is no equity in matters of taxation. One cannot read into a section which has not been specifically provided for and therefore, we do not agree with the submissions of the learned counsel appearing for the appellant and we are not prepared to read something in the section which has not been provided for. The judgments referred to hereinabove support the view which we have expressed here."

47. It shall be useful to refer to the Explanatory Notes on the Finance Act, 2002. Explanatory Notes both on Section 10(20) and Section 10(20-A) are relevant and contained in paras 12.2 to 12.4 and 13.1 to 13.4. Paras 12.2. to 12.4 under the heading: ***Income of certain local authorities to become taxable*** are to the following effect:

> "**12.2.** Through the Finance Act, 2002, this exemption has been restricted to the Panchayats and Municipalities as referred to in Articles 243(*d*) and 243-P(*e*) of the Constitution of India respectively. Municipal Committees and District Boards, legally entitled to or entrusted by the Government with the control or management of a Municipal or a local fund and Cantonment Boards as defined under Section 3 of the Cantonments Act, 1924.
>
> **12.3.** The exemption under clause (20) of Section 10 would, therefore, not be available to Agricultural Marketing Societies and Agricultural Marketing Boards, etc., despite the fact that they may be deemed to be treated as local authorities under any other Central or State Legislation. Exemption under this clause would not be available to port trusts also.
>
> **12.4.** This amendment will take effect from 1-4-2003 and will, accordingly, apply in relation to Assessment Year 2003-2004 and subsequent assessment years."

48. Further paras 13.1 to 13.4 of the Explanatory Notes contained heading: "***Income of certain Housing Boards, etc. to become taxable***" on deletion of clause (20-A), are as stated below:

> "**13.1.** Under the existing provisions contained in clause (20-A) of Section 10, income of the Housing Boards or other statutory authorities set up for the purpose of dealing

with or satisfying the need for housing accommodations or for the purpose of planning, development or improvement of cities, towns and villages is exempt from payment of income tax.

13.2. Through the Finance Act, 2002, clause (20-A) of Section 10 has been deleted so as to withdraw exemption available to the abovementioned bodies. The income of Housing Boards of the States and of Development Authorities would, therefore, also become taxable.

13.3. Under Section 80-G, donation made to housing authorities, etc. referred to in clause (20-A) of Section 10 is eligible for 50% deduction from total income in the hands of the donors. Since clause (20-A) of Section 10 has been deleted, donation to the housing authorities, etc. would not be eligible for deduction in the hands of the donors and this may result in drying up of donations. To continue the incentive to donation made to housing authorities, etc., Section 80-G has been amended so as to provide that 50% of the sum paid by an assessee to an authority constituted in India by or under any law enacted either for the purpose of dealing with and satisfying the need for housing accommodation or for the purpose of planning, development or improvement of cities, towns and villages, or for both, shall be deducted from the total income of such assessee.

13.4. These amendments will take effect from 1-4-2003 and will, accordingly, apply in relation to Assessment Year 2003-2004 and subsequent assessment years."

49. The Explanatory Note clearly indicates that by the Finance Act, 2002 the exemption under Section 10(20) has been restricted to the Panchayats and Municipalities as referred to in Articles 243-P(*d*) and 243-P(*e*). Further by deletion of clause (20-A), the income of the Housing Boards of the States and of Development Authorities became taxable.

50. On a writ petition filed by the appellant before the Allahabad High Court where the notices issued in the year 1998 under Section 142 of the Income Tax Act were challenged vide its judgment dated 14-2-2000, the High Court held that the appellant's case comes squarely under Section 10(20-A) of the Income Tax Act, hence, the appellant was liable to be exempted under the said Act, although, the High Court did not express any opinion on the question whether the appellant was exempted under Section 10(20) in that judgment.

51. After omission of Section 10(20-A), the only provision under which a body or authority can claim exemption is Section 10(20). Local authority having been exhaustively defined in the Explanation to Section 10(20) an entity has to fall under Section 10(20) to claim exemption. It is also useful to notice that this Court laid down in *State of Gujarat* v. *Essar Oil Ltd.* [*State of Gujarat* v. *Essar Oil Ltd.*, (2012) 3 SCC 522 : (2012) 2 SCC (Civ) 182] that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision. It is useful to extract para 88 which is to the following effect: (SCC p. 547)

> "*88*. This Court in *Novopan case* [*Novopan India Ltd.* v. *CCE*, 1994 Supp (3) SCC 606] , held that the principle that in case of ambiguity, a taxing statute should be construed in favour of the assessee, does not apply to the construction of an exception or an exempting provision, as the same have to be construed strictly. Further this Court also held that a person invoking an exception or an exemption provision to relieve him of the tax liability must establish clearly that he is covered by the said provision and in case of doubt or ambiguity, benefit of it must go to the State."

52. For interpreting an explanation this Court in *S. Sundaram Pillai* v. *V.R. Pattabiraman* [*S. Sundaram Pillai* v. *V.R. Pattabiraman*, (1985) 1 SCC 591] , laid down in paras 47 and 53 as follows: (SCC pp. 611 & 613)

> "*47*. Swarup in *Legislation and Interpretation* very aptly sums up the scope and effect of an Explanation thus:
>
> 'Sometimes an Explanation is appended to stress upon a particular thing which ordinarily would not appear clearly from the provisions of the section. The proper function of an Explanation is to make plain or elucidate what is enacted in the substantive provision and not to add or subtract from it. Thus an Explanation does not either restrict or extend the enacting part; it does not enlarge or narrow down the scope of the original section that it is supposed to explain…. The Explanation must be interpreted according to its own tenor; that it is meant to explain and not vice versa.' (pp. 297-98)
>
> ***
>
> *53*. Thus, from a conspectus of the authorities referred to above, it is manifest that the object of an Explanation to a statutory provision is—

'(*a*) to explain the meaning and intendment of the Act itself,

(*b*) where there is any obscurity or vagueness in the main enactment, to clarify the same so as to make it consistent with the dominant object which it seems to subserve,

(*c*) to provide an additional support to the dominant object of the Act in order to make it meaningful and purposeful,

(*d*) an Explanation cannot in any way interfere with or change the enactment or any part thereof but where some gap is left which is relevant for the purpose of the Explanation, in order to suppress the mischief and advance the object of the Act it can help or assist the court in interpreting the true purport and intendment of the enactment, and

(*e*) it cannot, however, take away a statutory right with which any person under a statute has been clothed or set at naught the working of an Act by becoming a hindrance in the interpretation of the same.'"

53. This Court in *Adityapur Industrial Area Development Authority* [*Adityapur Industrial Area Development Authority* v. *Union of India*, (2006) 5 SCC 100] after considering Section 10(20) as amended by the Finance Act, 2002 and consequences of deletion of Section 10(20-A) has laid down the following in para 13: (SCC p. 107)

"*13*. Applying the above test to the facts of the present case, it is clear that the benefit, conferred by Section 10(20-A) of the Income Tax Act, 1961 on the assessee herein, has been expressly taken away. Moreover, the Explanation added to Section 10(20) enumerates the "local authorities" which do not cover the assessee herein. Therefore, we do not find any merit in the submission advanced on behalf of the assessee."

54. It is also relevant to notice that this Court in *Gujarat Industrial Development Corpn.* v. *CIT* [*Gujarat Industrial Development Corpn.* v. *CIT*, (1997) 7 SCC 17] , after considering the provisions of Section 10(20-A) of the IT Act held that Gujarat Industrial Development Corporation is entitled for exemption under Section 10(20-A). The Gujarat Industrial Development Corporation was held to be entitled for exemption under Section 10(20-A) at the time when the provision was in existence in the

statute book and after its deletion from the statute book the exemption is no more available. Now, reverting back to Section 10(20) as amended by the Finance Act, 2002, the same has also come for consideration before different High Courts. A Division Bench of the Allahabad High Court in *Krishi Utpadan Mandi Samiti* v. *Union of India* [*Krishi Utpadan Mandi Samiti* v. *Union of India*, 2004 SCC OnLine All 2152 : (2004) 267 ITR 460] stated the following: (SCC OnLine All paras 7-10)

> "*7*. A bare perusal of the Explanation to Section 10(20) shows that now only four entities are local authorities for the purpose of Section 10(20), namely, (*i*) Panchayat; (*ii*) Municipality; (*iii*) Municipal Committee and District Board; (*iv*) Cantonment Board. Krishi Utpadan Mandi Samiti is not one of the entities mentioned in the Explanation to Section 10(20).
>
> *8*. It may be noted that the Explanation to Section 10(20) uses the word "means" and not the word "includes". Hence, it is not possible for this Court to extend the definition of "local authority" as contained in the Explanation to Section 10(20), vide *P. Kasilingam* v. *P.S.G. College of Technology* [*P. Kasilingam* v. *P.S.G. College of Technology*, 1995 Supp (2) SCC 348, para 19 : AIR 1995 SC 1395, para 19] . It is also not possible to refer to the definitions in other Acts, as the IT Act now specifically defines "local authority".
>
> *9*. It is well settled that in tax matters the literal rule of interpretation applies and it is not open to the court to extend the language of a provision in the Act by relying on equity, inference, etc.
>
> *10*. It is the first principle of interpretation that a statute should be read in its ordinary, natural and grammatical sense. As observed by the Supreme Court of India:
>
> > '*22*. … In construing a statutory provision, the first and the foremost rule of construction is the literary construction. All that [the Court has] to see at the very outset is what does the provision say? If the provision is unambiguous and if from that provision, the legislative intent is clear, [the Court] need not call into aid the other rules of construction of statutes. The other rules of construction of statutes are called into aid only when the legislative intent is not clear.'
>
> Vide *HiralalRattanlal* v. *State of U.P.* [*HiralalRattanlal* v. *State of U.P.*, (1973) 1

SCC 216 : 1973 SCC (Tax) 307 : AIR 1973 SC 1034] , SCC p. 224, para 22."

55. A Division Bench of the Delhi High Court also in *Agricultural Produce Market Committee* v. *CIT* [*Agricultural Produce Market Committee* v. *CIT*, 2006 SCC OnLine Del 1722 : (2007) 294 ITR 549] had occasion to consider Section 10(20) as amended w.e.f. 1-4-2003 where the High Court in para 5 has stated the following: (SCC OnLine Del)

> "5. The most striking feature of the Explanation is that the same provides an exhaustive meaning to the expression "local authority". The word "means" used in the Explanation leaves no scope for addition of any other entity as a "local authority" to those enlisted in the Explanation. In other words, even if an entity constitutes a "local authority" for purposes of the General Clauses Act, 1897, or for purposes of any other enactment for that matter, it would not be so construed for purposes of Section 10(20) of the Act unless it answers the description of one of those entities enumerated in the Explanation. Mrs Ahlawat did not make any attempt to bring her case under clauses (*i*), (*ii*) and (*iv*) of the Explanation and, in our opinion, rightly so because the appellant Committee cannot by any process of reasoning be construed as a Panchayat as referred to in clause (*d*) of Article 243 of the Constitution of India, a municipality in terms of clause (*e*) of Article 243-P of the Constitution of India or a Cantonment Board as defined under Section 3 of the Cantonments Act, 1924. What she argued was that looking to the nature of the functions enjoined upon the appellant Committee, it must be deemed to be a Municipal Committee within the meaning of that expression in clause (*iii*) of the Explanation. We regret our inability to accept that submission. We say so for two distinct reasons. Firstly, because the expression "Municipal Committee" appears in a taxing statute and must, therefore, be construed strictly. It is fairly well settled by a long line of decisions rendered by the Supreme Court that while interpreting a taxing statute, one has simply to look to what is clearly stated therein. There is, in fiscal statutes, no room for any intendment nor is there any equity about the levy sanctioned under the same. The following passage from *Cape Brandy Syndicate* v. *IRC* [*Cape Brandy Syndicate* v. *IRC*, (1921) 1 KB 64] has been approved by the Apex Court in the decisions rendered by their Lordships: (KB p. 71)

> '… in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.'"
>
> **56.** We fully endorse the views taken by the High Court in the above two judgments [*Krishi Utpadan Mandi Samiti* v. *Union of India*, 2004 SCC OnLine All 2152 : (2004) 267 ITR 460] [*Agricultural Produce Market Committee* v. *CIT*, 2006 SCC OnLine Del 1722 : (2007) 294 ITR 549] .
>
> **57.** Now, reverting back to the Explanation to Section 10(20), these are entities which mean the local authority. The submission of the appellant is that the appellant is covered by clause (*ii*) of the Explanation i.e. "Municipality as referred to in clause (*e*) of Article 243-P of the Constitution". We, while discussing the above provisions, have already held that the appellant is not covered by the word/expression of "Municipality" in clause (*e*) of Article 243-P. Thus, the appellant is not clearly included in clause (*ii*) of the Explanation. It is not even the case of the appellant that the appellant is covered by Section 10(20) except clause (*ii*).

43. Proceeding to the facts of the case, Mr. Hossain pointed out that Form LC IV-D in unambiguous terms provides for the EDC being paid to HSVP. The aforesaid clause as contained in the bilateral agreement, according to Mr. Hossain, is incontrovertible proof of the obligation of the petitioner to pay EDC to HSVP, albeit *"through"* the DTCP. In any event, according to learned counsel, the payment of EDC is *"not to"* the DTCP. It was submitted that the petitioners have at no stage questioned HSVP as being the ultimate recipient of the EDC.

44. Learned counsel also questioned the reliance which was sought to be placed on the OM dated 06 October 2017 and contended that merely because the EDC payments were ultimately placed under a '*receipt*' head of the DTCP, the same does not detract from the payment having been made directly to HSVP. According to Mr. Hossain how that payment is ultimately accounted for in the books of HSVP and

DTCP is an issue which is of little relevance or significance insofar as Section 194C is concerned.

45. Mr. Hossain also questioned the correctness of the arguments and which were addressed on the basis of the judgment of the Supreme Court in *New Delhi Municipal Council*. It was his submission that the arguments addressed on this score were thoroughly misconceived since this is clearly not a case where properties of the State were being sought to be taxed. In fact, according to learned counsel, the decision of the Supreme Court is a resounding negation of the arguments addressed on the anvil of Article 289 of the Constitution.

46. It was then submitted that a reading of the provisions of the 1977 Act would clearly point towards statutory obligations placed upon HSVP to carry out external development work in accordance with directives that may be issued by the DTCP and the Government of Haryana. According to learned counsel, the aforesaid would clearly fall within the ambit of an agreement or an arrangement between the DTCP and HSVP and would thus qualify the prerequisites of Section 194C. Mr. Hossain pointed out that for the purposes of Section 194C it is not imperative that the payment to the contractor be based on a written or explicit contract. According to learned counsel, the existence of an agreement or an arrangement can always be gathered from the conduct of parties. Viewed in that light, it was his submission that it would be apparent that the payments which were made by the petitioners was for the carrying out of works pursuant to an agreement between the contractor (HSVP) and a specified person (DTCP). In support of the aforenoted contention Mr. Hossain laid reliance on the following pertinent observations as appearing in the decision of the Supreme

Court in **Shree Choudhary Transport Company v. Income Tax Officer**[26]:-

> **"15.** In order to maintain that the appellant was under no obligation to make any deduction of tax at source, it has been argued that there was no oral or written contract of the appellant with the truck operators/owners, whose vehicles were engaged to execute the work of transportation of the goods only on freelance and need basis. The submission has been that the question of TDS under Section 194-C(2) would have arisen only if the payment was made to a "sub-contractor" and that too, in pursuance of a contract for the purpose of "carrying whole or any part of work undertaken by the contractor". In our view, the submissions so made remain entirely baseless.
>
> **15.1.** The nature of contract entered into by the appellant with the consignor company makes it clear that the appellant was to transport the goods (cement) of the consignor company; and in order to execute this contract, the appellant hired the transport vehicles, namely, the trucks from different operators/owners. The appellant received freight charges from the consignor company, who indeed deducted tax at source while making such payment to the appellant. Thereafter, the appellant paid the charges to the persons whose vehicles were hired for the purpose of the said work of transportation of goods. Thus, the goods in question were transported through the trucks employed by the appellant but, there was no privity of contract between the truck operators/owners and the said consignor company. Indisputably, it was the responsibility of the appellant to transport the goods (cement) of the company; and how to accomplish this task of transportation was a matter exclusively within the domain of the appellant. Hence, hiring the services of truck operators/owners for this purpose could have only been under a contract between the appellant and the said truck operators/owners. Whether such a contract was reduced into writing or not carries hardly any relevance. In the given scenario and set up, the said truck operators/owners answered to the description of "sub-contractor" for carrying out the whole or part of the work undertaken by the contractor (i.e. the appellant) for the purpose of Section 194-C(2) of the Act.
>
> **15.2.** The suggestions on behalf of the appellant that the said truck operators/owners were not bound to supply the trucks as per the need of the appellant nor the freight payable to them was pre-determined, in our view, carry no meaning at all. Needless to

[26] (2021) 13 SCC 401

observe that if a particular truck was not engaged, there existed no contract but, when any truck got engaged for the purpose of execution of the work undertaken by the appellant and freight charges were payable to its operator/owner upon execution of the work i.e. transportation of the goods, all the essentials of making of a contract existed; and, as aforesaid, the said truck operator/owner became a sub-contractor for the purpose of the work in question. The AO, CIT(A) and ITAT have concurrently decided this issue against the appellant with reference to the facts of the case, particularly after appreciating the nature of contract of the appellant with the consignor company as also the nature of dealing of the appellant, while holding that the truck operators/owners were engaged by the appellant as sub-contractors. The same findings have been endorsed by the High Court in its short order [*Shree Choudhary Transport Co.* v. *CIT*, 2009 SCC OnLine Raj 5525 : (2009) 225 CTR 125] dismissing the appeal of the appellant. We are unable to find anything of error or infirmity in these findings.

15.3. The decision of the Delhi High Court in *Hardarshan Singh* [*CIT* v. *Hardarshan Singh*, 2013 SCC OnLine Del 128 : (2013) 350 ITR 427] , in our view, has no application whatsoever to the facts of the present case. The assessee therein, who was in the business of transporting goods, had four trucks of his own and was also acting as a commission agent by arranging for transportation through other transporters. As regards the income of assessee relatable to transportation through other transporters, it was found that the assessee had merely acted as a facilitator or as an intermediary between the two parties (i.e. the consignor company and the transporter) and had no privity of contract with either of such parties inasmuch as he only collected freight charges from the clients who intended to transport their goods through other transporters; and the amount thus collected from the clients was paid to those transporters by the assessee while deducting his commission. Looking to the nature of such dealings, the said assessee was held to be "not the person responsible" for making payments in terms of Section 194-C of the Act and hence, having no obligation to deduct tax at source. In contradistinction to the said case of *Hardarshan Singh* [*CIT* v. *Hardarshan Singh*, 2013 SCC OnLine Del 128 : (2013) 350 ITR 427] , the appellant of the present case was not acting as a facilitator or intermediary between the consignor company and the truck operators/owners because those two parties had no privity of contract between them. The contract of the company, for transportation of its goods, had only been with the appellant and it was the appellant who hired the services of the trucks. The payment made by the appellant to such a truck operator/owner was clearly a payment made to a sub-contractor.

> **15.4.** Though the decision of this Court in *Palam Gas Service* [*Palam Gas Service* v. *CIT*, (2017) 7 SCC 613 : (2017) 394 ITR 300] essentially relates to the interpretation of Section 40(*a*)(*i-a*) of the Act and while the relevant aspects concerning the said provision shall be examined in the next question but, for the present purpose, the facts of that case could be usefully noticed, for being akin to the facts of the present case and being of apposite illustration. Therein, the assessee was engaged in the business of purchase and sale of LPG cylinders whose main contract for carriage of LPG cylinders was with Indian Oil Corporation, Baddi wherefor, the assessee received freight payments from the principal. The assessee got the transportation of LPG done through three persons to whom he made the freight payments. The assessing officer held that the assessee had entered into a sub-contract with the said three persons within the meaning of Section 194-C of the Act. Such findings of AO were concurrently upheld up to the High Court and, after interpretation of Section 40(*a*)(*i-a*), this Court also approved the decision [*Palam Gas Service* v. *CIT*, 2014 SCC OnLine HP 2388 : (2015) 370 ITR 740] of the High Court while dismissing the appeal with costs. The learned counsel for the appellant has made an attempt to distinguish the nature of contract in *Palam Gas Service* [*Palam Gas Service* v. *CIT*, (2017) 7 SCC 613 : (2017) 394 ITR 300] by suggesting that therein, the assessee's sub-contractors were specific and identified persons with whom the assessee had entered into contract whereas the present appellant was free to hire the service of any truck operator/owner and, in fact, the appellant hired the trucks only on need basis. In our view, such an attempt of differentiation is totally baseless and futile. Whether the appellant had specific and identified trucks on its rolls or had been picking them up on freelance basis, the legal effect on the status of parties had been the same that once a particular truck was engaged by the appellant on hire charges for carrying out the part of work undertaken by it (i.e. transportation of the goods of the company), the operator/owner of that truck became the sub-contractor and all the requirements of Section 194-C came into operation."
>
> **15.5.** Thus, we have no hesitation in affirming the concurrent findings in regard to the applicability of Section 194-C to the present case. Question 1 is, therefore, answered in the negative; against the appellant assessee and in favour of the Revenue."

47. We at the outset note that Mr. Hossain apart from addressing submissions noticed hereinbefore had also raised an objection to the maintainability of the writ petitions asserting that orders passed under

Section 201 are appealable under the provisions of the Act. It was his submission, therefore, that these writ petitions should be dismissed on this score. We, however, find ourselves unable to sustain that objection bearing in mind the undisputed fact that most of these writ petitions were entertained as far back as in 2019 and 2021 and on which, and after hearing counsels for respective sides, the Court had entertained the writ petitions and passed interim orders. It would thus be wholly inequitable to relegate parties to pursue an alternative remedy. We additionally note from the initial orders passed on these writ petitions, that an objection to their maintainability in the face of an alternative remedy does not appear to have been raised or addressed in the first instance. In any case and since parties have addressed submissions at great length on the merits of the questions which arise and the jurisdictional challenge that stands raised, we find no justification to accept the objection as is raised.

48. As was clarified by us in the prefatory parts of this judgment, we propose to decide and rule upon the applicability of Section 194C of the Act principally and leave it open for the writ petitioners as well as the respondents to proceed further in respect of notices that may have been issued referable to Sections 201 and Section 271C of the Act in accordance with the present judgment. We shall also while examining the challenge which stands raised deal with an additional ground which has been urged in some of the writ petitions and which had questioned the validity of the show cause notices not even referring to the appropriate provision comprised in Chapter XVII-B which was sought to be invoked and thus asserting that those notices are liable to be quashed on the ground of lacking in material particulars and being wholly vague.

49. The principal question which stands raised would have to be answered on an understanding of the scope the scope and ambit of Section 194C. We at the outset note that the aforesaid provision places an obligation on any person responsible for paying a sum to any resident for carrying out any work pursuant to a contract between the resident and a specified person, to deduct tax at source at the time of crediting such sum to the account of the resident or at the time of payment. The resident, who is envisaged to have a contract with a specified person, is referred to in that provision as the "*contractor*". The liability to deduct tax, on an ex facie reading of Section 194C, stands attracted at the time of payment of any sum or the credit thereof to the account of the contractor. The existence of a contract which is spoken of in Section 194C is between the contractor and a specified person. The provision thus does not construct a contractual relationship between the person responsible for paying the sum and deducting tax with the contractor as a precondition. This is clearly not a prerequisite for Section 194C being attracted. For the purposes of Section 194C, all that is required is a payment being effected to a contractor who has a contractual relationship with a specified person.

50. HSVP, according to the respondents, has an arrangement with the Government of Haryana to undertake external development work. Undisputedly the Government of Haryana, by virtue of being the State Government, would fall within the meaning of the expression '*specified person*' as per the Explanation appended to Section 194C. The critical question which thus arises is whether the arrangement between HSVP and the Government of Haryana could be said to fall within the meaning of the phrase "*in pursuance of a contract*" as occurring in that provision.

51. The HDRUA Act in Section 2(g) defines EDC to include all infrastructure development work, such as water supply, sewerage, drains, treatment and disposal of sewage, storm water, roads, electrical works and other activities including those which may be additionally specified by the Director, to be executed in the periphery or outside a colony or an area for the benefit thereof. A 'colony' has been defined in Section 2(c) to mean an area of land divided or proposed to be divided into plots for residential, commercial, industrial development or for the establishment of a cyber-city, cyber-park, integrated commercial complexes or for construction of flats in a group housing project or for creation of a low density eco-friendly colony. Section 3(3)(a)(ii) casts an obligation upon an owner/ applicant to pay proportionate development charges if its external development work is to be carried out by the Government or any other local authority. The aforesaid statutory obligation as placed is again reiterated in Rule 11(1)(c) and which requires the applicant to submit an undertaking agreeing to pay proportionate development charges if activities comprised in external development are to be constructed, developed and undertaken by the Government or other local authority. The aforesaid obligation again finds specific mention in Form LC IV-D, which is the bilateral agreement that the applicant has to execute with the DTCP. Clause 1(ii) of Form LC IV-D stipulates that the proportionate EDC is to be paid to HSVP through the DTCP within 30 days from the date of grant of the licence or in ten equal six monthly instalments as per the schedule prescribed therein. The bilateral agreement clearly places the owner/developer under an unerring obligation to pay EDC to the HSVP.

52. The 1977 Act came to be promulgated with the avowed objective of establishing HSVP for undertaking urban development and for it to

act as a local development authority for the development of local areas in the State of Haryana. The expression "*amenities*" and "*basic amenities*" are defined therein in the following terms:

> "(a) amenity" includes roads, water supply, street lighting, drainage, [sewerage, treatment and disposal of sewage, sullage and storm water] Public works, tourist spots, open spaces, Parks, landscaping and Play fields, and such other conveniences as the State Government may, by notification, specify to be an amenity for the purposes of this Act;
>
> (ai) "basic amenities" include metalled roads, wholesome water, sewerage and electrification;"

53. The objects of HSVP are set out in Section 13 of the 1977 Act and which explains it to include the promotion and securing the development of all or any of the areas comprised in an urban area. By virtue of Section 21, HSVP is enjoined to create and maintain a fund to which, amongst others, would be credited all monies received by it from the State Government or the Central Government by way of grants, loans, advances "or otherwise". The aforesaid fund is liable to be applied towards meeting expenditure for development of land and for such other purposes as the State Government might direct or permit. Section 21 of the 1977 Act reads as follows:

> "**(21). Fund of authority**
>
> (1) the authority shall have and maintain its own fund to which shall be credited –
>
> (a) all moneys received by the authority from the State Government and the Central Government by way of grants, loans, advances or otherwise;
>
> (b) all moneys borrowed by the authority from source other than the Government, by way of loans or debentures;
>
> (c) all fees received by the authority under this Act;
>
> (d) all moneys received by the authority from the disposal of lands, building and other properties, movable and immovable; and

(e) all moneys received by the authority by way of rents and profits or in any other manner or from any other source.

(2) The fund shall be applied towards meeting-

(a) expenditure incurred in the administration of this Act;

(b) cost of acquisition of land for purposes of this Act;

(c) expenditure for development of land;

(d) expenditure for such other purposes as the State Government may direct or permit.

(3) The authority shall keep its fund in any Scheduled Bank.

(4) The authority may invest any portion of its fund in such securities or in such other manner as may be prescribed.

(5) The income resulting from investments mentioned in sub-section (4) and proceeds of the sale of the same shall be credited to the fund of the authority."

54. Apart from the above, Section 22 of the 1977 Act recognizes the power of the State Government to provide grants, advances and loans to the HSVP as it may consider necessary to enable it to discharge its functions under the Act. Section 22 reads as follows:

"22. Power of State Government to make grants, advances and loans to authority

- The State Government may make such grants, advances and loans to the authority as the State Government may deem necessary, for the performance of the functions under this Act and all grants, loans and advances so made shall be on such terms and conditions, as the State Government may determine."

55. Section 30 then places HSVP under a binding obligation to carry out such directions as may be issued to it from time to time by the State Government. The 1977 Act thus clearly envisages HSVP as being an authority which is charged with undertaking external development works in all areas falling within an urban area. The authority thus appears to have been constituted as a specialised agency which would carry out external development works in colonies and areas. A statutory

obligation to carry out external development, thus, cannot possibly be doubted.

56. Of critical significance is the communication of the DTCP dated 19 June 2018. A reading of that communication evidences an acknowledgement by that authority of HSVP undertaking external development work in and around a colony/ area. The aforesaid communication also admits to an arrangement which was in existence upto 31 March 2017 in terms of which the DTCP used to collect EDC from colonisers in the shape of a bank draft drawn in favour of and sent to HSVP. The communication further asserts that HSVP is thus an executing agency working for and on behalf of the State Government for carrying out external development works for which funds are provided to HSVP through the DTCP.

57. In para 4 of this communication, the DTCP discloses that since receipts on account of EDC were found to be insufficient to bear the cost of development work, it had formulated a new scheme and for which appropriate budgetary provisions were made for execution of all external development works by it. It was on the promulgation of the aforesaid scheme titled as the "Swarn Jyanti Haryana Urban Infrastructure Development Scheme" that EDC w.e.f. FY 2017-18 was deposited directly with the State Government and constituted a part of the Consolidated Fund of that State. It is further admitted that it was post the promulgation of that scheme and the issuance of an order dated 12 May 2017 that all payments towards EDC were made online through the State Government's e-payment gateway or in the shape of demand drafts favouring the DTCP. It is further averred that the required funds for execution of development works were thereafter released to HSVP upon sanction being granted by the Finance Department of the

Government of Haryana. This communication is thus evidence of all EDC charges being made over to the HSVP at least prior to 31 March 2017 pursuant to an understanding that those funds would be utilised towards external development. Undisputedly, EDC charges, which form the subject matter of the present batch were payments made directly to HSVP and prior to FY 2017-18.

58. As we read the communication of 19 June 2018, it becomes manifest that all payments were made to HSVP albeit under the directives of the DTCP. Those payments clearly appear to be directed towards subserving an arrangement existing between HSVP and the Government of Haryana for external development work being carried out by the former. While it is true that this arrangement does not stand encapsulated in a formally executed contract or instrument, there clearly appears to be in existence an understanding between the State Government and HSVP for external development work being executed by it and for the funds remitted to it being utilized for the said purposes. It is in the aforesaid context that the decision of the Supreme Court in *Shree Chaudhary Transport* assumes significance.

59. As is manifest from the passages of that decision extracted hereinabove, Section 194C was explained to embody an obligation on the person responsible to make a payment to a sub-contractor being liable to deduct tax at source. The Supreme Court held that an underlying contract which could otherwise be discerned from the arrangement between parties and their conduct would be sufficient even though it may not have been reduced in writing. The arrangement and conduct of parties led the Supreme Court to hold and observe that since the hiring of the sub-contractor was only for the purposes of fulfilling the principal contract which the appellant had with the specified person,

the provisions of Section 194C were satisfied. It was thus the conduct of parties which led to the Supreme Court coming to the conclusion that all essentials of the creation and existence of a contract existed.

60. In the facts of the present case, and as we construe the provisions of the HDRUA read along with the Rules as also the statutory obligations placed upon HSVP, it becomes apparent that there was in existence an understanding or an arrangement between HSVP and the Government of Haryana for the execution of external development works. The phrase "*in pursuance of a contract*" as finding place in Section 194C would have to necessarily be construed bearing in mind the salient principles which were propounded by the Supreme Court in *Shree Chaudhary Transport*. If the existence of a contract were to be gleaned from the arrangement which existed between HSVP and the Government of Haryana and is also duly acknowledged by the DTCP itself, the absence of a written or codified agreement would not be relevant for the purposes of Section 194C being applicable.

61. We further note that not only the provisions of the HDRUA but also the forms and bilateral agreements executed by the applicants, mandated that all payments of EDC were to be drawn in favour of HSVP. Although they were routed through the DTCP, those payments undoubtedly were to the account of HSVP. The statute as well as the licence conditions thus placed the petitioners under a binding obligation to advance all EDC payments in favour of HSVP. The aforesaid clearly qualifies the responsibility which Section 194C places upon a payer who is contemplating making payments to a contractor.

62. The submission of a lack of privity between the writ petitioners and HSVP is noticed only to be rejected since Section 194C does not contemplate the existence of a contractual relationship between a

person who is responsible for paying a sum and the contractor as defined in that provision. The existence of a contract is only envisaged to be a factor pertinent to an arrangement which the contractor may have with a specified person. Thus merely because EDC is determined and directed to be paid by the DTCP, the same does not deprive the payment of its intrinsic characteristic, namely, of being a payment made to HSVP.

63. In our considered opinion the fact that EDC is determined, computed or is recoverable by the DTCP is wholly inconsequential since Section 194C is solely concerned with a payment being made to a contractor who has an arrangement with a specified person. Merely because an exercise of quantification is undertaken by the specified person, the same would have no bearing on the applicability of Section 194C. We would thus be of the opinion that the moment the petitioners effected a payment in favour of HSVP in connection with the external development work which was to be executed by it pursuant to the arrangement that existed between the said entity and the State Government, the provisions of Section 194C stood attracted.

64. It is also pertinent to note that Chapter XVII-B, and more particularly Section 190 thereof, commences with a non-obstante clause and thus places a responsibility upon a person effecting a payment which is taxable under the provisions of the Act to deduct and collect tax at source in accordance with the provisions placed in that Chapter. The aforesaid provisions except in certain contingencies and in respect of certain category of payments, does not confer any discretion in a person effecting payment to consider whether tax is liable to be deducted and collected at source. It is only in certain contingencies, such as those which are spoken of in Section 195, that the statute

enables the person responsible for effecting a payment to consider whether the amount sought to be paid would be income chargeable under the Act. This is evident from Section 195 which is extracted hereunder:

> "**195.** Other sums.—((1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, [any interest (not being interest referred to in Section 194-LB or Section 194-LC) [or Section 194-LD]] [* * *] or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries" [* * *] shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force:
>
> Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23-D) of Section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode:
>
> [* * *]
>
> [Explanation-1].—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.
>
> [Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—
>
> (i) a residence or place of business or business connection in India; or
>
> (ii) any other presence in any manner whatsoever in India.
>
> (2) Where the person responsible for paying any such sum chargeable under this Act, [(other than salary)] to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an

application [in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable:

[* * *]

(3) Subject to rules made under sub-section (5), any person entitled to receive any interest or other sum on which income tax has to be deducted under sub-section (1) may make an application in the prescribed form to the Assessing Officer for the grant of a certificate authorising him to receive such interest or other sum without deduction of tax under that sub-section, and where any such certificate is granted, every person responsible for paying such interest or other sum to the person to whom such certificate is granted shall, so long as the certificate is in force, make payment of such interest or other sum without deducting tax thereon under sub-section (1).

(4) A certificate granted under sub-section (3) shall remain in force till the expiry of the period specified therein or, if it is cancelled by the Assessing Officer before the expiry of such period, till such cancellation.

(5) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (3) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith.

(6) The person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall furnish the information relating to payment of such sum, in such form and manner, as may be prescribed.

(7) Notwithstanding anything contained in sub-section (1) and sub-section (2), the Board may, by notification in the Official Gazette, specify a class of persons or cases, where the person responsible for paying to a non-resident, not being a company, or to a foreign company, any sum, whether or not chargeable under the provisions of this Act, shall make an application 3636[in such form and manner to the Assessing Officer, to determine in such manner, as may be prescribed], the appropriate proportion of sum chargeable, and upon such determination, tax shall be deducted under sub-section (1) on that proportion of the sum which is so chargeable."

65. The special character of that section and others similar thereto and which speak of "income chargeable" was noticed by the Supreme Court in **Engineering Analysis Centre of Excellence Private Limited v. Commissioner of Income Tax and Anr.**[27]. We deem it apposite to extract paras 27 to 31 of that decision hereunder:

> "**27.** The learned Additional Solicitor General further pointed out that the Indian Government had expressed its reservations on the OECD Commentary, especially on the parts of the OECD Commentary dealing with the parting of copyright and royalty. He also relied upon the Report of the High-Powered Committee on "Electronic Commerce and Taxation" constituted by the CBDT, [F. No 500/122/99 dated 16-12-1999] ["HPC Report 2003"] and the Report of the Committee on the Taxation of E-Commerce ["E-Commerce Report 2016"], which proposed an equalisation levy on specified transactions. He then went on to rely on certain judgments to state that even if the OECD Commentary could be relied upon, it being a rule of international law contrary to domestic law, to the extent it was contrary to Explanations 2 and 4 of Section 9(1)(vi) of the Income Tax Act, it must give way to domestic law. Referring to the doctrine of first sale/principle of exhaustion, he cited a number of judgments in order to show that under Section 14(b)(ii) of the Copyright Act, this doctrine cannot be said to apply insofar as distributors are concerned.
>
> **28.** The learned Additional Solicitor General finally concluded his arguments by stating that the judgments which deal with computer software under sales tax law and excise law have no relevance to income tax law, as the laws relating to indirect taxes are fundamentally different from the laws relating to direct taxes, since they must follow the drill of the chargeability under the Income Tax Act, which is different from chargeability under sales tax law or excise law.
>
> **29.** Having heard the learned counsel appearing on behalf of various parties, we first set out the relevant provisions of the Income Tax Act that we are directly concerned with:
>
> "2. Definitions.—In this Act, unless the context otherwise requires—
>
> ***

[27] (2022) 3 SCC 321

(7) "assessee" means a person by whom any tax or any other sum of money is payable under this Act, and includes—

(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income or assessment of fringe benefits or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;

(b) every person who is deemed to be an assessee under any provision of this Act;

(c) every person who is deemed to be an assessee in default under any provision of this Act;

***

[Substituted by the Finance Act, 1992 (18 of 1992), Section 3(c) (w.e.f. 1-6-1992).] (37-A) "rate or rates in force" or "rates in force", in relation to an assessment year or financial year, means—

***

(iii) for the purposes of deduction of tax under Section 194-LBA or Section 194-LBB or Section 194-LBC or Section 195, the rate or rates of income tax specified in this behalf in the Finance Act of the relevant year or the rate or rates of income tax specified in an agreement entered into by the Central Government under Section 90, or an agreement notified by the Central Government under Section 90-A, whichever is applicable by virtue of the provisions of Section 90, or Section 90-A, as the case may be;

***

4. Charge of income tax.—(1) Where any Central Act enacts that income tax shall be charged for any assessment year at any rate or rates, income tax at that rate or those rates shall be charged for that year in accordance with, and subject to the provisions (including provisions for the levy of additional income tax) of, this Act in respect of the total income of the previous year of every person:

Provided that where by virtue of any provision of this Act income tax is to be charged in respect of the income of a period other than the previous year, income tax shall be charged accordingly.

(2) In respect of income chargeable under sub-section (1), income tax shall be deducted at the source or paid in advance, where it is so deductible or payable under any provision of this Act.

5. Scope of total income.—(1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year; or

(c) accrues or arises to him outside India during such year:

Provided that, in the case of a person not ordinarily resident in India within the meaning of sub-section (6) of Section 6, the income which accrues or arises to him outside India shall not be so included unless it is derived from a business controlled in or a profession set up in India.

(2) Subject to the provisions of this Act, the total income of any previous year of a person who is a non-resident includes all income from whatever source derived which—

(a) is received or is deemed to be received in India in such year by or on behalf of such person; or

(b) accrues or arises or is deemed to accrue or arise to him in India during such year.

Explanation 1.—Income accruing or arising outside India shall not be deemed to be received in India within the meaning of this section by reason only of the fact that it is taken into account in a balance sheet prepared in India.

Explanation 2.—For the removal of doubts, it is hereby declared that income which has been included in the total income of a person on the basis that it has accrued or arisen or is deemed to have accrued or arisen to him shall not again be so included on the basis that it is received or deemed to be received by him in India.

***

9. Income deemed to accrue or arise in India.—(1) The following incomes shall be deemed to accrue or arise in India—

***

[Inserted by the Finance Act, 1976 (66 of 1976), Section 4(b) (w.e.f. 1-6-1976).] (vi) income by way of royalty payable by—

***

(b) a person who is a resident, except where the royalty is payable in respect of any right, property or information used or services utilised for the purposes of a business or

profession carried on by such person outside India or for the purposes of making or earning any income from any source outside India;

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Explanation 2.—For the purposes of this clause, "royalty" means consideration (including any lump sum consideration but excluding any consideration which would be the income of the recipient chargeable under the head "Capital gains") for—

(i) the transfer of all or any rights (including the granting of a licence) in respect of a patent, invention, model, design, secret formula or process or trade mark or similar property;

(ii) the imparting of any information concerning the working of, or the use of, a patent, invention, model, design, secret formula or process or trade mark or similar property;

(iii) the use of any patent, invention, model, design, secret formula or process or trade mark or similar property;

(iv) the imparting of any information concerning technical, industrial, commercial or scientific knowledge, experience or skill;

[Inserted by the Finance Act, 2001 (14 of 2001), Section 4(i) (w.e.f. 1-4-2002).] (iv-a) the use or right to use any industrial, commercial or scientific equipment but not including the amounts referred to in Section 44-BB;

(v) the transfer of all or any rights (including the granting of a licence) in respect of any copyright, literary, artistic or scientific work including films or video tapes for use in connection with television or tapes for use in connection with radio broadcasting; or

(vi) the rendering of any services in connection with the activities referred to in [Substituted by the Finance Act, 2001 (14 of 2001), Section 4(ii), for "sub-clauses (i) to (v)" (w.e.f. 1-4-2002).] [sub-clauses (i) to (iv), (iv-a) and (v)].

[Substituted by the Finance Act, 2000 (10 of 2000), Section 4, for Explanation 3 (w.e.f. 1-4-2001). Explanation 3 before substitution, stood as under:"Explanation 3.—For the purposes of this clause, the expression "computer software" shall have the meaning assigned to it in clause (b) of the Explanation to Section 80-HHE."] Explanation 3.—For the purposes of this clause, "computer software" means any computer program recorded on any disc, tape, perforated media or other information storage device and includes any such program or any customised electronic data.

[Inserted by the Finance Act, 2012 (23 of 2012), Section 4(b) (w.r.e.f. 1-6-1976).] Explanation 4.—For the removal of doubts, it is hereby clarified that the transfer of all or any rights in respect of any right, property or information includes and has always included transfer of all or any right for use or right to use a computer software (including granting of a licence) irrespective of the medium through which such right is transferred.

[Inserted by the Finance Act, 2012 (23 of 2012), Section 4(b) (w.r.e.f. 1-6-1976).] Explanation 5.—For the removal of doubts, it is hereby clarified that the royalty includes and has always included consideration in respect of any right, property or information, whether or not—

(a) the possession or control of such right, property or information is with the payer;

(b) such right, property or information is used directly by the payer;

(c) the location of such right, property or information is in India.

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90. Agreement with foreign countries or specified territories.—(1) The Central Government may enter into an agreement with the Government of any country outside India or specified territory outside India,—

(a) for the granting of relief in respect of—

(i) income on which have been paid both income tax under this Act and income tax in that country or specified territory, as the case may be, or

(ii) income tax chargeable under this Act and under the corresponding law in force in that country or specified territory, as the case may be, to promote mutual economic relations, trade and investment, or

(b) for the avoidance of double taxation of income under this Act and under the corresponding law in force in that country or specified territory, as the case may be, without creating opportunities for non-taxation or reduced taxation through tax evasion or avoidance (including through treaty-shopping arrangements aimed at obtaining reliefs provided in the said agreement for the indirect benefit to residents of any other country or territory), or

(c) for exchange of information for the prevention of evasion or avoidance of income tax chargeable under this Act or under the corresponding law in force in that country or

specified territory, as the case may be, or investigation of cases of such evasion or avoidance, or

(d) for recovery of income tax under this Act and under the corresponding law in force in that country or specified territory, as the case may be, and may, by notification in the Official Gazette, make such provisions as may be necessary for implementing the agreement.

(2) Where the Central Government has entered into an agreement with the Government of any country outside India or specified territory outside India, as the case may be, under sub-section (1) for granting relief of tax, or as the case may be, avoidance of double taxation, then, in relation to the assessee to whom such agreement applies, the provisions of this Act shall apply to the extent they are more beneficial to that assessee.

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[Inserted by the Finance Act, 2017, Section 39 (w.e.f. 1-4-2018).] Explanation 4.—For the removal of doubts, it is hereby declared that where any term used in an agreement entered into under sub-section (1) is defined under the said agreement, the said term shall have the same meaning as assigned to it in the agreement; and where the term is not defined in the said agreement, but defined in the Act, it shall have the same meaning as assigned to it in the Act and explanation, if any, given to it by the Central Government.

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195. Other sums.—(1) Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest (not being interest referred to in Section 194-LB or Section 194-LC) or Section 194-LD or any other sum chargeable under the provisions of this Act (not being income chargeable under the head “Salaries”) shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force:

Provided that in the case of interest payable by the Government or a public sector bank within the meaning of clause (23-D) of Section 10 or a public financial institution within the meaning of that clause, deduction of tax shall be made only at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode.

Explanation 1.—For the purposes of this section, where any interest or other sum as aforesaid is credited to any account, whether called “Interest payable account” or “Suspense account” or by any other name, in the books of account of the

person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.

[Inserted by the Finance Act, 2012 (23 of 2012), Section 77(a)(ii) (w.r.e.f. 1-4-1962).]

Explanation 2.—For the removal of doubts, it is hereby clarified that the obligation to comply with sub-section (1) and to make deduction thereunder applies and shall be deemed to have always applied and extends and shall be deemed to have always extended to all persons, resident or non-resident, whether or not the non-resident person has—

(i) a residence or place of business or business connection in India; or

(ii) any other presence in any manner whatsoever in India.

(2) Where the person responsible for paying any such sum chargeable under this Act [Substituted by the Finance Act, 2003 (32 of 2003), Section 80(b) (w.e.f. 1-6-2003).] (other than salary) to a non-resident considers that the whole of such sum would not be income chargeable in the case of the recipient, he may make an application in such form and manner to the assessing officer, to determine in such manner, as may be prescribed, the appropriate proportion of such sum so chargeable, and upon such determination, tax shall be deducted under sub-section (1) only on that proportion of the sum which is so chargeable.

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201. Consequences of failure to deduct or pay.—(1) Where any person, including the principal officer of a company—

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1-A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a payee or on the sum credited to the account of a payee shall not be deemed to be an assessee in default in respect of such tax if such payee—

(i) has furnished his return of income under Section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed:

Provided further that no penalty shall be charged under Section 221 from such person, unless the assessing officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax."

30. The scheme of the Income Tax Act, insofar as the question raised before us is concerned, is that for income to be taxed under the Income Tax Act, residence in India, as defined by Section 6, is necessary in most cases. By Section 4(1), income tax shall be charged for any assessment year at any rate or rates, as defined by Section 2(37-A) of the Income Tax Act, in respect of the total income of the previous year of every person. Under Section 4(2), in respect of income chargeable under sub-section (1) thereof, income tax shall be deducted at source or paid in advance, depending upon the provisions of the Income Tax Act. Importantly, under Section 5(2) of the Income Tax Act, the total income of a person who is a non-resident, includes all income from whatever source derived, which accrues or arises or is deemed to accrue or arise to such person in India during such year. This, however, is subject to the provisions of the Income Tax Act. Certain income is deemed to arise or accrue in India, under Section 9 of the Income Tax Act, notwithstanding the fact that such income may accrue or arise to a non-resident outside India. One such income is income by way of royalty, which, under Section 9(1)(vi) of the Income Tax Act, means the transfer of all or any rights, including the granting of a licence, in respect of any copyright in a literary work.

31. That such transaction may be governed by a DTAA is then recognised by Section 5(2) read with Section 90 of the Income Tax Act, making it clear that the Central Government may enter into any such agreement with the Government of another country so as to grant relief in respect of income tax chargeable under the Income Tax Act or under any corresponding law in force in that foreign country, or for the avoidance of double taxation of income under the Income Tax Act and under the corresponding law in force in that country. What is of importance is that once a DTAA applies, the provisions of the Income Tax Act can only apply to the extent that they are more beneficial to the assessee and not otherwise. Further, by Explanation 4 to Section 90 of the Income

Tax Act, it has been clarified by Parliament that where any term is defined in a DTAA, the definition contained in the DTAA is to be looked at. It is only where there is no such definition that the definition in the Income Tax Act can then be applied. This position has been recognised by this Court in Azadi BachaoAndolan [Union of India v. Azadi BachaoAndolan, (2004) 10 SCC 1] , which held : (SCC pp. 25 & 27, paras 21 & 28)

> "21. The provisions of Sections 4 and 5 of the Act are expressly made "subject to the provisions of this Act", which would include Section 90 of the Act. As to what would happen in the event of a conflict between the provision of the Income Tax Act and a notification issued under Section 90, is no longer res integra.
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> ***
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> 28. A survey of the aforesaid cases makes it clear that the judicial consensus in India has been that Section 90 is specifically intended to enable and empower the Central Government to issue a notification for implementation of the terms of a Double Taxation Avoidance Agreement. When that happens, the provisions of such an agreement, with respect to cases to which they apply, would operate even if inconsistent with the provisions of the Income Tax Act. We approve of the reasoning in the decisions which we have noticed. If it was not the intention of the legislature to make a departure from the general principle of chargeability to tax under Section 4 and the general principle of ascertainment of total income under Section 5 of the Act, then there was no purpose in making those sections "subject to the provisions of the Act". The very object of grafting the said two sections with the said clause is to enable the Central Government to issue a notification under Section 90 towards implementation of the terms of DTACs which would automatically override the provisions of the Income Tax Act in the matter of ascertainment of chargeability to income tax and ascertainment of total income, to the extent of inconsistency with the terms of DTAC."

Unlike those provisions finding place in Chapter XVII-B, and which require a person responsible for effecting a payment to examine whether the sum is chargeable under the provisions of the Act, Section 194C places no such discretion or leeway in the hands of the person responsible for paying a sum to a contractor.

66. We further take note of the significant provisions contained in Sections 197 and 197A of the Act, and which are reproduced hereinbelow:

> "**197.** Certificate for deduction at lower rate.—(1) Subject to the rules made under sub-section (2-A), [where, in the case of any income of any person [or sum payable to any person], income tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of Sections 192, 193, 194, 194-A, 194-C 194-D, 194-G, 194-H, 194-I, 194-J, 194-K, 194-LA , 194-LBA, 194-LBB, 194-LBC, 194-M, 194-O [* * *] and 195, the Assessing Officer is satisfied], that the total income of the recipient justifies the deduction of income tax at any lower rates or no deduction of income tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.
>
> (2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income tax at the rates specified in such certificate or deduct no tax, as the case may be.
>
> (2-A) The Board may, having regard to the convenience of assessees and the interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith."
>
> **197-A**. No deduction to be made in certain cases.—(1) Notwithstanding anything contained in [* * *] Section 194 [* * *], [or Section 194-EE] no deduction of tax shall be made under any of the said sections in the case of an individual, who is resident in India, if such individual furnishes to the person responsible for paying any income of the nature referred to in [* * *] Section 194, [* * *], or as the case may be, Section 194-EE] a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that [the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be nil.
>
> (1-A) Notwithstanding anything contained in [Section 192-A or Section 193 or Section 194-A [or Section 194-D] or Section 194-DA [or Section 194-I]] or Section 194-K, no deduction of tax shall be made under [any] of the said sections in the case of

a person (not being a company or a firm), if such person furnishes to the person responsible for paying any income of the nature referred to in Section [Section 192-A or Section 193 or Section 194-A [or Section 194-D] or [or Section 194-I]] or Section 194-K, as the case may be, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be nil.]

(1-B) The provisions of this section shall not apply where the amount of any income of the nature referred to in sub-section (1) or sub-section (1-A), as the case may be, or the aggregate of the amounts of such incomes credited or paid or likely to be credited or paid during the previous year in which such income is to be included exceeds the maximum amount which is not chargeable to income tax.]

(1-C) Notwithstanding anything contained in [Section 192-A or Section 193 or Section 194 or Section 194-A [or Section 194-D] or Section 194-DA] or Section 194-EE [or Section 194-I] or Section 194-K or sub-section (1-B) of this section, no deduction of tax shall be made in the case of an individual resident in India, who is of the age of [sixty years] or more at any time during the previous year [* * *], if such individual furnishes to the person responsible for paying any income of the nature referred to in [Section 192-A or Section 193 or Section 194 or Section 194-A [or Section 194-D] or Section 194-DA] or Section 194-EE [or Section 194-I] or Section 194-K, as the case may be, a declaration in writing in duplicate in the prescribed form and verified in the prescribed manner to the effect that the tax on his estimated total income of the previous year in which such income is to be included in computing his total income will be nil.]

(1-D) Notwithstanding anything contained in this section, no deduction of tax shall be made by the Offshore Banking Unit from the interest paid—

(a) on deposit made on or after the 1st day of April, 2005, by a non-resident or a person not ordinarily resident in India; or

(b) on borrowing, on or after the 1st day of April, 2005, from a non-resident or a person not ordinarily resident in India.

Explanation.—For the purposes of this sub-section "Offshore Banking Unit" shall have the same meaning as assigned to it in clause (u) of Section 2 of the Special Economic Zones Act, 2005.]

(1-E) Notwithstanding anything contained in this chapter, no deduction of tax shall be made from any payment to any person for, or on behalf of, the New Pension System Trust referred to in clause (44) of Section 10.]

(1-F) Notwithstanding anything contained in this Chapter, no deduction of tax shall be made, or deduction of tax shall be made at such lower rate, from such payment to such person or class of persons, including institution, association or body or class of institutions, associations or bodies, as may be notified by the Central Government in the Official Gazette, in this behalf.]

(2) The person responsible for paying any income of the nature referred to in sub-section (1) or sub-section (1-A)] [or sub-section (1-C)] shall deliver or cause to be delivered to the [Principal Chief Commissioner or Chief Commissioner] or [Principal Commissioner or Commissioner] one copy of the declaration referred to in sub-section (1) [or sub-section (1-A)] [or sub-section (1-C)] on or before the seventh day of the month next following the month in which the declaration is furnished to him."

67. The liability to deduct tax as would be evident from the aforenoted provisions, stands effaced only if a recipient obtains a certificate of exemption or where a beneficiary produces a certificate which obliges the payer to deduct tax at a rate lower than that prescribed. HSVP had obtained no certification as contemplated in terms of the aforenoted provisions nor had it obtained a declaration that moneys received by it were exempt from tax. In view of the aforesaid, it is apparent that the writ petitioners did not stand absolved of the obligation to deduct tax on payments that were being made to HSVP.

68. That takes us further to consider the submission which was addressed in the context of Section 196 of the Act. The submission essentially was that since payments being made to HSVP were pursuant to the directives of the DTCP and in aid of external development work being carried out, those payments should be viewed as sums which were payable to the Government of Haryana. It was in this context

submitted that all aspects pertaining to EDC were regulated by the DTCP. The petitioners urged that the determination and quantification of EDC were subjects exclusively regulated by directives of the DTCP. The petitioners also referred to the power vested in the DTCP to initiate proceedings for recovery of EDC as arrears of revenue and thus constituting a statutory impost exempt from taxation. It was in the backdrop that the petitioners urged us to accept EDC payments as falling within Section 196. We find ourselves unable to sustain that submission bearing in mind the indubitable position which emerges from the discussion which ensues.

69. Section 196 frees sums payable to the Government, RBI or a corporation established by or under a Central Act from the obligation of tax being collected at source. Undisputedly, HSVP would neither fall within the ambit of clause (1) or clause (3) of Section 196. The mere fact that HSVP has been constituted under a statutory enactment does not make it the "Government". Even if it were discharging functions akin to or similar to governmental obligations or performing activities closely connected with State functions, the same would not result in us recognising HSVP as the Government.

70. This issue, in our considered opinion, stands conclusively answered against the writ petitioners by *Adityapur Industrial Area*. The said decision eloquently explains the distinction which is liable to be borne in mind between a sovereign government and a statutory authority. Quoting from Basu's Commentary on the Constitution of India, the Supreme Court noted that it is the property of the State which alone is immune from taxation under Article 289 of the Constitution.

Dealing more specifically with the case of a statutory corporation, it took note of the judgment in **A.P. SRTC v. ITO**[28] and observed thus: -

> *"***14.** In *A.P. SRTC* v. *ITO* [(1964) 7 SCR 17 : AIR 1964 SC 1486] the question arose as to whether the income derived from trading activity by the Andhra Pradesh Road Transport Corporation established under the Road Transport Corporation Act, 1950 was not the income of the State of Andhra Pradesh within the meaning of Article 289(1) of the Constitution and hence exempted from Union taxation. This Court considered the scheme of Article 289 and observed as follows: (SCR p. 25)
>
> > "The scheme of Article 289 appears to be that ordinarily, the income derived by a State both from governmental and non-governmental or commercial activities shall be immune from income tax levied by the Union, provided, of course, the income in question can be said to be the income of the State. This general proposition flows from clause (1).
> >
> > Clause (2) then provides an exception and authorises the Union to impose a tax in respect of the income derived by the Government of a State from trade or business carried on by it, or on its behalf; that is to say, the income from trade or business carried on by the Government of a State or on its behalf which would not have been taxable under clause (1), can be taxed, provided a law is made by Parliament in that behalf. If clause (1) had stood by itself, it may not have been easy to include within its purview income derived by a State from commercial activities, but since clause (2), in terms, empowers Parliament to make a law levying a tax on commercial activities carried on by or on behalf of a State, the conclusion is inescapable that these activities were deemed to have been included in clause (1) and that alone can be the justification for the words in which clause (2) has been adopted by the Constitution. It is plain that clause (2) proceeds on the basis that but for its provision, the trading activity which is covered by it would have claimed exemption from Union taxation under clause (1). That is the result of reading clauses (1) and (2) together.
> >
> > Clause (3) then empowers Parliament to declare by law that any trade or business would be taken out of the purview of clause (2) and restored to the area covered by clause (1) by declaring that the said trade or business is incidental to the ordinary functions of the Government. In other words, clause (3) is an exception to the exception

[28] (1964) 7 SCR 17

> prescribed by clause (2). Whatever trade or business is declared to be incidental to the ordinary functions of the Government, would cease to be governed by clause (2) and would then be exempt from Union taxation. That, broadly stated, appears to be the result of the scheme adopted by the three clauses of Article 289."

71. In *A.P. SRTC*, the Supreme Court had held that a statutory corporation has a personality distinct and separate from that of the State or its shareholders. This would thus appear to lend credence to the stand of the respondents who had argued that even if HSVP be funded by the State Government, it would continue to remain a legal entity separate from the State Government. We are also unimpressed by the argument that since the payment was made on the directives of the DTCP, it should be treated as falling within the scope of Section 196 of the Act. It becomes pertinent to note that Section 196 is not dependent upon a directive to pay. It is concerned solely with whether the payment is made to a Government or an authority specified therein. Similarly, the fact that arrears of EDC could be recovered as arrears of land revenue is also wholly immaterial. Section 10A is merely a mode of recovery of EDC. Even if that provision were to elevate EDC to a statutory levy, the same would not be determinative of whether the payment falls within the scope of Section 196. The applicability of Section 196 is not liable to be answered on the basis of whether the amount has a statutory hue. The amount paid would be exempt from the rigours of TDS only if it is made to a category of entities specified therein.

72. Ultimately, the question which warrants consideration is whether EDC was a payment to the State. This must necessarily be answered in the negative bearing in mind the undisputed fact that the income was placed in the hands and at the disposal of HSVP. We note that undisputedly at least till 31 March 2017 all EDC payments even as per

the DTCP were being made out in favour of HSVP. It is only thereafter that EDC was deposited with the DTCP. This too leads us to the irresistible conclusion that the payments made to HSVP would not fall within Section 196.

73. We also bear in mind the unambiguous legislative command of Section 194C which places the payer under the unshirkable obligation of deducting tax from all payments being made to a contractor. We have already noticed in the preceding parts of this decision that Section 194C of the Act vests no discretion in the payer to examine or contemplate chargeability of that payment to tax. We, in this connection, note the following pertinent observations as rendered by the Supreme Court in **Associated Cement Co. Ltd. v. Commissioner of Income Tax**[29]**.**

> "**7.** The above decision cannot be of any help to the appellant for it does not lay down that the percentage amount deductible under Section 194-C(1) should be out of the income of the contractor from the sum or sums credited to the account of or paid to him. The words in the sub-section 'on income comprised therein' appearing immediately after the words 'deduct an amount equal to two per cent of such sum as income tax' from their purport, cannot be understood as the percentage amount deductible from the income of the contractor out of the sum credited to his account or paid to him in pursuance of the contract. Moreover, the concluding part of the sub-section requiring deduction of an amount equal to two per cent of such sum as income tax, by use of the words 'on income comprised therein' makes it obvious that the amount equal to two per cent of the sum required to be deducted is a deduction at source. Indeed, it is neither possible nor permissible to the payer to determine what part of the amount paid by him to the contractor constitutes the income of the latter. It is not also possible to think that the Parliament could have intended to cast such impossible burden upon the payer nor could it be attributed with the intention of enacting such an impractical and unworkable provision. Hence, on the express language employed in the sub-section, it is impossible to hold that the amount of two per cent required to be deducted by the payer out of the sum credited to the account of or paid to the contractor has

[29](1993) 2 SCC 556

> to be confined to his income component out of that sum. There is also nothing in the language of the sub-section which permits exclusion of an amount paid on behalf of the organisation to the contractor according to Clause 13 of the terms and conditions of the contract in reimbursement of the amount paid by him to workers, from the sum envisaged"

We thus find ourselves unable to sustain the challenge as raised.

74. In light of the foregoing discussion and for reasons set out hereinabove, we find ourselves unable to concur with the view taken by the Tribunal in *Santur, Satya, Perfect Constech* and *Spaze Tower*. Those decisions have proceeded on the basis of a contractual obligation between the petitioner and HSVP being a prerequisite. They have additionally based their decision on the fact that HSVP was undertaking external development work on the directives of the DTCP. These, for reasons recorded hereinabove, were factors wholly irrelevant for the purposes of considering the applicability of Section 194C.

75. That only leaves to consider some of the supplemental questions which were raised and which included the Show Cause Notices not specifically adverting to the specific provision contained in Chapter XVIIB and in terms of which the petitioners were held liable to deduct tax. We, in this regard, also bear in consideration the two earlier rounds of litigation when in the first instance the respondents had sought to hold the petitioners liable to deduct tax under Section 194 in the case of *BPTP* and subsequently under Section 194I as is evident from the judgment rendered in *DLF Homes Panchkula***.**

76. We are of the firm opinion that in matters pertaining to taxation we would not readily import the principle of a power otherwise inhering being sufficient for the purposes of examining the validity of a Show Cause Notice. Chapter XVII-B embodies Sections 192 to 206AB and refers to various contingencies and situations where a payer is

bound in law to deduct tax. The respondents were thus clearly obliged to indicate with sufficient clarity the specific statutory provision contained in Chapter XVII-B and which according to them placed an obligation on the petitioners to deduct tax. This aspect of criticality could not have been left to supposition or for the writ petitioners grappling to understand and discern an obligation to deduct tax flowing from any one of the more than the fifty sections comprised in Chapter XVII-B. A Show Cause Notice fundamentally must apprise the noticee of the case that it is called upon to answer, the context in which an explanation is sought and the charge that it has to answer. The notice thus cannot leave the assessee grappling with or trying to discern the provision which it is supposed to have infringed. In the absence of requisite particulars, the Show Cause Notice would be liable to be quashed on the ground of being wholly vague. As far back as in **State of Orissa v. Binapani Dei**[30]**,** the Supreme Court had pertinently observed:-

> "**9**. The first respondent held office in the Medical Department of the Orissa Government. She, as holder of that office, had a right to continue in service according to the Rules framed under Article 309 and she could not be removed from office before superannuation except "for good and sufficient reasons". The State was undoubtedly not precluded, merely because of the acceptance of the date of birth of the first respondent in the service register, from holding an enquiry if there existed sufficient grounds for holding such enquiry and for re-fixing her date of birth. But the decision of the State could be based upon the result of an enquiry in manner consonant with the basic concept of justice. An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fair play. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is however under a duty to give the person against whom an

[30] 1967 SCC OnLine SC 15

> enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom in enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would therefore arise from the very nature of the function intended to be performed : it need not be shown to be super-added. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

77. The requisites of a valid Show Cause Notice were lucidly explained by the Supreme Court in **Gorkha Security Services v. Govt. (NCT of Delhi)**[31] as under:

> "Contents of the show-cause notice
>
> 21. The central issue, however, pertains to the requirement of stating the action which is proposed to be taken. The fundamental purpose behind the serving of show-cause notice is to make the noticee understand the precise case set up against him which he has to meet. This would require the statement of imputations detailing out the alleged breaches and defaults he has committed, so that he gets an opportunity to rebut the same. Another requirement, according to us, is the nature of action which is proposed to be taken for such a breach. That should also be stated so that the noticee is able to point out that proposed action is not warranted in the given case, even if the defaults/breaches complained of are not satisfactorily explained. When it comes to blacklisting, this requirement becomes all the more imperative, having regard to the fact that it is harshest possible action."

[31](2014) 9 SCC 105

78. Similar observations find place in **UMC Technologies (P) Ltd. v. Food Corpn. of India**[32]:

> "**13**. At the outset, it must be noted that it is the first principle of civilised jurisprudence that a person against whom any action is sought to be taken or whose right or interests are being affected should be given a reasonable opportunity to defend himself. The basic principle of natural justice is that before adjudication starts, the authority concerned should give to the affected party a notice of the case against him so that he can defend himself. Such notice should be adequate and the grounds necessitating action and the penalty/action proposed should be mentioned specifically and unambiguously. An order travelling beyond the bounds of notice is impermissible and without jurisdiction to that extent. This Court in Nasir Ahmad v. Custodian General, Evacuee Property- has held that it is essential for the notice to specify the particular grounds on the basis of which an action is proposed to be taken so as to enable the noticee to answer the case against him. If these conditions are not satisfied, the person cannot be said to have been granted any reasonable opportunity of being heard."

79. The reliance which is placed by Mr. Hossain on the decisions in **Isha Beevi v. Tax Recovery Officer**[33] **and Commissioner of Income-Tax vs. Rajinder Nath**[34] is clearly misconceived. We note that in *Isha Beevi*, the writ petitioner had sought the issuance of a writ of prohibition seeking quashing of notices that were impugned. It was in the aforesaid context and the prerequisites of a writ of prohibition that the Supreme Court observed that the mere mentioning of a wrong provision would not justify the issuance of that prerogative writ and more so where the writ petitioner had failed to establish a total absence of jurisdiction.

80. Insofar as *Rajinder Nath* is concerned, the principal question which arose in that case was whether the Appellate Assistant Commissioner while considering an appeal could substitute Section

[32] (2021) 2 SCC 551
[33] (1976) 1 SCC 70
[34] 1971 SCC OnLine Del 254

153(3)(ii) in place of Section 147(a) of the Act. It was in the aforesaid context that the Supreme Court observed as follows: -

> "We are of the opinion that the contention is not well-founded. Section 147 of the 1961 Act is an enabling provision which empowers the Income-tax Officer to bring to tax incomes which have escaped assessment either on account of the failure of the assessee to disclose fully and truly all material facts necessary for his assessment for the relevant year or the Income-tax Officer in consequence of the information in his possession has reason to believe that income chargeable to tax has escaped assessment for any assessment year. That being so, it is not necessary that notice under section 147 of 1961 Act should state under which of the clauses, whether under clause (a) or clause (b) the same is issued. The main notice to be issued in a case under section 147 is a notice under section 139(2), and section 148 read with section 147 merely authorises the issue of such a notice. [See *Kantamani Venkatanarayan and Son* v. *First Additional Income-tax Officer*, (63, I.T.R. 638) (8) *Deep Chand Daga* v. *Income-tax Officer C-Ward, Raipur*, (77, I.T.R. 661) (9) *Anne Nagendram and BommaReddiVenkayya and Company* v. *Commissioner of Income-tax, Andhra Pradesh*, (66 I.T.R. 46) (10) *Sowdagar Ahmad Khan* v. *Commissioner of Income-tax, Nellore*, (66, I.T.R. 55) (11)]. The point to be considered is whether assessment can be defeated or rendered invalid if it can be sustained under any other provision of the Act. However, this aspect of the matter need not further detain us as in view of our discussion above we are of the opinion that the assessment can be sustained under section 153(3)(ii) of the 1961 Act.
>
> It is a well settled principle of law that the exercise of a power would be referable to a jurisdiction which confers validity upon it and merely because the Income-tax Officer while proceeding to assess the assessee, has quoted a wrong section, the assessment cannot be rendered invalid if it can be supported under section 153(3)(ii) of the 1961 Act.*"*

We note that in *Rajinder Nath*, Section 153(3) came to be invoked while the Appellate Assistant Commissioner was already *in seisen* of proceedings relating to assessment and is thus clearly distinguishable.

81. The principle of a power otherwise inhering or existing and not being impacted by the mere mention of a wrong provision is one which we apply to ratify, save and uphold a decision which is otherwise found

to be valid and sustainable. We would be wary of either readily or unhesitatingly adopting or invoking that precept at the stage of a show cause notice especially where the noticee is left to fathom which of the more than fifty variable obligations it is alleged to have violated.

82. However, while this may have conceivably been a valid ground to interdict some of the impugned show cause notices, we find no justification to invoke our prerogative writ powers on this score since the petitioners have, in the course of these proceedings, been afforded more than an ample and adequate opportunity to establish why Section 194C would not be attracted and have been heard at great length on the questions which were raised. The applicability of Section 194C also appears to have been expressly raised in the counter affidavits which were filed and thus placing the petitioners on adequate notice. In any case and in view of the above, we are of the firm opinion that the principles of prejudice would not stand attracted. It would thus be inappropriate at this late stage of the day to interfere with the show cause notices on this ground.

83. That only leaves us to deal with the issue of the petitioners having been treated as an assessee in default in terms of Section 201 and called upon to pay penalties by virtue of Sections 221 and 271C of the Act. Pursuant to the interim orders that were made on these writ petitions, while the respondents were permitted to continue further in terms of the show cause notices impugned herein, orders if passed against the petitioner were not to be given effect to. We have not been apprised of the status of those proceedings nor have the respondents apprised of any final orders that may have been framed in respect of each of the writ petitioners. We have also not been apprised of whether

the EDC payments have been taxed in the hands of the HSVP or whether the same was offered to tax.

84. We are also cognizant of the legal position of penalty be it either under Section 221 or 271C not being an inevitable corollary in case of default. This position is made explicit by the Second Proviso to Section 221 as well as Section 273B. The imposition of penalty where a question with respect to taxability had remained unclear or where an assessee had good and sufficient cause to not deposit the tax were lucidly explained by the Supreme Court in **CIT v. Eli Lilly & Co. (India) (P) Ltd**[35]**.** in the following terms: -

> **"91.** A bare reading of Section 201(1) shows that interest under Section 201(1-A) read with Section 201(1) can only be levied when a person is declared as an assessee-in-default. For computation of interest under Section 201(1-A), there are three elements. One is the quantum on which interest has to be levied. Second is the rate at which interest has to be charged. Third is the period for which interest has to be charged. The rate of interest is provided in the 1961 Act. The quantum on which interest has to be paid is indicated by Section 201(1-A) itself. Sub-section (1-A) specifies "on the amount of such tax" which is mentioned in sub-section (1) wherein, it is the amount of tax in respect of which the assessee has been declared in default.
>
> **92.** The object underlying Section 201(1) is to recover the tax. In the case of short deduction, the object is to recover the shortfall. As far as the period of default is concerned, the period starts from the date of deductibility till the date of actual payment of tax. Therefore, the levy of interest has to be restricted for the abovestated period only. It may be clarified that the date of payment by the employee concerned can be treated as the date of actual payment.
>
> **94.** Section 273-B states that notwithstanding anything contained in Section 271-C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who does not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to

[35] (2009) 15 SCC 1

penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason.

95. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue. It has not been considered by this Court before. Further, in most of these cases, the tax deductor assessee has not claimed deduction under Section 40(*a*)(*iii*) in computation of its business income. This is one more reason for not imposing penalty under Section 271-C because by not claiming deduction under Section 40(*a*)(*iii*), in some cases, higher corporate tax has been paid to the extent of Rs 906.52 lakhs (see Civil Appeal No. 1778 of 2006 entitled *CIT* v. *Bank of Tokyo-Mitsubishi Ltd.*)."

85. The aforesaid view has been reiterated in a more recent judgment of the Supreme Court in **Singapore Airlines Ltd. Vs. CIT** [36]where the following principles were laid down: -

"58. This Court in *Hindustan Coca Cola Beverage (P) Ltd.* v. *CIT* [*Hindustan Coca Cola Beverage (P) Ltd.* v. *CIT*, (2007) 8 SCC 463] was confronted with a similar situation where the recipient of income on which the assessee had failed to deduct TDS under Section 194-C of the IT Act, had already paid income taxes on that amount. The Court held : (SCC pp. 464-65, paras 6 & 9)

"*6.* The Tribunal upon rehearing the appeal held that though the appellant assessee was rightly held to be an "assessee in default", there could be no recovery of the tax alleged to be in default once again from the appellant considering that Pradeep Oil Corporation had already paid taxes on the amount received from the appellant. It is required to note that the department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. There is no dispute whatsoever that Pradeep Oil Corporation had already paid the taxes due on its income received from the appellant and had received refund from the Tax Department. The Tribunal came to the right conclusion that the tax once again could

[36] (2023) 1 SCC 497

not be recovered from the appellant (the deductor assessee) since the tax has already been paid by the recipient of income.

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9. Be that as it may, Circular No. 275/201/95- IT(B) dated 29-1-1997 issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualised under Section 201(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 deducted 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 deducted assessee or the liability for penalty under Section 271-C of the Income Tax Act."

59. A similar principle was also advanced in the context of Section 192 of the IT Act in *CIT* v. *Eli Lilly & Co. (India) (P) Ltd.* [*CIT* v. *Eli Lilly & Co. (India) (P) Ltd.*, (2009) 15 SCC 1] : (SCC p. 30, paras 98-100)

98. … In our view, therefore, the tax deductor assessee [the respondent(s)] were duty-bound to deduct tax at source under Section 192(1) from the home salary/special allowance(s) paid abroad by the foreign company, particularly when no work stood performed for the foreign company and the total remuneration stood paid only on account of services rendered in India during the period in question.

99. As stated above, in this matter, we have before us 104 civil appeals. We are directing the AO to examine each case to ascertain whether the assessee employee (the recipient) has paid the tax due on the home salary/special allowance(s) received from the foreign company. In case taxes due on home salary/special allowance(s) stands paid off then the AO shall not proceed under Section 201(1). In cases where the tax has not been paid, the AO shall proceed under Section 201(1) to recover the shortfall in the payment of tax.

100. Similarly, in each of the 104 appeals, the AO shall examine and find out whether interest has been paid/recovered for the period between the date on which tax was deductible till the date on which the tax was actually paid. If, in any case, interest accrues for the aforestated period and if it is not paid then the adjudicating authority

shall take steps to recover interest for the aforestated period under Section 201(1-A)."

60. It appears to us that if the recipient of income on which TDS has not been deducted, even though it was liable to such deduction under the IT Act, has already included that amount in its income and paid taxes on the same, the assessee can no longer be proceeded against for recovery of the shortfall in TDS. However, it would be open to the Revenue to seek payment of interest under Section 201(1-A) for the period between the date of default in deduction of TDS and the date on which the recipient actually paid income tax on the amount for which there had been a shortfall in such deduction.

61. As noted earlier, the learned counsel for the parties were *ad idem* on the fact that the travel agents had already paid taxes on the amounts earned by them. The Revenue had contended that the default in payment of TDS could not be excused purely on this ground. However, the decisions in *HindustanCoca Cola* [*Hindustan Coca Cola Beverage (P) Ltd.* v. *CIT*, (2007) 8 SCC 463] and *Eli Lilly & Co.* [*CIT* v. *Eli Lilly & Co. (India) (P) Ltd.*, (2009) 15 SCC 1] clearly bar their ability to pursue the assessee airlines for recovery of the shortfall in TDS and restricts them to imposing interest for the default.

xxxx xxxx xxxx

65. The ambit of "reasonable cause" under Section 273-B requires our scrutiny before we reach the conclusion that the assessing officer is required to also calculate potential penalties to be levied against the assessees. This Court in *Eli Lilly & Co.* [*CIT* v. *Eli Lilly & Co. (India) (P) Ltd.*, (2009) 15 SCC 1] had elaborated, in the passage extracted below, on the context in which Section 273-B may be utilised : (SCC p. 29, paras 94-96)

> "*94*. Section 273-B states that notwithstanding anything contained in Section 271-C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who does not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason.
>
> *95*. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the

> head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue. …
>
> *96.* … The tax deductor assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under Section 271-C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source."

66. We find some parallels between the facts of the present case and the situation in *Eli Lilly & Co.* [*CIT* v. *Eli Lilly & Co. (India) (P) Ltd.*, (2009) 15 SCC 1] The liability of an airline to deduct TDS on supplementary commission had admittedly not been adjudicated upon by this Court when the controversy first arose in AY 2001-2002. While the learned counsel for the Revenue, Mr Kumar, has notified us that various airlines were deducting TDS under Section 194-H at that time, this does not necessarily mean that the position of law was settled. Rather, it appears to us that while one set of air carriers acted under the assumption that the supplementary commission would come within the ambit of the provisions of the IT Act, another set held the opposite view. The assessees before us belong to the latter category. Furthermore, as we have highlighted earlier, there were contradictory pronouncements by different the High Courts in the ensuing years which clearly highlights the genuine and bona fide legal conundrum that was raised by the prospect of Section 194-H being applied to the supplementary commission.

67. Hence, there is nothing on record to show that the assessees have not fulfilled the criteria under Section 273-B of the IT Act. Though we are not inclined to accept their contentions, there was clearly an arguable and "nascent" legal issue that required resolution by this Court and, hence, there was "reasonable cause" for the air carriers to have not deducted TDS at the relevant period. The logical deduction from this reasoning is that penalty proceedings against the airlines under Section 271-C of the IT Act stand quashed."

86. We find a succinct enunciation of the legal position in this regard in a judgment of this Court in **Commissioner of Income Tax (TDS)**

Vs. M/S American Express Bank Ltd.[37] where it was observed as follows: -

> "**8.** From the above conclusions of the Income Tax Appellate Tribunal, it is apparent that as a finding of fact, the Tribunal came to the conclusion that the assessee had acted honestly and fairly in short deducting the tax at source under a bona fide belief that the reimbursement of certain expenses on account of salary of gardeners/sweepers etc., actual conveyance expenditure and the expenditure on newspapers and periodicals were not taxable in the hands of the employees. After having returned such a finding, the Income Tax Appellate Tribunal concluded that the assessee cannot be held to be an 'assessee in default' under Section 201 of the Act for short deduction of tax on the above items. Consequently, the Tribunal held that no interest under Section 201(1A) was leviable on the assessee and, therefore, the Tribunal deleted the levy of tax and interest under Section 201/201(1A) of the said Act.
>
> **9.** While we are not inclined to disturb the finding of the Income Tax Appellate Tribunal that the assessee had acted in a bona fide manner, we do not agree with the conclusion of the Income Tax Appellate Tribunal that the assessee cannot be regarded as being as an "assessee in default" in respect of the short deduction. It is important to remember that the question of "good and sufficient reasons" only arises when one considers the proviso to Section 201(1) of the said Act. That proviso has been specifically introduced to negate the possibility of imposition of penalty under Section 221 if the Assessing Officer is satisfied that the person liable had good and sufficient reasons to not deduct and pay the tax in question. Thus, the proviso is to be applied only to the question of penalty. It would not absolve the assessee insofar as his being considered as an assessee in default for the purposes of Section 201(1) of the said Act. Therefore, this finding of the Tribunal is set aside. Consequently, question no. 1 is decided in favour of the Revenue and against the assessee.
>
> **10.** Insofar as the second question is concerned i.e., with regard to the interest payable under Section 201(1A) of the said Act, that is a mandatory provision, as already held by a Division Bench of this Court in the case of *CIT* v. *ITC Limited*, ITA No. 475/2010, dated 11.05.2011. The said Division Bench observed as under:-
>
> xxxx xxxx xxxx

[37] 2011 SCC OnLine Del 5517

> However, levy of interest under section 201(1A) is neither treated as penalty nor has the said provision been included in Section 273B to make 'reasonableness of the cause' for the failure to deduct a relevant consideration. Section 201(1A) makes the payment of simple interest mandatory. The payment of interest under that provision is not penal. There is, therefore, no question of waiver of such interest on the basis that the default was not intentional or on any other basis. (See *Bennet Coleman & Co. Ltd.* v. *V.P. Damle, Third ITO*, [1986] 157 ITR 812 (Bom.) and *CIT* v. *Prem Nath Motors (P). Ltd.*, [2002] 120 Taxman 584 (Delhi)."
>
> Therefore, the second question is also answered in favour of the Revenue and against the assessee.
>
> **11.** We would like to reiterate that although the questions have been decided in favour of the Revenue, it must be remembered that the finding of the Tribunal that the assessee acted in a bona fide manner, has to be kept in mind and, therefore, no penalty can be imposed on the assessee under Section 221 because of the specific stipulation in the proviso to Section 201(1) of the said Act. We also note that the exact quantum of the default needs to be computed. It would, therefore, be necessary to remand the matter to the assessing officer for the limited purpose of computing the exact quantum of default and the interest payable under Section 201(1A) of the said Act. We make it clear that in case the employees of the assessee have paid the taxes as per their individual returns/assessments, then no amount towards tax would be payable to that extent by the assessee, however, the assessee would continue to be liable for interest under Section 201(1A) but only for the period commencing 'from the date on which such tax was deductible to the date on which the tax is actually paid' [see: *CIT* v. *Adidas India Marketing P. Ltd*: (2007) 288 ITR 379 (Del) and *CIT*v. *Trans Bharat Aviation (P) Ltd*: (2010) 320 ITR 671 (Del)]. The assessing officer shall give full opportunity to the assessee to produce documents in this regard.
>
> The appeals are allowed to the extent indicated above."

87. We are accordingly of the opinion that while the challenge as raised in the writ petition must fail, subject to due verification of the issues flagged in para 82 and 83 above as well as the scope of a person in default and penalty provisions as noticed above, the respondents may revive the proceedings presently pending and conclude the same in light of the observations made hereinabove.

88. Accordingly, we negative the challenge raised in these writ petitions insofar as the invocation of Section 194C of the Act is concerned and hold that EDC payments would be covered thereunder. For reasons recorded in the body of this judgment, we also turn down the challenge to the Clarification issued by the Central Board of Direct Taxes dated 23 December 2017.

89. We dispose of those writ petitions where final orders under Section 201 may not have been made by according liberty to the respondents to revive the pending show cause notice proceedings and conclude the same in accordance with law bearing in mind the observations appearing hereinabove. The proceedings on the pending show cause notices would be liable to be decided afresh after affording an opportunity of hearing to the writ petitioners and decided in accordance with this judgment.

90. We dispose of W.P. (C) 9236/2022 leaving it open to the respondents to finalise the Section 148 notice proceedings as per law and in accordance with the present judgement.

91. We allow W.P.(C) 4909/2023, W.P.(C) 4097/2021, W.P.(C) 11552/2021, W.P.(C) 4778/2021, W.P.(C) 5319/2021, W.P.(C) 5683/2021, W.P. (C) 5715/2021, W.P.(C) 11531/2021, W.P. (C) 6631/2022, W.P. (C) 6694/2022, W.P. (C) 6737/2022, W.P. (C) 6893/2022, W.P. (C) 7978/2022, W.P. (C) 11706/2022, W.P. (C) 4920/2023, and W.P. (C) 5313/2023 and quash the final orders under Section 201 of the Act. The respondents shall decide the notice proceedings afresh and in accordance with the principles laid down in the instant decision.

92. We also allow W.P.(C) 9483/2019, W.P.(C) 11232/2019, W.P.(C) 4033/2022 and W.P.(C) 299/2022 and set aside the final orders under

Section 201 and consequential penalty orders referable to Section 271C impugned therein with liberty reserved to the respondents to retry the issue bearing in mind the judgments in *Eli Lilly, Singapore Airlines and American Express*.

93. We allow W.P. (C) 6552/2022 and W.P. (C) 6558/2022 and quash the impugned notices and orders of reassessment bearing in mind the undisputed fact that the respondents in these two writ petitions have rested their case on Section 194 of the Act. The said issue stands conclusively answered against the respondents in light of the judgment in *BPTP*. We however leave it open to the respondents to consider these two cases under Section 201 of the Act and draw proceedings afresh if permissible in law.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

FEBRUARY 13 2024
RW/kk