IN THE INCOME TAX APPELLATE TRIBUNAL ñCò BENCH : KOLKATA

[Before Hondble Sri Mahavir Singh, JM & Hondble Sri B.P.Jain, AM]

I.T.A No. 265/Kol/2012

Assessment Year : 2008-09

I.T.O., Ward-57(3) Kolkata	-vs.-	Earnest Towers (P) Ltd. Kolkata [PAN : CALEO 2737 A)
(Appellant)		(Respondent)

For the Appellant : Shri Varinder Mehta, CIT

For the Respondent : Shri R.N.Bajoria, Sr.Advocate & Shri Santosh Bajaj, Advocate

Date of Hearing : 10.04.2015
Date of Pronouncement : 13.05.2015.

ORDER

Per Shri B.P.Jain, AM

This appeal of the Revenue arises from the order of ld.CIT(A)-I, Kolkata dated 20.12.2011 for Financial year 2007-08 i.e. Assessment Year 2008-09.

2. The revenue has raised the following grounds of appeal :

"1. The Ld. CIT(A) has erred in holding that premium for acquiring leasehold rights for the leased plot was not rent, whereas the real nature of the payment of the impugned amount by way of "Lease Premium" as per lease deed falls within the purview of sub clause (i) of explanation to sec. 194 I of the I.T.Act, 1961, which specifies the meaning of the term 'rent'.
2. The ld.CIT(A) has erred both on facts and in law to appreciate that the issue in appeal was not capital vs. revenue expenditure, but whether the payment was made for use of the land or not as required u/s 194 I of the Act.
3. The Ld. CIT(A) has erred both on facts and in law to appreciate that restrictive clauses in the deed covering the transaction, governing use of the land, alteration etc. provision in the said deed for "ref und of 75% of such premium on forfeiture of the lease" as also for additional premium for additional built up area to be constructed using the "Land" as well as the "Building" constructed thereupon, do not amount to absolute transfer of land or extinguishment of the rights of the lessor MMRDA or demise of the rights of the lessor unto lessse and on the contrary, those provisions in the deed indicates that the payments – named as "Premium" was made for the use of the land – characterizing the payment as "rent" within the ambit of section 194 I of the Act. "

3. The brief facts of the case are that the assessee is a private limited company and is engaged in the business of real estate investment. MMRDA, a body corporate constituted and established under provision of Mumbai Metropolitan Region Development Authority Act, 1974 who allotted a plot of land measuring 8076.38 sq.mts to the assessee on lease for a period of 80 years. The lease deed was executed on 23rd June, 2008 and the lease premium paid by the assessee for grant of lease was Rs.1041.42 crores. It is worthwhile to note that the said payment has been made before execution of the lease deed. As per the lease deed the assessee was also required to pay the annual rent every month of Rs.8077 every year to MMRDA. The annual rent was to be increased by 10% over the rent of the preceding year. The contention of the Revenue is that the assessee did not deduct TDS on the aforesaid amount of Rs.1041.42 crores paid to MMDA. Consequently the AO issued a notice dated 10.02.2011 requiring the assessee to show cause as to why the payment made to MMRDA was not covered by the TDS provision u/s 194 I of the Act.

3.1. The AO after considering these submissions of the assessee and relying upon the definition of ñrentò as per section 194 I of the Act held that the lease premium of Rs.1041.42 crores was in fact an advance rent and therefore the assessee was required to deduct tax at source. The assessee was therefore treated as assessee in default in terms of section 201(1) and 201(1A) of the Act for non deduction of TDS and non payment of interest amounting to Rs.325,65,95,400/-.

3.2. Before the ld. CIT(A) the assessee made submission who allowed the appeal of the assessee. While doing so the ld. CIT(A) emphasized on the expression ñfor the use of landò appearing in section 194 I of the Act and held that the payment of premium by the assessee is not for ñuseò of property itself rather it is for the rights for the exploitation of the property by constructing commercial apartments. Furthermore, the

ld. CIT(A) referred to the distinction between the lease premium and the rent and came to the conclusion that premium is not paid under lease but is paid as a price for obtaining the lease.

4. We have heard the rival contentions of the parties and perused the facts of the case. As regards ground no.1 the main question is whether the provisions of section 194 I of the Act are applicable to the assessee. The case of the revenue is that payment of lease premium is in the nature of advance rent for 80 years and definition of the term ñrentò u/s 194 I of the Act was wide enough to include such payments made. It is further contended by the revenue that even after the execution of the lease deed the rights of the lessor did not extinguish in view of the provisions of obtaining the additional premium from the assessee in case time limit for its commercial development was not adhered to. According to the revenue premium paid in the case of the assessee came within the purview of section 194 I of the Act.

4.1. The ld. Counsel for the assessee has refuted the submissions made by the revenue by submitting that the assessee had paid lease premium to MMRDA as consideration for the demise of the land in favour of the assessee and not for the use of land. The ld. Counsel for the assessee has further argued that there is a distinction between the lease premium and rent. It is the case of the assessee that substantial premium of Rs.1041.42 crores having been paid, there is no question of camouflaging the same as advance rent. It was further submitted by the ld. Counsel for the assessee that payment of annual rent was Rs.8077 was however within the definition of rent as per section 194 I of the Act but as the annual rent was substantially lower than Rs.1,20,000/-, the assessee was not required to deduct tax at source from the annual rent payment also.

4.2. Having considered the submissions of the parties on the aforesaid principal issue involved in the present appeal it shall be apposite to first refer to the provision of section 194 I of the Act which is extracted as under :-

*"**194-I** Any person not being an individual or a Hindu undivided family, who is responsible for payment to a resident any income by way of rent, 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 rate of –*

(a) Ten per cent for the use of any machinery or plant or equipment;

(b) Fifteen per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings where the payee is an individual or a Hindu undivided family; and

(c) Twenty per cent for the use of any land or building (including factory building) or land appurtenant to a building (including factory building) or furniture or fittings where the payee is a person other than an individual or a Hindu undivided family:]]

***Provided** that no deduction shall be made under this section where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the aforesaid person to the account of, or to, the payee, does not exceed one hundred and twenty thousand rupees :*

***Provided** further that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed the monetary limits specified under clause (a) or clause (b) of section 44AB during the financial year immediately preceding the financial year in which such income by way of rent is credited or paid, shall be liable to deduct income-tax under this section]*

Explanation – For the purposes of this section –

[(i) "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of (either separately or together) any,-

(a) land; or

(b) building (including factory building); or

© land appurtenant to a building (including factory building); or

(d) Machinery; or

(e) Plant; or

(f) Equipment; or

(g) Furniture; or

(h) Fittings ,

Whether or not any or all of the above are owned by the payee;]

(ii) where any income is credited to any account, whether called "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.]"

4.3. The important question to be determined from the terms of the lease deed is whether payment of premium was for acquisition of leasehold rights or for use of land. If the payment made was for use of land then assessee was required to deduct tax u/s 194 I of the Act, otherwise not. The relevant terms of the lease deed are extracted herein below :-

> *"In consideration of the premises and of the sum of Rs.1041,41,73,600 (Rupees One Thousand Forty-one Crore Forty-One Lacs Seventy-three Thousand Six Hundred Only) paid by the lessee to the lessor as a premium and of the covenants and agreements on the part of the Lessee hereinafter contained, the Lessor doth hereby demise unto the Lessee all that piece of land……..together with all Rights easements and appurtenances thereto belonging to the Lessor ……to hold the land and premises hereinbefore expressed to be hereby demised unto the Lessee for the term of 80 years …… "*

4.4. Further as per clause 3(p) of the Lease Deed, the assessee is further permitted to sell and mortgage, assign, underlet or sublet or part with the possession of the premises or any part of there or any interest therein the demised with the consent of Metropolitan Commissioner and after making payment of transfer charges.

4.5. The aforesaid terms of the lease deed leaves no manner of doubt that the lease premium of Rs.1041.42 crores was for acquisition of rights in the lease hold property rather than use of land. Therefore the provisions of section 194 I of the Act are not applicable in the case of the assessee. The purport of section 194 I of the Act is not to bring in its purview payments of any or every kind. Only those payments which are in the nature of ñuseò of land come within the ambit of section 194 I of the Act. The word ñuseò is therefore of prime importance for transactions where the consideration paid for the property would be termed as ñrentò. The term ñuse ñ according to us has to be interpreted keeping in mind the relationship between the landlord and the tenant. The same cannot be extended to bring within its purview exploitation of any kind with reference to the property by changing its identity for its own benefit and thereafter selling it for profit. If that be so and the word óuseô is given an extended meaning, there

would be no difference between a sale transaction and a transaction between the landlord and the tenant. This would render the intention of the legislature in importing the word ôuse ó in section 194 I of the Act otiose. Landlord-tenant relationship does not contemplate such right being given to the tenant. However, there may be transactions of lease that may be identical to the transactions between a landlord and tenant and that is why the definition of the rent includes lease, sub-lease etc.

4.6. It is further relevant to mention that the amount paid by the assessee for lease premium has no connection with the market rent of the property leased to the assessee. Furthermore the term of lease deed is for a considerable period of 80 years which further supports the case of the assesee that the payment made was for the acquisition of rights in the land along with the right of possession, right of exploitation of property, its long term enjoyment, to mortgage the property, to sell the property etc. Also the entire lease premium of Rs.1041.42 crores has been paid before the execution of the lease deed and not after.

4.7. The distinction between the lease premium and the rent has been a subject matter of discussion in various judicial pronouncements. The Hon'ble Supreme Court in the case or CIT vs Panbari Tea company Ltd. 57 ITR 422 has brought out the aforesaid distinction and the relevant part is reproduced as under :-

> *" Under s. 105, of the Transfer of Property Act, a lease of immovable property is a transfer of a right to enjoy the property made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. The transferor is called the lessor, the transferee is called the lessee, the price is called the premium, and the money, share, service or other thing to be so rendered is called the rent. The section, therefore, brings out the distinction between a price paid for a transfer of a right to enjoy the property and the rent to be paid periodically to the lessor. When the interest of the lessor is parted with for a price, the price paid is premium or salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is a capital*

income and the latter a revenue receipt. There may be circumstances where the parties may camouflage the real nature of the transaction by using clever phraseology. In some cases, the so-called premium is in fact advance rent and in others rent is deferred price. It is not the form but the substance of the transaction that matters. The nomenclature used may not be decisive or conclusive but it helps the Court, having regard to the other circumstances, to ascertain the intention of the parties."

4.8. The Hon'ble Calcutta High Court in the case of CIT vs Purnendu Mullick 116 ITR 0591 observed that in case where the leases is for a long period, the lumpsum payment cannot be treated as rent. The relevant portion of the judgement is extracted herein below :-

"8. On further appeal, the Supreme Court held that the Tribunal and the High Court were both in error in treating the said sum of Rs. 55,200 as advance payment of rent for the following reasons:
(a) Prima facie, premium or salami was not income and it would be for the IT authorities to show that the facts existed which would make it a revenue receipt.
(b) The sub-lease did not contain any condition or stipulation from which it could be inferred that the aforesaid amount was paid by way of advance rent.
(c) It was clearly stated in the lease that the money was being paid for completion of the building required for running as a cinema house.
(d) The payment of the rent under the lease was to commence not from the date of the sub-lease which was February 23,1946, but w.e.f. June 1, 1946.
(e) The sub-lessees would enter in to possession after the cinema house was said to be completed.
(f) The payment of the lump sum was of a non-recurring nature.
9. On the basis of the aforesaid reasons the Supreme Court held that the said sum of Rs. *55,200 was a capital receipt and not income.*
10. *It appears to us that the facts of the present case are very similar to the facts which were considered by the Supreme Court in the above decision and that the present reference is covered by the said decision.*
11. *In the instant case the lease is for a long period with provision for escalation of rent. The rent fixed is higher than the previous rent. The lease provides for demolition of the old structures and construction of a new building after substantial expenditure. The lump sum paid is described as salami or premium and not rent. There is no clause for repayment of the lump sum paid or adjustment of the said lump sum against rent. There is thing on record to show that the premium or salami paid had any characteristic of rent."*

4.9. The Hon'ble Delhi High Court in the case of Bharat Steel Tubes Ltd. Vs CIT reported in (2001) 252 ITR 0622 has brought out the distinction between the lease

premium and the rent by laying down broad principles relating to the term lease premium/salami. The said principle are applicable in the case of the assessee in as much as the lease premium has been paid before the execution of the lease which is for a term of a long period of 80 years and there is no provision to treat the same as advance rent in the succeeding years. The relevant portion of the judgment is extracted herein below :-

> *" **4.** As was observed by apex Court in Board of Agrl. IT vs. Sindhurani Chaudharani (1957) 32 **ITR** 169 (SC) : TC 31R.278 and Chintamani Saran NathSah Deo vs. CIT (1961) 41 **ITR** 506 (SC) : TC 38R.l046. Indicia of Salami are : (i) its simple non-recurring character, and (ii) payment prior to creation of tenancy. It is the consideration paid by the tenant for being let into possession and can be neither rent nor revenue but it is capital receipt in the hands of the landlord. In the former case it was observed that Salami is a payment by a tenant as a price for parting by the landlord with the rights under the lease of the holiday as a consideration for what the landlord transfers to the tenant. The broad principle relating to term Salami are as follows:*
> *(1) Prima facie Salami or premium is not income, it is for the taxing authorities to prove that the facts exist which would make the same as income, if they seek to tax it.*
> *(2) Where the premium represents payment of rent in advance it is income. But if it represents the whole or part of the price of the land or the sale price of the leasehold interest is not income but capital.*
> *(3) Salami to be income should be a periodical monetary return coming in which some sort of regularity or expected regularity from definite sources.*
> *(4) Salami or premium paid at the beginning of a mining lease for a long period ordinarily represents the purchase price of an out anti out sale of the property and the sum received is capital and not income but rent or royalty paid periodically is income. The principle is the same whether the premium is for a simple lease of land or for a lease of mineral rights. But royalty payable under the mining lease stands on a different footing from premium or Salami.*
> *(5) When a premium is received merely as an incident in the possession of property (even if leasehold) and there is no finding that the letting out of the property is the business of the assessee, the premium receipt is capital.*
> *(6) Salami or premium paid in advance of rent once for all at the outset the period of tenancy being uncertain and the changes of the resettlement of the same land to some other tenant being remote, is capital.*
> *(7) Premium (Salami) is a single payment made for the acquisition by the lessee of the right to enjoy the benefits granted to him by the lease. Money paid to purchase the said general right is a payment on capital account.*
> *(8) Salami is the amount of money which a landlord insists on receiving as condition precedent for parting with the land in favour of the lessee and that it was received by the landlord not because of the use of the land, but before the land was put into use by the assessee.*

(9) The question of Salami should not be decided on the length of the period of the lease but on the nature of the right conveyed. The characteristics of the payment should be decided without reference to the nature of the lease including the wasting nature of the assets under the lease.

*These broad principles were summarized by Calcutta High Court in Promode Ch. Roy Chowdhury vs. CIT (1962) 46 **ITR** 1064 (Cal) : TC 38R.1092. Question whether a particular receipt like Salami can be regarded as revenue or capital cannot be decided in the abstract and each case has to be decided on its facts.*

***5.** Rent is allowable as deduction under s. 30 of the Act. What is allowable is the rent paid or payable for the period during which the premises are used for the purposes of business. Sec. 105 of the Transfer of Property Act, 1882 (in short, T.P. Act) makes a distinction between rent and premium payable under a lease when the interest of the lessor is parted with for a price, the price paid is premium or Salami. But the periodical payments made for the continuous enjoyment of the benefits under the lease are in the nature of rent. The former is capital and the latter is a revenue in nature. "*

4.10. A similar issue arose for consideration by ITAT Delhi Bench in the case of ITO vs Indian Newspapers Society reported in (2013) 144 ITD 0668, wherein the assessee had been granted lease for a period of 80 years by MMRDA to enable construction of office complex. The terms of the lease deed in the aforesaid case are very much similar to the lease deed executed in the present case. The Tribunal in the similar circumstances held the issue in favour of the assessee. The relevant portion of the decision is extracted herein below:-

*10. Apropos these grounds, the DR submitted that the Commissioner of Income Tax(A) has grossly erred in not appreciating that the payment made by the assessee in the respective assessment years to MMRDA was covered under the definition of "Rent" as per provisions of Section 194-1 of the Act. The DR further submitted that the assessee has acquired land rights from MMRDA who provided land to the assessee on lease basis but on payment of lease premium. The DR also contended that the assessee company was not holding full rights of land as the agreement entered into between MMRDA and the assessee company was bearing some restrictive clauses which show that the MMRDA did not transfer all perpetual rights to the assessee in the land. The DR finally contended that in the case of **Commissioner of Income Tax vs Reebok Company 163 Taxman 61 (Del)** it was held that as per the facts and circumstances of the case, even a security deposit under lease agreement can be tantamount to advance rent, hence TDS deduction is required to be made.*

11. After careful consideration of the above submissions, contentions and legal propositions of both the parties in the light of factual matrix of present case, we observe that it is argued on behalf of the assessee that the MMRDA in its

computation of income has not included the lease premium received in computing the total income because it was further payable to the Government of Maharashtra. From the impugned order, we observe that the issue involved in this ground has been decided in favour of the assessee with following observations and findings:-

"I have considered the written submission of AR's and gone through various arguments canvassed by the learned counsel of the appellant as also taken into account the objections of the Assessing Officer as mentioned in the impugned order.

i) It is well settled that premium and rent have distinct and separate connotations in law as enshrined in Section 105 of the Transfer of Property Act, 1882. The essence of premium lies in that fact it is paid prior to the creation of the landlord and tenant relationship, that is, before the commencement of the tenancy and constitutes the very superstructure of the existence of that relationship. Its another vital characteristic is that it is a one time non-recurring payment for transferring and purchasing the right to enjoy the benefits granted by the lessor resulting in conveyance of some of the rights, title and interest in the property out of such a bundle of rights.

ii) In the Appellant's case, the premium RS.88,52,75,000/- has been paid in two installments on 27.12.2005 [Rs.22,13, 18,750/-] and 18.02.2008 [Rs.66,39,56,250/-] to MMRDA in respect of the Bandra land and as per the lease agreement dated 09.04.2008 read with the possession receipt dated 10.04.2008 issued by MMRDA the lease starts from 09.04.2008 and hence the payment of Rs.88,52,75,000/- is before the initiation of the tenancy relationship between the Appellant and MMRDA and consequently, a cardinal ingredient of premium as advocated in the case laws cited supra is satisfied ..

iii) Moreover, the payment Rs.88,52,75,000/- is made only once for all by the Appellant since there is no other further payment apart from Rs.88,52,75,000/- which can be attributed to bringing into existence the foregoing landlord and tenant relationship between the appellant and MMRDA.

iv) Furthemore, the receipts dates 27.12.005 and 18.02.2008 pertaining to the payment of Rs.88,52,75,000/- contain the description that the payment is on account of lease premium and not rent and there is no provision either in lease agreement dated 09.04.2008 or any other document for adjustment of the aforementioned premium amount against the annual rent Rs.10,415/- payable by the Appellant to MMRDA de hors the premium.

v) The development agreement dated 14.02.2008 entered into by the Appellant with Orbit

Enterprises transfers development rights to the latter on terms and conditions set out therein which would not have been possible, but for the substantive rights, interest and title enjoyed by the Appellant in the Bandra land in consideration of Rs.88,52,75,OOO/- disbursed to MMRDA.

vi) In addition, clause 1 of the operative portion of the lease agreement dated 09.04.2008 read with the recitals thereof unequivocally covenants that in consideration of the payment of RS.88,52,75,OOO/- by the Appellant, MMRDA, the lessor, demises the Bandra plot to the Appellant together with all the rights, easements and appurtenances and the like for 80 years commencing from 09.04.2008. In light of the above discussion read with the lease agreement dated

09.04.2008, the conclusion is irresistible that Appellant by tendering the amount Rs.88,52,75,OOOl- acquired the right, title and interest in the Bandra land demised by MMRDA, the lessor.

In the result, I hold that all the yardsticks as judicially held in the foregoing rulings relied upon by the l earned counsel for terming the sum of Rs. 88,52,75,000/- as lease premium are fulfilled in the Appellant's case.

Moreover, in A. R. KRISHANAMURTHY v. CIT 176 ITR 417 (SC), the transfer of leasehold rights even for temporary period of 10 years has been held to give rise to chargeable capital gains where the Apex Court followed its earlier decision in R.K. PALSHIKAR v. CIT 172 ITR 311 (SC) where the lease for 99 years was concluded to be of an enduring nature. Similar view has been upheld in JCIT v. MUKUND LTD. 106 ITD 231 (MUM) (SB), CIT v. INTERNATIONAL HOUSING. COMPLEX (KER) BEARING ITA NO 770 OF 2009 which was converse case where the Assessee offered the lease premium received for 99 years as rental income in each year, but the revenue assessed the same as capital gains which was ratified by the High Court. The abovementioned view has been approved by the jurisdictional Delhi High Court in KRISHAK BHARA TI v. CIT DECIDED ON 12.07.2012 to which my attention was drawn by the learned counsel vide letter dated 23.07.2012 enclosing the copy of the same. Thus in conformity with the consistent stand of the judiciary including the latest pronouncement of the jurisdictional High Court, in my view, undoubtedly premium in relation to leased land is a payment on capital account not liable to be classified as revenue outgoing and I hold accordingly. On the facts and circumstances of the present case, even the revenue in its affidavit in reply dated 14.09.2011 filed in the Bombay High Court in Writ petition no 1504 of 2011 instituted by the Appellant has accepted that MMRDA has construed the receipt of premium as a capital receipt not exigible to tax and the AO (TDS), Delhi cannot now approbate and reprobate, on the above issue.

In DURGA KHANNA v. CIT 72 ITR 796 (SC), the Supreme Court held that the onus is on the revenue to demonstrate that premium has been camouflaged as advance rent and the Assessing Officer, in the instant case has not brought on record any material to indicate that the rent has been suppressed and the premium has been inflated. In my opinion, to prove such a factual case of measly rent and enlarged premium where an arm of the government is a party [MMRDA] to the lease agreement, the burden would very heavy and onerous. Such a state of affairs cannot be presumed without cogent evidence and the AO has made no attempt to lead any such evidence whatsoever, much less to substantiate the same.

In that view of the matter, I hold that the impugned sum does not constitute advance rent, but lease premium for capital expenditure not falling within the operative realm of Section 194-1of the Act. I am strengthened in my view by the orders passed by CIT(A)-14, Mumbai in favour of the Assessee in the cases listed on page no.9 above, copies of which are placed on record by the Appellant wherein facts are identical and all the seven cases pertain to the land leased by MMRDA in the same or adjoining area which is fortified by the plan appearing at page no.-44 and 59 of the lease deed dated 09.04.2008 [G block-page 43 of the factual paper book.]"

12. In view of above observations, we clearly observe that the Commissioner of Income Tax(A) has also dealt with other cases pertaining to the land leased by

MMRDA in the same or adjoining area and has held that the impugned deposit of lease premium does not constitute advance rent but it is a lease premium for acquiring land with right to construct a commercial building although with certain restrictions, but it is a capital expenditure not falling within the ambit of section 194-1 of the Act. We also observe that the payment of lease premium was not to be made on periodical basis but it was one time payment to acquire the land with right to construct a commercial complex thereon and the lease premium was paid to MMRDA in four instalments, therefore, we are unable to see any perversity, infirmity or any other valid reason to interfere with the findings of the Commissioner of Income Tax(A). Accordingly, this issue is decided in favour of the assessee by disposing ground no.2 of ITA 5207/D/12 and ground no.1 of ITA 5208/D/12.

Ground no.3 of ITA No.5207/D/12 and ground no.2 of ITA 5208/0/12

13. Apropos these grounds, the DR submitted that the Commissioner of Income Tax(A) has erred in not treating the assessee as assessee in default within the meaning of section 201(1) of the Act for non-payment of TDS on payment made to MMRDA. The DR further contended that as per section 201 of the Act where any person including the Principal Officer of a company who is required to deduct any sum in accordance with the provisions of this Act or referred to sub- section lA of Section 192 of the Act being an employer does not deduct or does not pay or after deduction fails to pay the whole or in part of the tax as required by the Act ,then such person shall, without prejudice to any other sections which he may incur, be deemed to be an assessee in default in respect of such taxes.

14. Replying to the above, the counsel of the assessee submitted that the payment of lease premium was payment of capital expenditure and the payment was not liable for tax deduction at source by the payee, therefore, the assessee had no occasion to deduct tax at source and in this situation, the Assessing Officer/TDS officer wrongly held that the assessee was liable to deduct tax at source on payment of lease premium to MMRDA. The counsel of the assessee vehemently submitted that when TDS was not required to be made, how the assessee can be held liable for default in not deducting TDS from the payment of lease rent paid to MMRDA.

15. On careful consideration of the rival submissions, we observe that as per section 194-1 of the Act, any person, not being an individual or a Hindu undivided family, who is responsible for paying any income by way of rent, 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, shall deduct income-tax thereon at the rate prescribed therein. Since in the present case, we have held that the lease premium paid by the assessee was capital in nature and was not rent, therefore, we are unable to approve the findings of TDS Officer/Assessing Officer that the assessee was liable to deduct TDS on payment of lease premium to MMRDA. At this point, we place reliance on the judgment of ***Hon'ble jurisdictional High Court of Delhi in the case of KrishakBharati Cooperative Ltd. vs DCIT (2013) 350 ITR 24 (Del)*** *wherein their lordships held*

that for premium on acquisition of lease hold rights in the land, lease for 90 years with substantial interest in the land, then lease premium constituted capital expenditure.

16. In view of discussions made hereinabove, we are not in agreement with the findings of the Assessing Officer and we decline to hold that the Commissioner of Income Tax(A) has erred in not treating the assessee as assessee in default within the meaning of section 201(1)of the Income Tax Act for non-deduction of TDS on payment of lease premium to MMRDA. At the cost of repetition, it is worthwhile to mention that for invoking the provisions of section 201(1)of the Act, this is a pre-condition that the person should be required to deduct any sum in accordance with the provisions of this Act and he does not deduct, or does not pay or after deduction fails to pay the whole or in part of the tax as required under the provisions of the Act, then only such person shall be deemed to be an assessee in default in respect of payment of such tax. In the case in hand, the assessee was not liable to deduct any tax on payment of lease premium to MMRDA because it was capital expenditure to acquire land on lease with substantial right to construct a commercial building complex "

4.11. Again in the case of ITO vs Wadhwa & Associates Realtors Pvt. Ltd. (2014) 146 ITD 0694 (Mum) similar issue arose before ITAT Mumbai Bench where it was held as under :

" 9. We have considered the rival submissions, perused the order of the lower authorities and the material evidence brought on record in the form of paper Book and the judicial decisions relied upon by the rival parties. The entire grievance revolves around the premium paid by the assessee to M/s. MMRDA Ltd. for the leasehold rights acquired by the assessee through the lease deed dt. 22nd November, 2004. It is the say of the Revenue that this lease premium was liable for deduction of tax at source failing which the assessee is to be treated asassessee in default. It is the say of the assessee that such lease premium is in the nature of capital expenditure and therefore there is no question of deduction of tax at source. Further, the said lease premium does not come within the purview of the definition of rent as provided u/s,194- 1 of the Act.

10. We have carefully perused the lease deed as exhibited from page-l to 42 of the Paper Book. A careful reading of the said lease deed transpires that the premium is not paid under a lease but is paid as a price for obtaining the lease, hence it precedes the grant of lease. Therefore, by any stretch of imagination, it cannot be equated with the rent which is paid periodically. A perusal of the records further show that the payment to MMRD is also for additional built up are and also for granting free of FSI area, such payment cannot be equated to rent. It is also seen that the MMRD in exercise of power u/s. 43 r.w. Sec. 37(1) of the Maharashtra Town Planning Act 1966, MRTP Act and other powers enabling the same has approved the proposal to modify regulation 4A(ii) and thereby increased the FSI of the entire 'G' Block of BKC. The Development Control Regulations for BKC specify the permissible FSI. Pursuant

to such provisions, the assessee became entitled for additional FSI and has further acquired/purchased the additional built up area for construction of additional area on the aforesaid plot. Thus the assessee has made payment to MMRD under Development Control for acquiring leasehold land and additional built up area. The decisions of the Tribunal in the case of M/s. National Stock Exchange (supra) and Mukund Ltd (supra) have been well discussed by the Ld. CIT(A) is his order. The decision of the Hon'ble Jurisdictional High Court in the case of Khimline Pumps Ltd. (supra) squarely and directly apply on the facts of the case wherein the Hon'ble Jurisdictional High Court has held that payment for acquiring leasehold land is a capital expenditure. Considering the entire facts in totality in the light of the judicial decisions vis-a-vis provisions of Sec. 194-1, definition of rent as provided under the said provision, we do not find any reason to tamper or interfere with the findings of the Ld. CIT(A) which we confirm. "

4.12. In the case of ITO (TDS) vs Navi Mumbai SEZ Pvt. Ltd. 147 ITD 0261 (Mum) Similar issue is held in favour of the assesee in similar consideration and the relevant decision in paras 19 and 20 is reproduced herein below :-

*"In the case before us, the assessee has entered in to lease agreements with CIDCO for acquisition of leasehold rights in the land to develop and operate the Special Economic Zone at **Navi Mumbai.** Assessee has paid premium for demised lease land. The question before us is as to whether the said lease premium paid by the assessee to CIDCO to acquire leasehold rights for 60 years under the lease deed(s) is liable for deduction of tax at source being rent within the meaning of section 194-1 of the Act or not. AO has stated that the said payment made by assessee under lease agreements qualifies for rent for the purpose of section 194-1 of the Act as it partakes all the characteristics of rent and whereas the assessee has contended that the assessee has obtained leasehold rights in the said leasehold lands on payment of lease premium and the said lease premium is not paid under a lease. Hence, it is a capital expenditure and not an advance rent. We observe that the main thrust of the AO to hold the premium paid by assessee to hold it as rent is on the definition of rent under section 194-1 of the Act that it creates a legal fiction and the lease deed(s) entered into contain various restrictive covenants. That the said payments in substance are for consideration for use of land under the lease deed(s), hence provisions of section 194-1 of the Act is attracted.*

*20. On the other hand, we observe that Government of Maharashtra appointed CIDCO as the nodal agency for setting up of Special Economic Zone at **Navi Mumbai** "NMSEZ". That the assessee has been jointly promoted as a Special Purpose Vehicle (SPV) by CIDCO and Dronagiri Infrastructure Pvt Limited (DIPL) to develop and operate the Special Economic Zone at **Navi Mumbai.** Pursuant thereto assessee and CID CO entered into Development Agreement and the assessee is required to make payment of lease premium in respect of the land which was being acquired by CIDCO and being allotted to assessee from time to time. As per Development Agreement, the assessee is to develop and market "NMSEZ". There is no dispute to the fact that the assessee has acquired leasehold right in the land for the*

purpose of developing, designing, planning, financing, marketing, developing necessary infrastructure, providing necessary services, operating and maintaining infrastructure administrating and managing "SEZ". By virtue of said lease deed(s), the assessee has acquired the rights to determine, levy, collect, retain, utilize user charges fee for provision of services and for tariffs in accordance with terms and conditions provided in the Development Agreement and the lease deed (s) entered into. Therefore, we agree with Id. CIT(A) that lease deed(s) and the Development Agreement have assigned to the assessee leasehold right which includes bundle of rights. The Assessee has paid the premium for lease deed(s) for the demised land to acquire entire rights of the land for a period of 60 years. Therefore, we are of the considered view that the said payment of lease premium is a payment for acquisition of leasehold land and not merely for use of land. The assessee has made payment for entering into lease agreements to acquire lease hold rights in the land for a period of 60 years and not under a lease. Similar issue came up before the Special Bench ITAT ***Mumbai*** *in the case of Mukund Ltd. (supra). The assessee acquired a land on lease for a period of 99 years from the Maharashtra Industrial Development Corporation (MIDC) and paid Rs.2.04 crores as premium of leasehold land and apart from fixing annual rent at Rs.1 per annum. The assessee claimed that the said premium on leasehold land is a revenue expenditure, which was disallowed by the Aa holding it as a capital in nature. Ld. CIT(A) held that the premium cannot be treated as capital expenditure as the assessee did not acquire ownership of land. It was held that it was an expenditure relatable to 99 years and should be allowed on proportionate basis. However, on further appeal to the Tribunal, the Tribunal held that the benefit conferred on the assessee on lease hold rights in 99 years against lump sum payment of the premium was of an enduring nature. It was held that there was no material on record to suggest that the sum of Rs.2.04 crores had been paid by way of advance rent nor there was any provision for its adjustment towards rent or for its re-payment to the assessee. It was held that the consideration paid by the assessee was capital expenditure and accordingly the issue was decided against the assessee."*

4.13. In the aforesaid decision the ITAT has distinguished the decision in the case of Foxconn India Developers Pvt. Ltd. Vs ITO 492/2010 rendered by ITAT, Chennai Bench. The distinction is brought out in the decision of ITAT Mumbai Bench in the case of ITO vs Navi Mumbai SEZ Pvt. Ltd (supra) in the following paras of the decisions at para 22 which is reproduced herein below :-

"22. During the course of hearing Id. DR submitted that the above decisions of ITAT, Delhi Bench and ITAT ***Mumbai*** *Bench (supra) are distinguishable. Whereas the decision of ITAT,Chennai Bench in the case of Foxconn India Developers Pvt.Ltd (supra) should be considered and be followed. We observe that the said decision of ITAT has been consideredbytheId.CIT(A)in para 5.40 of the impugned order. On perusal of the said order of ITAT, Chennai Bench, we observe that in the said order of*

Chennai Bench only the provisions of section 194-1 has been considered in respect of upfront charges paid in respect of leaseoflandforaperiodof99years. On perusal of the facts of the case, it is observed that the assessee had already entered into lease agreements and the said payment was made to SIPCOT Ltd under lease agreement. Therefore, the said payment is for lease or use of land and accordingly the payment could not be said to have been made for acquiring leasehold land and hence, it is observed that the Chennai Bench has held that the payment by the assessee company to CIDCO is rent u/s194-1 of the Act. Therefore, we are of the considered view that the above decision of ITAT Chennai Bench (supra) relied upon by Id. DR is not applicable to the case before us. On the other hand, the Special Bench Decision of ITAT, ***Mumbai*** *in the case of Mukund Ltd. (supra) squarely apply wherein it has been held that the premium paid for acquiring lease hold right in land is a capital expenditure. The Special Bench decided the issue after considering the various judgments of the Hon'ble Jurisdictional High Court, Hon'ble Apex Court, various decisions of the Tribunal as discussed hereinabove which have distinguished between the lease premium and rent under the Income Tax Act. The Hon'ble Apex Court has held in the case of Enterprising Enterprises V/s DCIT (2007) 293 ITR 437 (SC) that the assessee which had taken a quarry on lease, the lease rent paid was capital expenditure and the Hon'ble High Court also affirmed the decision of the Tribunal. The Hon'ble Apex Court while confirming the decision of the Hon'ble High Court held that premium for lease or any lump sum payment for obtaining a lease for a long period is payment for enduring advantage, so that it is a capital expenditure which is not deductible."*

Even if the aforesaid decision of ITAT Chennai Bench in the case of Foxconn India Developers Pvt. Ltd. (supra) is taken to be against the assessee on the issue under consideration , we are bound to follow the view which is in favour of the assessee as per the ratio laid down in CIT vs Vegetable products 88 ITR 192 (SC) Accordingly ground no.1 is decided in favour of the assessee and against the revenue. Thus ground no.1 of the revenue is dismissed.

5. As regards ground no.2 of the revenue the said issue is covered against the revenue in various judicial pronouncements as mentioned herein above. In the case of ITO vs Indian Newspaper Society (supra) ITAT Delhi Bench has held that in case the lease premium paid by the assessee is held to be capital in nature and the assessee is not liable to deduct TDS on payment of lease premium to MMRDA. The issue is therefore decided against the revenue. Thus ground no.2 of the revenue is dismissed.

6. As regards issue no.3 of the revenue the revenue has contended that the lease deed contained restrictive clauses therefore the payment of the assessee is in the nature of rent. A bare perusal of the clauses referred to by the revenue shows that they are only regulatory in nature for the uniform development of the area of land leased out to the assessee. Regulatory clauses are also present in the cases of development of freehold land owned by a person. Such regulatory clauses cannot convert the lease premium into tenancy as per section 194 I of the Act. Accordingly the issue is decided against the revenue. Thus ground no.3 of the revenue is dismissed.

7. In the result the appeal of the revenue is dismissed.

Order pronounced in the Court on 13.05.2015.

Sd/-	**Sd/-**
[Mahavir Singh]	[B.P.Jain]
Judicial Member	Accountant Member

Dated : 13.05.2015.
[RG PS]

Copy of the order forwarded to:

1.Earnest Towers (P) Ltd., 9B, Wood Street, 3rd Floor, Kolkata-700016.
2. I.T.O., Ward-57(3), Kolkata
3. CIT(A)-I, Kolkata 4. CIT Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt.Registrar, ITAT, Kolkata Benches