IN THE INCOME TAX APPELLATE TRIBUNAL

'C' BENCH, CHENNAI

BEFORE SHRI ABRAHAM P. GEORGE, ACCOUNTANT MEMBER AND SHRI CHALLA NAGENDRA PRASAD, JUDICIAL MEMBER

I.T.A. No. 492/Mds/2010

Assessment Year : 2007-08

M/s Foxconn India Developer (P) Ltd., SIPCOT Hi Tech SEZSIPCOT Industrial Park, Phase II, Sunguvarchatram TK. Kancheepuram.	v.	The Income Tax Officer, TDS Ward – II(3), Chennai - 600 034 .
PAN : AABCF0043Q (Appellant)		(Respondent)

Appellant by : Shri Vikram Vijayaraghavan, Advocate

Respondent by : Dr. Yogesh Kamat, IRS, Sr.DR

Date of Hearing : 24.04.2012

Date of Pronouncement : 30.04.2012

O R D E R

PER ABRAHAM P. GEORGE, ACCOUNTANT MEMBER :

In this appeal filed by the assessee, its grievance is two-fold. First is that the CIT(Appeals) confirmed the action of the A.O. considering upfront charges paid by the assessee to SIPCOT for allotment of land as rent advance, making the assessee liable for deduction of tax at source under Section 194-I of Income-tax Act, 1961 (in short 'the Act'). As per the assessee, the payee having shown the amount as a part of its

income, assessee could not be considered as one in default nor could be there any question of levy of interest under Section 201(1A) of the Act.

2. Short facts apropos are that assessee is engaged in the business of developing Special Economic Zone (SEZ) as per Special Economic Zone Act and Rules, in notified areas. Assessee had taken on lease a land of 151.85 acres for a period of 99 years from M/s SIPCOT Ltd., which is a company incorporated by the Government of Tamil Nadu under Companies Act, 1956. An amount of ₹ 28.41 Crores was paid by the assessee-company to M/s SIPCOT Ltd. as upfront charges for the lease. M/s SIPCOT Ltd. is the nodal agency for development of land for SEZ at Sriperumbudur. As per the allotment letter dated 11.1.2007 of M/s SIPCOT and the lease deed entered by the assessee with M/s SIPCOT Ltd. dated 30.4.2008, the annual lease rent was ₹ 1 per year for 98 years and ₹ 2 for the 99th year. Such amounts were also paid in advance. The upfront fee was non-refundable. Such upfront fee consisted of ₹ 27.092 Crores, non-refundable upfront charges and ₹ 1.3215 Crores being payment towards provision of water and pipeline upto the boundary limit. Assessing Officer was of the opinion that such amounts paid came within the definition of “rent” as per the Explanation to Section 194-I of the Act. According to him, assessee was bound to

deduct tax at source at the rate of 20%, which it had not done. A.O. also noted that M/s SIPCOT Ltd. though owned by Tamil Nadu Government, was a company formed under Companies Act, 1956. He, therefore, raised a demand on the assessee for ₹ 6,43,84,991/- under Section 201(1) of the Act, considering the assessee as one in default and also levied interest of ₹ 1,73,86,623/- under Section 201(1A) of the Act.

3. Assessee in its appeal before ld. CIT(Appeals), submitted that the amount paid was for allotment of land and this was a capital asset and so considered in its books of accounts. The amount paid for providing water pipeline was also a part of capital cost, as per the assessee. Therefore, according to it, such payments were not coming within the purview of Section 194-I of the Act. Assessee also brought to the notice of ld. CIT(Appeals) that the recipient company, namely, M/s SIPCOT Ltd. had offered the amount as its business income and paid tax thereon. Relying on the decision of Hon'ble Apex Court in the case of Hindustan Coca Cola Beverages P. Ltd. v. CIT (293 ITR 226), assessee argued that no liability could be fastened on the assessee for non-deduction of tax at source since the recipient had offered the amount as its income. Relying on the lease agreement entered with M/s SIPCOT, assessee argued that the lease was for payment of annual rent, and the annual rent was ₹ 1 for 98 years and ₹ 2 for 99th year. Reliance was placed on

the decision of Hon'ble Patna High Court in the case of Traders And Miners Ltd. v. CIT (27 ITR 341) for its submission that "transfer" will also include a lease of land. Crux of its argument was that the payment of lump sum was for right of possession in the immovable property and not towards use of such property. Assessee also filed a certificate from M/s SIPCOT Ltd. wherein they certified that the upfront fee received from assessee was shown as income from deemed sale and offered for tax in its return of income. Reliance was also placed on CBDT Circular No.275/201/95-IT(B), dated 29.1.1997 for arguing that interest could be charged under Section 201(1A) of the Act only upto the date on which the recipient had made arrangement for payment of tax. As per the assessee, M/s SIPCOT Ltd. had paid necessary advance tax and therefore, no liability under Section 201(1A) of the Act could be fastened on the assessee.

4. After considering above submissions and also verifying the lease deeds, ld. CIT(Appeals) came to an opinion that true nature of the payment towards upfront fee was nothing but rent. According to ld. CIT(Appeals), per year rent was infinitesimally small and therefore, the huge amount paid as upfront fee was only rent advance. As per ld. CIT(Appeals), such payment obviated the problems for M/s SIPCOT Ltd. in collecting the rent annually. Therefore, he held that A.O. was justified

in applying Section 194-I of the Act and holding that assessee had failed to deduct tax at source as stipulated under the said Section. However, ld. CIT(Appeals) noted that M/s SIPCOT Ltd. had included upfront charges received by it as well as water connection charges as a part of its income and paid tax thereon. Therefore, according to him, TDS could not be recovered from the assessee though assessee was one in default, in view of the decision of Hon'ble Apex Court in the case of Hindustan Coca Cola Beverages P. Ltd. (supra). Ld. CIT(Appeals) thus confirmed the order of the A.O., but, nevertheless, held that payee having paid the tax, no TDS can be recovered from the assessee. However, according to him, interest under Section 201(1A) of the Act could be levied on the assessee in respect of tax deductible at source on such upfront charges, upto the date of payment of final instalment of advance tax by M/s SIPCOT Ltd. He, therefore, directed the A.O. to re-calculate interest under Section 201(1A) of the Act after verifying the dates of payment of advance tax by M/s SIPCOT Ltd.

5. Now before us, learned A.R., strongly assailing the orders of the authorities below, submitted that what was paid by the assessee was an upfront fee which was a capital outgo. According to him, by such payment, assessee had derived the right of possession of land for 99 years. This was an asset for the assessee which got an enduring

benefit. Learned A.R. pointed out that assessee had shown such payment as an asset in its balance sheet and for this, reliance was placed on paper-book page 85, which is a copy of balance sheet of the assessee-company, as on 31.12.2007. Learned A.R. also pointed out that M/s SIPCOT Ltd. had treated this amount as revenue receipt and as a part of its business income and for this purpose, he relied on a letter dated 9.3.2009 of M/s SIPCOT Ltd. placed at paper-book page 79. Such payment no way can be treated as rent, according to learned A.R., and there was no question of deducting tax at source on a capital outgo. Reliance was also placed on the decision of Hon'ble Patna High Court in the case of Traders And Miners Ltd. (supra) for his argument that lease of the land was a transfer of capital asset. According to him, M/s SIPCOT Ltd. had paid taxes, duly considering the amount as part of its sale, and therefore, assessee was not required to deduct any tax at source. Liability for non-deduction of tax could not be fastened on the assessee. In any case, according to the learned A.R., nothing more than interest under Section 201(1A) of the Act could have been charged on the assessee. Since M/s SIPCOT Ltd. had paid advance tax on due dates, even such a levy of interest was not warranted, according to him.

6. Per contra, learned D.R. supported the order of learned CIT(Appeals).

7. We have perused the orders and heard the rival submissions. It is an admitted position that assessee had taken a lease of 151.85 acres from M/s SIPCOT Ltd. and it had paid a sum of ₹ 27.092 Crores as a non-refundable amount and a sum of ₹ 1.3215 Crores as charges for providing water pipeline. It is also not disputed that assessee had treated this payment as an acquisition of capital asset and shown accordingly in its balance sheet. There is also no dispute that the amount was shown by M/s SIPCOT Ltd. as part of its business revenue falling under the head "income from business" and M/s SIPCOT Ltd. had paid advance tax on its business income on due dates. Ld. CIT(Appeals) has reproduced portion of letters of M/s SIPCOT Ltd. and this is once again reproduced hereunder by us, for brevity:-

> "I. The upfront charges paid by your company has been treated as "deemed Sale" and accounted as 'income from Area Development Activity' as detailed below:
>
> a. Rs.1050 lakhs paid for 100 acres of land allotted on 11.1.2007 relating to the fin. Year 2006-07 (Asst. Yr.: 2007-08)
> b. Rs. 1659.20 lakhs paid for 51.85 acres of land in SEZ area allotted on 10.4.2007 relating to the Fin. Yr: 2007-08 (Asst. Yr.: 08-09) is accounted in that year.
>
> ii. The water connection charges collected of Rs.132.15 lakhs on 22.2.08 has been treated as Misc. Income during the year 2007-08 (a.Yr: 2008-09)"

"Please refer our letter 1st cited confirming that your company's payment of Rs.1050 lakhs for allotment of 100 acres of land on 11.1.2007 was accounted by SIPCOT in the Financial Year 2006-07 (Asst. Year 2007-08). The above payment forms part of the amount of Rs.25527.52 lakhs shown under the head 'income from Area Development Activity' under schedule 'M' of the Profit & Loss Account of SIPCOT for the year 2006-07 SIPCOT paid Rs.12,25,22,400/- on 14.3.2007 as Advance tax besides the TDS payments of Rs.1,58,82,813/- since the tax liability of SIPCOT for the A.Yr.: 2007-08 worked out as Rs.2,64,98,0621/- we have claimed the refund of Rs.11,19,07,150/- and the same is pending with IT Dept.

Similarly your company's payment of Rs.1659.20 lakhs for allotment of 51.85 acres of land on 10.4.2007 was accounted by SIPCOT in the Fin. Yr.: 2007-08 (Asst. Year 2008-09) The above payment forms part of the amount of Rs.25590.56 lakhs shown under the head 'Income from Area Development Activity' under Schedule 'M' of the Profit & Loss Account of SIPCOT for the year 2007-08. SIPCOT paid Rs.34,13,17,094/- as income tax for the asst. year 2008-09 by way of Advance tax, TDS and Self-assessment as detailed below:

Date of payment	**Amount paid (Rs)**
Advance tax	
13.06.2007	3,37,85,000
13.09.2007	6,75,70,730
14.12.07	6,75,71,090
13.3.08	1,37,59,830
	18,26,86,650
TDS	4,75,70,314
Self Asst. (26.9.08)	11,10,60,130
	34,13,17,094

8. As per learned A.R., since assessee had received a benefit of enduring nature, the outgo was on capital account and it had acquired an asset by making such payment. In our opinion, there cannot be any quarrel on this argument. Assessee had derived an interest in the property since lease hold interest is a valuable right. But, the question

here is not whether the outgo was capital or revenue, the question is whether the upfront fee paid will fall within the definition of "rent" as given under Explanation to Section 194-I of the Act. It is pertinent to note that Section 194-I does not make any differentiation between capital outgo and revenue outgo. Explanation to the said Section which defines "rent" is reproduced hereunder:-

> 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
> (c) 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.

9. What the assessee had paid to M/s SIPCOT Ltd. was under a lease agreement. One of the arguments taken by learned A.R. was that

the lease agreement was dated after the end of the relevant previous year and hence the payments made ought not be considered as pursuant to the lease agreement. However, in our opinion, this is not relevant. Reason being that payments were effected during the relevant previous year and it is an accepted position that such payments were for the lease of the land. So, the date of the agreement does not matter since the lease was already in contemplation and assessee would not have given the money unless the lease was atleast orally agreed between the parties. This being so, the payment made by the assessee to M/s SIPCOT Ltd., by whatever name called, was under a lease agreement. Definition of "rent" given above will definitely include payments of any type under any agreement or arrangement for use of land. On the face of such a clear statutory definition, we cannot say that normal meaning of "rent" has to be given while interpreting Section 194-I of the Act. While interpreting "rent" as mentioned in Section 194-I, we have to apply the definition given to "rent" in the explanation thereto. The definition of "rent" given under Explanation to Section 194-I of the Act will squarely cover the payment made by the assessee to M/s SIPCOT Ltd. and render such payment as something on which assessee was obliged to deduct tax at source. We are, therefore, of the opinion that assessee having not deducted such tax at source, rigours of Sections 201(1) and 201(1A) of the Act are attracted. However, the

letter of M/s SIPCOT Ltd., reproduced at para 6 above, clearly states that it had paid taxes in advance on its income which included the upfront charges paid by the assessee. In our opinion, in such a situation, decision of Hon'ble Apex Court in the case of Hindustan Coca Cola Beverages P. Ltd. (supra) relied on by ld. CIT(Appeals) will definitely help the assessee. Since the payee has included the charges in its income and paid taxes thereon, there cannot be any doubt that TDS could not be recovered from the assessee on such amounts despite assessee being one in default. Nevertheless, assessee would be liable for interest under Section 201(1A) of the Act and this position is clear from paras 10 and 11 of the decision of Hon'ble Apex Court, which are reproduced hereunder:-

> "10. Be that as it may, the Circular No.275/201/95-IT(B), dt. 29th Jan., 1997 issued by the CBDT, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under s. 201(1) of the I.T. Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under s. 201(1A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under s. 271C of the I.T. Act."
>
> 11. In the instant case, the appellant had paid the interest under s. 201(1A) of the Act and there is no dispute that the tax due had been paid by deductee-assessee (M/s Pradeep Oil Corporation). It is not disputed before us that the circular is applicable to the facts situation on hand."

What the ld. CIT(Appeals) had done was to direct the A.O. to calculate interest under Section 201(1A) of the Act, after considering the advance tax payment effected by M/s SIPCOT Ltd. and the time period involved in effecting such payment when compared to dates on which assessee was to deduct tax at source in accordance with Section 194-I of the Act. In our opinion, the order of ld. CIT(Appeals) is well reasoned and after proper appreciation of facts. We do not find any reason to interfere.

10. In the result, appeal filed by the assessee is dismissed.

The order was pronounced in the Court on 30th April, 2012.

sd/-	sd/-
(Challa Nagendra Prasad)	(Abraham P. George)
Judicial Member	Accountant Member

Chennai,
Dated the 30th April, 2012.

Kri.

Copy to:
(1) Appellant
(2) Respondent
(3) CIT(A)-IV, Chennai-34
(4) CIT (TDS), Chennai-34
(5) D.R.
(6) Guard file