IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI ' F ' BENCH
MUMBAI BENCHES, MUMBAI

BEFORE SHRI VIJAY PAL RAO, JM & SHRI N K BILLAIYA, AM

ITA No.2018/Mum/2010 (Assessment Year 2006-07)
ITA No.1949/Mum/2011 (Assessment Year 2006-07)
ITA No.1950/Mum/2011 (Assessment Year 2007-08)
ITA No.1951/Mum/2011 (Assessment Year 2008-09)

The Income Tax Officer (TDS) 3(5), Mumbai	Vs	M/s Vishinda Diamonds 102 /115 & 116 Prasad Chamber Opera Houser\Mumbai 4
(Appellant)		**(Respondent)**

PAN No.	**AACFV3647G**
Assessee by	None
Revenue by	Sh M Murali
Dt.of hearing	21st May 2012
Dt of pronouncement	25th, May 2012

ORDER

PER VIJAY PAL RAO, JM

The ITA No.2018/Mum/2010 and ITA No.1949/Mum/2011 are two appeals against the same order dated 30.12.2009 of the CIT(A) arising from the order passed u/s 201(1) and 201(1A) of the I T Act for the Assessment Year 2006-07.

2 It appears that the revenue has filed these two appeals against the same order in respect of the same Assessment Year i.e. 2006-06. Therefore, the appeal in ITA No.1949/Mum/2011 is treated as infructuous/nonest being a duplicate appeal of ITA No.2018/Mum/2010. Accordingly, the appeal in ITA No.1949/Mum/2011 is dismissed.

3 The other three appeals are relating to AYs 2006-07, 07-08 and 08-09 and are directed against the respective orders of the Commissioner of Income Tax(Appeals)

4 The revenue has raised common grounds in all these three appeals; therefore, the grounds raised for the aY 2006-07 are reproduced hereunder:

(a) On the facts and in the circumstances of the case and in law, the Ld. CIT (A) has failed to appreciate that the liability of the payer to make deduction of tax is absolute and any personal arrangement between payer and payee can not absolve the payer from deducting tax as his statutory liability.

(b) On the facts and in the circumstances of the case and in law, the Ld CIT (A) erred in holding that TDS is not applicable on the payment of core service charges by M/s. Vishinda Diamonds to MIs. Dilipkumar V. Lakhi as no income is generated to M/s. Dilipkumar V. Lakh i.

(c) On the facts and in the circumstances of the case and in law the Ld CIT (A) has failed to appreciate that the value addition charges on the rough diamonds also fall under article 13 of India — UK tax treaty and therefore, the nature of core service charges is not disputed.

(d) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) has failed to appreciate that there is no provision in the I.T. Act for exemption from the TDS from the payment by one assessee to the payee for 'Core Service Fees' wherein, the same has been debited by the assessee from Profit and Loss Account.

(e) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in holding that the payment made by assessee is purely 'reimbursement of expenses' and therefore, it does not fall within the ambit of the provision of TDS of the Act..

(f) On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in concluding that there is no element of service rendered by M/s. Dilipkumar V. Lakhi, Prop. Shri Dilipkumar V. Lakhi and therefore, section 1 94J is not attracted.

5 None has appeared on behalf of the respondent assessee when these appeals were called for hearing. Accordingly, we propose to hear and dispose off these appeals exparte.

6 The brief facts arising from the records are that there was a survey action u/s 133 of the I T Act at the office premises of the assessee. During the course of survey

action, statement of Mr Dilip Kumar V Lakhi the partner of the assessee firm was recorded. On verification of the records/details submitted by the assessee during the course of survey action and subsequent proceedings, the Assessing Officer noted that the assessee has debited Core Service Fees of ₹. 59,45,937/- and no TDS was debited on the same. On enquiry, the assessee has explained that the core service fee paid by the assessee is only by way of reimbursement to m/s Dilipkumar V Lakhi, a proprietary concern. The assessee has explained the facts before the Assessing Officer as under:

> i) Two companies in the group namely i) MIs. Dilipkumar V. LaKni Prop. Shri Dilipkumar V. Lakhi (Proprietary concern,) (ii) Mis. Vshinda Diamonds have effected purchases of Roughs from Diamond Trading Co. (DTC) for which they have separate purchase Invoices and confirmations from DTC; however DTC started levying a charge for valued added services (VAS) on all the purchases made after 1st July 2005 onwards and hence raised a single invoice on the principle sight holder MIs. Dilipkumar V. Lakhi as it is their policies to entertain only one name in the group; however, Shri Dilipkumar V. Lakhi paid the core service fees after deducting 15% as per article 13 of the India — UK Tax Treaty. The TDS paid to the credit of Central government on 25.01.2006. In short no revenue and/or income is generated vis a vis. the reimbursement; hence TDS is not applicable nor there is any loss to the revenue as TDS has already been deducted and paid.
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> ii) Purchases were effected by two companies and according to the ratio of their purchases; the expenses paid by Shri Dilipkumar V Lakhi were 'reimbursed' by the firm M/s. Vishinda Diamonds as expenses were incurred by Shri Dilipkumar V. Lakhi and on behalf of Mis. Vishinda Diamonds. It shall not be out of place to mention that there Is no element of any services by Shri Dll!pkumar V. Lak1 to M/s Visliinda Diamonds."

6.1 Apart from this, the assessee has also contended before the Assessing Officer that since the total value added service charges were paid by Shri Dilipkumar V Lakhi after deduction of tax at source and paid to the credit to the revenue;

therefore, there is no revenue loss on the said amount; otherwise it shall be a case of double deduction of tax on the same transaction.

6.2 The Assessing Officer did not accept the explanation of the assessee and held that the assessee is to be deemed as an assessee in default in respect of the tax which was required to be deducted and also liable to pay simple interest as per the provisions of sec. 201(1) and 201(1A) of the I T Act.

7 On appeal, the Commissioner of Income Tax(Appeals) has held that the payment made by the assessee is purely reimbursement of expenses which in no way fall within the ambit of the provisions of TDS. Accordingly, the assessee cannot be treated as an assessee in default u/s 201(!) and consequently not liable to pay interest u/s 201(1A) of the Act.

8 We have heard the ld DR and carefully perused the relevant material on record. The ld DR has heavily relied upon the order of the Assessing Officer passed u/s 201(1) and 201(1A). As it is evident from the records that the assessee has explained that the payments were actually made by the sister concern M/s Dilipkumar V Lakhi to Diamond Trading company against the purchase of rough diamonds. Since the Diamond Trading Company had charged value added services on all the purchases and the payment was made after the deduction of tax @ 15% as per Article 13 of Indo-UK DTAA. The Assessing Officer has not denied the payment against the purchase of diamond by the sister concern but rejected the explanation of the assessee on technical grounds that any arrangement with the group company cannot effect or alter or modify the statutory liability of the tax

payer to pay tax at appropriate rate. The Assessing Officer has recorded his reasoning at page 4 as under:

> "The explanation offered by the assessee/representatives are not acceptable as the private arrangement cannot discharge liability of TDS as per the provisions of Income tax Act. The liability of payer to make deduction of tax is absolute and any arrangement or agreement between payer and payee cannot discharge the statutory liability of the payer to deduct tax at source. Whatever the private arrangements between the payer and payee may be, the payer's liability under the statute is clear. No arrangement or agreement privately arrived at between the payer and the payee can effect or alter or modify the statutory liability of the tax payer to deduct tax at the appropriate rate from the payment made to the payee. Where a person decides to make payment or net or tax, he has himself to pay taxes which has been specifically prescribed under sec. 195A of the Income- tax Act.
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> Further the contention of the assessee that the assessee has also obtained lower deduction certificate from the department for the period from 1st July 2005 to 31 December 2005 with an understanding that the 'reimbursement of fees' do not attract any TDS is also not acceptable as the validity or the certificate issued under sec 197 of the Act on 28.3.2006 for Rs 44,23,570/- was in force upto 31st March 2006 only. Whereas the amount of Rs.44,23,570/- was remitted to Mr. Dilipkumar V. Lakhi on 23rd January-2006 i.e. well before the issuance of the above mentioned certificate. Under the circumstances, the contention of the assessee is rejected and the total amount of Rs.59,45,937.43 paid Mr. Dipumar V. Lakhi as Core Service tee are liable for TDS under sec. 194-J of the I T Act and accordingly brought to tax along with interest Under sec. 201(1A) of the Act.
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> *On verification, it is further noticed that the assessee has deducted TDS rate on payment made to M/s. Kone Elevators India Ltd. The interest on such delayed payment of ₹ 6,080/- is recovered from the assessee(₹1404 on 24.7.2007 and ₹5,373/- on 23.10.2008)".*

8.1 It is clear from the findings of the Assessing Officer that the he has not disputed the fact that the original payment was made by the sister concern of the assessee after deducting the tax @ 15% and the assessee has made the reimbursement of the same to the sister concern, which is already subjected to TDS. When there is no element of margin, profit or value addition by the sister concern and it was only a simple case of reimbursement of expenses on account of purchases made by the sister concern on behalf of the assessee; therefore, once

the payment is already subjected to TDS and the assessee has only reimbursed the payment, then no TDS is required to be made at the time of payment by the assessee to the sister concern, which is purely a transaction of reimbursement. The Commissioner of Income Tax(Appeals) has considered the contention of the assessee as well as the relevant facts and adjudicated the issue in para 7 to 9 as under:

> *"7. I have gone through the above submissions very carefully and perused the order of the assessing officer. In the orders passed under section 201 (1) and 201 (IA) of the Act, the AO has held the Appellant as an 'assessee in default" for its failure to deduct taxes as per the provisions of section 194J of the Act in respect of payments made to the proprietary sister concern of Shri Dkipkumar V Lakshi as Core Service Fees.*
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> *7.1 In this regard the appellant has argued that the payment made as core service fees to M/s. Dilipkumar V. Lakhi is reimbursement of expenses incurred by the assessee in proportion of purchases which does not attract TDS provisions as no revenue and I or income is generated vis a vis the reimbursement nor there is any element of services rendered by the sister concern and it is a purely reimbursement of expenses only which is fully supported by bills/vouchers: In this connection, the Appellant relied on the various circulars issued by the C.B.D.T. and court decisions which support the contention of t., Appellant that provisions of section 194J of the Act are not applicable in respect of payments made by way of reimbursement only.*
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> *The CBDT has isued guidelines regarding the applicability of the provisions of section 194J of the Act in the Circular No 715, Query No.30 dated 08-08-1995.*
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> *In addition to the above, the Appellant has also relied on some of the court rulings in support of its contention that the payments made to the sister concern by way of reimbursement do not fall within the provisions of section 1 94J of the Act. The Judgments as relied on by the Appellant are mentioned hereunder*
>
> > *1. The decisions in the case of Clifford Chance, United Kingdom v. Dy. CIT [2002] 82 ITD 106 (Mumbai) and*
> >
> > *2. In the case of Asstt. CIT v. Arthur Anderson & Co. [2006] 5 SOT 393 (Mumbai).*
>
> *7.2 Based on the above, it is amply clear that the nature of payment made by the appellant to its sister concern is reimbursement. The entire correspondence along with the bills also supports the contention. The Assessing Officer failed to appreciate the nature of payment made by the appellant. The Assessing Officer has merely acted upon the nomenclature of the payment and held that on this payment tax u/s. 194J should have been*

deducted. The Assessing Officer also failed to establish how the payment made by the appellant has become income to the recipient as the recipient has already paid this amount to the Diamond Trading Company on behalf of the appellant. It is also a fact that this payment is also not against any services rendered by the recipient to the appellant. In absence of both such situations, the provisions of T.D.S. cannot be applicable on the payment. Moreover, Shri Dilipkumar V. Lakhi, recipient had already paid the core service fees after deducting tax @ 15% as per article 13 of the India - UK tax treaty. The TDS deducted is paid to the credit of Central Government accordingly. Any further as proposed by the Assessing Officer will amount to double taxation.

7.3 Thus, in view of the above facts, I find merit in the submission of the appellant that out of the payment in question, no income is generated to the recipient nor there is any element of service rendered by M/s. Dilipkumar V. Lakhi to the appellant. Therefore, in my opinion the payment made is purely reimbursement of expenses' which in no way fall within the ambit of the provisions of T.D.S. of the Act.

7.4 As held above, since the Appellant was not liable for deduction of tax as per the provisions of section 194J of the Act, the assessee should not be treated as 'assessee in default under section 201(1) of the Act. Therefore, I direct the Assessing Officer to delete the demand.

8. As regards Ground No.2 i.e. interest u/s. 201(IA), the appellant submitted as under:

> *The appellant submitted that the Assessing Officer erred in charging interest u/s. 201 (1A) without giving an opportunity and also without stating any reasons for charging the same.*

9. In this regard it is worthwhile to mention that the Hon'ble I T.A T. Bench Jodhpur in the case of I.T.O. vs. Emerald Construction (P) Ltd held that "when the "tax" which was to be deducted u/s. 201(1) was not payable at all, it would be unjust to conclude that, in the all eventualities, interest u/s. 201(1A) is to be charged from the deductor.

Therefore, as per finding given in respect of Ground No.1 and following the ratio of the decision of the Hon'ble I.T.A.T., Jodhpur Bench cited (supra), the question of levy of interest under section 201(1A) of the Act does not arise and accordingly the Assessing Officer is directed to delete the same."

9 The facts, as emerged from the records that the original payment was made by the sister concern of the assessee to Diamond Trading Company on behalf of the assessee and subsequently the assessee has reimbursed the amount to the sister concern. Thus, once the TDS was deducted by the sister concern and deposited to the government account, then no subsequent TDS is required to be deducted on

the same amount. Accordingly, we do not find any reason to interfere with the order of the Commissioner of Income Tax(Appeals) on this issue.

10 Since the payment was not subjected to TDS provisions, then the liability of interest also does not arise. Rather, in this case, there is no loss of revenue because the original payment was already subjected to tax and the amount in question is only reimbursement.

11 In view of the above discussion, we do not find any merit in the appeals of the revenue; accordingly, the same are dismissed.

12 In the result, all the four appeals filed by the revenue are dismissed.

Order pronounced on this 25th, day of May 2012

Sd/ **Sd/-**

(N K BILLAIYA) Accountant Member	**(VIJAY PAL RAO)** Judicial Member

Place: Mumbai : Dated: 25th, May 2012

Raj*

Copy forwarded to:

1	Appellant
2	Respondent
3	CIT
4	CIT(A)
5	DR

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BY ORDER

Dy /AR, ITAT, Mumbai

	Draft dictated on	21 May 2012 Dict pad placed in the org. file	Sr PS
2	Draft placed before Author on	23 May 2012	Sr PS
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4	Draft discussed/approved by 2nd Member		JM/AM
5	Approved draft comes to the Sr PS		Sr.PS
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7	File sent to the Bench Clerk		Sr PS
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9	Date on which file goes to the AR		
10	Date of despatch		Sr PS