

आयकर अपीलिय अधीकरण, न्यायपीठ –“C” कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL “C” BENCH: KOLKATA
[Before Hon’ble Shri P. M. Jagtap, Vice President and Hon’ble Shri A. T. Varkey, JM]

I.T.A. No. 1032/Kol/2016
Assessment Year: 2011-12

Special Land Acquisition Officer (PAN: CALSI5547A)	Vs.	Income-tax officer, Ward-TDS, Haldia
Appellant		Respondent

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I.T.A. No. 1256/Kol/2016
Assessment Year: 2011-12

Special Land Acquisition Officer (PAN: CALSI5547A)	Vs.	Joint Commissioner of Income-tax, Range-59/TDS, Kolkata.
Appellant		Respondent

Date of Hearing (Virtual)	29.06.2021
Date of Pronouncement	07.07.2021
For the Appellant	Shri Akkal Dudhwewala, AR
For the Respondent	Shri Supriyo Pal, Addl. CIT

ORDER

Per Shri A. T. Varkey, JM:

These captioned two appeals filed by the assessee, pertains to AY 2011-12 are directed against the separate order passed by the Ld. CIT(A)-24, Kolkata both dated 31.03.2016

2. At the outset, it was brought to our notice that the ITA No. 1032/Kol/2016 is challenging the action of the Ld. CIT(A) in confirming the action of the AO (TDS) passed u/s. 201(1)/201(1A) of the Income-tax Act, 1961 (hereinafter referred to as the “Act”) for non-deduction of TDS u/s. 194LA of the Act; and ITA No. 1256/Kol/2016 is against the action of the AO in levying penalty u/s. 271C of the Act.

3. Brief facts of the case are that the AO noticed that while he was verifying the case records of the office of the Special Land Acquisition Officer (hereinafter 'SLAO'), Midnapore, he noted that the SLAO has made payment to various persons while acquiring the immovable property for the National Highway Project. However, according to the AO (TDS), the SLAO has not deducted any TDS as required u/s. 194LA of the Act. According to him, the SLAO was found to have made total payment of Rs.1,14,61,007/- without deducting TDS. He listed out two cases i.e. LA case No. 20/07-08 wherein the SLAO has made payment On 08.04.2010 to various persons totaling Rs.4,11,772/- without deducting TDS and LA case No. 23/08-09 wherein payments have been made on (19.06.2010, 21.06.2010 and 04.10.2010) to the tune of Rs.1,10,49,235/- to various persons shown in the list. Thereafter, he issued Show Cause Notice (SCN) u/s. 201(1)/201(1A) of the Act asking the assessee/SLAO as to why he should not be treated as an '*assessee in default*' as per section 201 of the Act for not deduction of TDS u/s. 194LA of the Act on the payment of Rs.1,14,61,007/-. According to the AO, the SLAO replied that payments were made to the persons from whom immovable properties were acquired after taking prior approval of the higher authorities of the Land & Land Reforms Department and since there was no clear instruction regarding deduction of TDS from the compensation amount paid and since years have elapsed, it was difficult to realize TDS at that stage. This reply of SLAO was not acceptable to the AO who quoted section 201 of the Act and was of the opinion that the assessee has failed to give proper reply either personally or through an authorized representative against the SCN given by him and, therefore, according to him, as per section 194AL of the Act, the SLAO was required to deduct TDS @ 10% and 20% in case of non furnishing of PAN on payments made towards acquisition of immovable properties *other than agricultural land*. Thereafter, he states that one of the junior officer of SLAO appeared and expressed his ignorance about the deduction of TDS. Therefore, the AO taking note of the various dates (4 dates) on which payments were made (i.e. on 08.10.2010, 19.06.2010, 21.06.2010 and 04.10.2010) noted that the payments to the tune of Rs.4,11,772/-, Rs.81,59,114/-, Rs.22,88,942/-, Rs.6,01,179/- respectively were made without deduction of TDS and so, there is violation of section 194LA of the Act. Thus, the AO opined that SLAO was deemed to be an '*assessee in default*' for non-deduction of tax at source (u/s.

194LA of the Act) as per the provisions of section 201(1) of the Act and was liable to deduct tax and interest thereon u/s. 201(1)/201(1A) of the Act; and thereafter computation of the same made in the last two pages of the assessment order. Further, according to the AO, since there was no PAN details of the payees, tax was calculated @ 20% for the payments made and he passed an order directing the SLAO to pay Rs.33,20,529/-. Aggrieved, the assessee preferred an appeal before the Ld. CIT(A) who confirmed the same. Aggrieved by the aforesaid decision of the Ld. CIT(A), the assessee/SLAO is before us.

4. Assailing the action of the Ld. CIT(A) the Ld. AR of the assessee Shri Akkal Dudhewewala contended that the SLAO was an officer appointed by the West Bengal Government. According to him, as part of his official duty he had to acquire immovable property for the purpose of National Highway Project. Compensation for acquiring the land was disbursed to the owners of the immovable properties on various dates which the AO (TDS) has alleged to have been made by the SLAO without deduction of TDS and for that, he has fastened 20% of the amount paid to payees/owners, since no PAN details were available in the payment register. According to the Ld. AR levy of 20% itself is erroneous. According to him, it is only 10%. According to Ld. AR, the SLAO was discharging his official duty casted on him as an officer of the Government of West Bengal, and has made the payment as compensation to the owners of the land as per the law on the subject. According to the Ld. AR, there was no standard operating procedure (SOP) during the time of payment that SLAO had to deduct TDS on the compensation paid. Therefore, according to him, in the absence of any SOP regarding this, there may be some omissions/lapses which were not intentional. It was pointed out by the Ld. AR that the compensation paid to the land owners for acquiring agricultural land was admittedly exempt from deduction of TDS u/s. 194LA of the Act. According to the Ld. AR, substantial part of the acquisition has been done for agricultural land, ponds, orchids, cultivated land etc. and there was only small portion of the land which was residential in nature. To buttress his argument he drew our attention to page 8 to 11 of the paper book wherein details of the immovable land is given in chart wherein the details are given viz, *measurement of the land acquired, its class, name of Awardee, nature of land, area, share, area/share, rate, land value etc.* He drew our attention to page 8 wherein the case of payee Shri Rajabul is given at Sl. Numbered as 193

wherein most of the land which were acquired are classified as Pukur (*pond*), Kala (*cultivated land*), Bans Bagan (*Bamboo/orchid*) which lands, according to the Ld. AR, admittedly were agricultural land and a small portion was only vastum(*residential*) which was only an area of 9541.91 valued at Rs.1,02,944.08 which is below the limit prescribed for deduction of TDS u/s. 194LA of the Act. Therefore, according to the Ld. AR, these details could not be furnished before the AO. At this juncture, on a query from the Bench as to the need of verification of these facts, the Ld. AR accepted that these facts may be verified by the AO and the Ld. DR did not have any objection if the matter is verified by AO. Therefore, we are of the opinion that the facts which the Ld. AR submitted need verification at the level of AO(TDS). Further according to the Ld. AR, the assessee/SLAO could not have been held the *assessee in default* without the AO having ascertained that the payees have not offered the amount/compensation (*except the agricultural land*) in the Return of Income for the purpose of taxation. According to the Ld. AR, the provision of section 201(1) of the Act would not have been invoked without undertaking such an exercise. Thus, according to the Ld. AR, the tax deductor (SLAO) could not have been treated as an *assessee in default* until it is found that the payee failed to pay such tax directly on the amount/compensation (*except the agricultural land*). For that proposition, he drew our attention to the Hon'ble Allahabad High Court decision in the case of Jagaran Prakashan Ltd. Vs. DCIT (2012) 21 taxmann.com 489(ALL); and drew our attention to a similar issue which had cropped up before this Tribunal in Ramakrishna Vedanta Math Vs. ITO, ITA No. 477-479/Kol/2012 dated 31.07.2012 wherein this Tribunal taking note of the Hon'ble Allahabad High Court decision has adjudicated the issue as under:

“3. The common issue in all the three appeals, which requires our adjudication, is whether a demand under section 201(1A) r.w.s. 194 C can be enforced even in a situation in which the recipient of income embedded in the payments has paid due taxes thereon, and, if not, who has the onus to demonstrate that status about payment of such taxes.

4. The issue in appeal lies in a very narrow compass of material facts. The assessee before us is a charitable trust, set up in the year 1939, doing significant public service. During the relevant period, the assessee has made several payments, in respect of book binding charges, printing charges, advertisement and publicity and bus hire charges etc, but had not deducted tax at source from these payments. On these facts, the Assessing Officer required the assessee to show cause as to why the assessee not be treated as assessee in default in respect of such non deduction of tax at source and the same not be recovered from the assessee under section 201(1), along with interest under section 201(1A). The

stand of the assessee is that the recipients have paid tax on income embedded in these payments, and in the light of Hon'ble Supreme Court's decision in the case of Hindustan Coca Cola Beverages Pvt Ltd Vs CIT (293 ITR 226), the taxes cannot once again be recovered from the assessee. This contention is rejected by the Assessing Officer on the ground that the assessee is not able to prove that taxes on income embedded in these payments have been duly been paid by the recipients. The assessee's request to the Assessing Officer to 'use his statutory powers to corroborate from the payers whether they have paid tax on their account' was also rejected. Aggrieved, assessee carried the matter in appeal but without any success. The assessee is not satisfied and is in appeal before us.

5. We have heard the rival contentions, perused the material on record and duly considered factual matrix of the case as also the applicable legal position.

6. Learned counsel's vehement reliance is on Hon'ble Allahabad High Court's judgment in the case of Jagran Prakashan Ltd Vs DCIT [(2012) 21 taxmann.com 489 All] wherein Their Lordships have, inter alia, observed as follows:

.....it is clear that deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly. In the present case, the Income tax authorities had not adverted to the Explanation to Section 191 nor had applied their mind as to whether the assessee has also failed to pay such tax directly. Thus, to declare a deductor, who failed to deduct the tax at source as an assessee in default, condition precedent is that assessee has also failed to pay tax directly. The fact that assessee has failed to pay tax directly is thus, foundational and jurisdictional fact and only after finding that assessee has failed to pay tax directly, deductor can be deemed to be an assessee in default in respect of such tax.....

7. It is thus argued that the onus is on the revenue to demonstrate that the taxes have not been recovered from the person who had the primarily liability to pay tax, and it is only when the primary liability is not discharged that vicarious recovery liability can be invoked. Learned counsel contends that once all the details of the persons to whom payments have been made, it is for the Assessing Officer, who has all the powers to requisition the information from such payers and from the income tax authorities, to ascertain whether or not taxes have been paid by the persons in receipt of the amounts from which taxes have not been withheld. It is learned counsel's submission that as a result of Hon'ble Allahabad High Court's judgment in the case of Jagaran Prakashan (supra), this paradigm shift in the interpretation of Section 201(1) has been brought about.

8. The plea is indeed well taken. Learned counsel is quite right in his submission that, as a result of the judgment of Hon'ble Allahabad High Court in Jagran Prakashan's case (supra) and in the absence of anything contrary thereto from Hon'ble jurisdictional High Court, there is a paradigm shift in the manner in which recovery provisions under section 201(1) can be invoked. As observed by Their Lordships, the provisions of Section 201(1) cannot be invoked and the "tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly". Once this finding about the non payment of taxes by the recipient is held to a condition precedent to invoking Section 201(1), the onus is on the Assessing Officer to demonstrate that the condition is satisfied. No doubt the assessee has to submit all such information about the recipient as he is obliged to maintain under the law, once this information is submitted, it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient of income. This approach, in our humble understanding, is in consonance with the law laid down by Hon'ble Allahabad High Court."

5. In the light of the aforesaid decision of this Tribunal and the decision of Hon'ble Allahabad High Court, we note that the condition precedent for invoking section 201(1) of the Act is that there could be a finding of fact that the recipient/payee has not made payment of taxes on the amount in question (*except the receipt of payment for acquirement of agricultural land*) and the onus is on the AO to demonstrate that this condition precedent is satisfied before he raises the demand in accordance to law. The SLAO has to submit all information available about the recipient/payee as is obliged by him to maintain under the law and once this information is submitted before the AO it is for him to ascertain whether or not taxes have been paid by the recipient/payee (*except agricultural income*). For doing the aforesaid exercise, we set aside the order of the Ld. CIT(A) and remit the matter back to the file of the AO to do the aforesaid exercise. The Ld. AR expressed his apprehension that the payments have been made in the year 2010, so there would be practical difficulty for the SLAO to know whether the payees had filed their Return of Income etc. So he prayed that considering the practical difficulty, certain directions to be given to AO/department, since the details of Return of Income would be available at the click of mouse in the departmental data base. We understand the difficulty of the SLAO, so we direct the SLAO to get the details of payees available in the official records at the time of payment which are required to be maintained as per law on the subject and then the AO to utilize the information from its data base to find out whether the payees have offered the amount/compensation (*except agricultural land*) and after collection of all the details and after giving proper opportunity to the SLAO, the AO to pass an order in accordance to law taking note of the case law cited supra.

6. The ITA No. 1256/Kol/2016 is against the action of the Ld. CIT(A) confirming the penalty levied by the AO u/s. 271C of the Act for the lapse of non-deduction of TDS. According to the AO, the SLAO has failed to discharge the onus to show that there was reasonable cause as provided u/s. 273B of the Act for its failure to deduct tax at source, therefore, he proposed 100% of the TDS default u/s. 271C of the Act to the tune of Rs.22,92,201/-. Since the penalty amount levied on the SLAO is a sum equal to the amount of tax which such person failed to deduct or pay as stated in section 271C of the Act determination of the amount of tax which the SLAO failed to deduct need to be determined

and thereafter only penalty can be/may be levied u/s. 271C of the Act
Therefore, the impugned order of the Ld. CIT(A) is set aside and this issue is also remitted
back to the AO for fresh adjudication in accordance to law.

6. In the result, both the appeal of the assessee are allowed for statistical purposes.

Order is pronounced in the open court on 7th July, 2021.

Sd/-

Sd/-

(P. M. Jagtap)
Vice President

(A. T. Varkey)
Judicial Member

Dated: 7th July, 2021

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Spl. Land Acquisition Officer, Tamluk, Purba Medinipur-721636
2. Respondent – ITO, Ward-TDS, Haldia/JCIT, Range-59/TDS, Kolkata.
3. The CIT(A)-24, Kolkata (sent through e-mail)
4. CIT , Kolkata
5. DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy,

By order,

Senior Pvt. Secretary/DDO
