IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION (L) NO. 4804 OF 2020

Sainath Rajkumar Sarode and others ... Petitioners
Versus
State of Maharashtra and others ... Respondents

WITH
INTERIM APPLICATION NO. 1151 OF 2021
WITH
INTERIM APPLICATION NO. 998 OF 2021
WITH
INTERIM APPLICATION NO. 2545 OF 2020
WITH
INTERIM APPLICATION (L) NO. 6724 OF 2020

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Mr. Subit Chakrabarti instructed by Vidhii Partners for the Petitioners.
Mr. P.H. Kantharia, GP alongwith Mr. Hemant Haryan, AGP for the State.
Mr. Zal Andhyarujina, Senior Advocate alongwith Ms. Akanksha Agrawal, Mr. Makarand Raut and Mr. Manoj Nikam for Respondent Nos.4 to 7.
Mr. Anosh Sequiera and Mr. Naresh Chheda instructed by Tauras Legal for the Applicants in IA-998-2021.

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CORAM : S.J. KATHAWALLA AND
MILIND N. JADHAV, JJ.
DATED : AUGUST 18, 2021.

ORAL ORDER : (S.J. KATHAWALLA AND MILIND N. JADHAV, JJ.) :

1. The Petitioners are individuals who between 2013 and 2016 entered into separate registered agreements with Respondent Nos. 4 to 7, for purchase of various flats in Respondent No.4's building known as Gaurav Discovery, proposed to be constructed at Village Malvani, Malad (West), Mumbai Suburban district.

2. The present petition has been filed seeking directions for the recovery of arrears due to the Petitioners under a Recovery Warrant dated 15th October 2018 passed by the Maharashtra Real Estate Regulatory Authority against Respondent Nos. 4 to 7.

3. It is admitted by the Petitioners that Respondent Nos. 4 to 7 have previously paid the Petitioners an amount of Rs.1,80,00,000/- (Rupees One Crore Eighty Lakhs Only) as part payment under the Recovery Warrant.

4. Subsequently, in view of there being balance amounts due and payable by Respondent Nos. 4 to 7 under the Recovery Warrant, the Petitioners and these Respondent entered into consent terms dated 4th March 2021. By these Consent Terms, Respondent Nos. 4 to 7 undertook, jointly and/or severally, to pay the Petitioners a sum of Rs.2,75,00,000/- (Rupees Two Crore Seventy Five Lakhs Only) along with simple interest at 10.05% thereon. Such sums were to be paid in the form of instalments and in the following manner:

SCHEDULE OF PAYMENTS

Sr. No.	Date	Amount (INR)	Interest (INR) payable as on date of payment	Total (INR)
1.	20.03.2021	50,00,000	---	50,00,000
2.	20.04.2021	50,00,000	1,79,661	51,79,661
3.	20.05.2021	50,00,000	1,39,736	51,39,736
4.	20.06.2021	50,00,000	1,03,253	51,03,253
5.	20.07.2021	50,00,000	59,887	50,59,887
6.	20.08.2021	25,00,000	20,650	25,20,650
			Net Total	**2,80,03,188**

5. On 4th March 2021, this Court accepted the undertakings recorded in the Consent Terms and an Order in terms thereof came to be passed.

6. In pursuance of the Schedule of Payments under the Consent Terms and in compliance with the Order dated 4th March 2021, Respondent Nos. 4 to 7 made payments of the instalments from March 2021 till June 2021 to the satisfaction of the Petitioners.

7. However, for the instalment due on 20th July 2021, Respondent Nos. 4 to 7 deducted 10% of the amount, namely, Rs. 5,05,989/- from the total of Rs. 50,59,887/- payable towards the July instalment, as tax deductible at source ("**TDS**") on the amount of interest under the Recovery Warrant and the Consent Terms. It is the case of the Petitioners that such amounts could not, in law, be deducted.

8. The Learned Counsel for the Petitioners submits that the amounts payable to the Petitioners under the Recovery Warrant and the Order dated 4th March 2021 and the Consent Terms is in the nature of a judgment debt, being compensatory amounts payable to the Petitioners under Orders of this Court and a Recovery Warrant owing to the failure of Respondent Nos. 4 to 7 to satisfactorily discharge their contractual and statutory obligations under the Real Estate (Regulation & Development Act), 2016 ("**RERA Act").** Learned Counsel for the Petitioners has pressed in to service the following Judgments in support of such contention: (i) All India Reporter Ltd vs

Ramchandra D Datar[1], (ii) Madhusudan Shrikrishna v Emkay Exports[2], (iii) PCIT v West Bengal Housing Infrastructure Development Corporation[3], (iv) PCIT v. West Bengal Housing Infrastructure Development Corporation[4], and (v) Beacon Projects (P) Ltd v CIT[5].

9. The Learned Senior Counsel for the Respondent Nos. 4 to 7 had submitted that the Respondents deducted the said amount as TDS as per the provisions of Section 194A of the Income Tax Act, 1961. The Learned Senior Counsel had further stated that the TDS has not been filed before the concerned authority and that they have no objection to paying the amount deducted as TDS, to the Petitioners, so far as it is in compliance with the statutory provisions and no penalties are imposed upon these Respondent Nos. 4 to 7 due to non- payment of the same.

10. The Learned Senior Counsel on behalf of the Respondent Nos. 4 to 7 has now considered the legal position with respect to deduction of the tax in the facts of the present matter and has tendered a Note dated 18th August 2021 in support of the contention that the provision for payment of interest to the flat purchasers/Petitioners in the present matter is by way of compensation, and hence outside the purview of Section 194A and Section 2(28A) of the Income Tax Act, 1961. The Learned Senior Counsel for Respondent Nos. 4 to 7 has no objection to this legal position being

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1 AIR 1961 SC 943
2 2010 (2) Bom CR 38
3 [2018] 96 Taxmann.com 610
4 [2019] 105 Taxmann.com 64
5 [2015] 62 Taxmann.com 177

clarified. To supplement the judgments tendered by the Petitioners, the Respondent Nos. 4 to 7 have relied upon the following judgments (i) Estate Officer, Greater Mohali Area Development Authority v. Gaurav Mutneja[6]; (ii) Ghaziabad Development Authority v. Dr. NK Gupta[7]; (iii) Ghaziabad Development Authority v. Naresh Kumar Sharma[8]; (iv) Rajnish Bhardwaj v. CHD Developers Ltd.[9]; (v) Central India Spinning and Weaving and Manufacturing Co. Ltd., the Empress Mills, Nagpur v Municipal Committee, Wardha[10]; and (vi) Commissioner of Income-tax Shimla vs. M/s HP Housing Board, Shimla[11].

11. We have considered the case law tendered by both the parties, and heard the Learned Counsel appearing for the Petitioners and the Learned Senior Counsel appearing for Respondent Nos. 4 to 7. The issue which arises for our consideration is whether the Respondent Nos. 4 to 7 are entitled to deduct TDS on the "interest" payable under the Recovery Warrant dated 15th October 2018, the Consent Terms and the Order of this Court both dated 4th March 2021?

12. To answer this, we must first look at the relevant provisions of the Income Tax Act, 1961 ("**IT Act**"). Deduction of tax at source is provided for under Sections 192 to 195 and Sections 196A to 196D forming part of Chapter XVII – B of the IT Act. The

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6 2020 SCC Online NCDRC 278
7 2002 SCC Online NCDRC 39
8 (2005) 9 SCC 477
9 2019 SCC Online NCDRC 739
10 AIR 1958 SC 341
11 (2012) 340 ITR 388

liability to deduct TDS arises under the IT Act only if the amount due and payable assumes the nature of payment specified under Chapter XVII-B thereof.

13. Even assuming specific cases of payment under Chapter XVII – B of the IT Act are considered, Sections 193 and 194A of the IT Act deals with provisions relating to deduction of tax at source in respect of payment relating to "*interest*". Section 193 of the IT Act deals with deduction of tax at source from "interest on securities" and section 194A deals with deduction of tax at source from "interest other than 'interest on securities'".

14. It would be convenient at this stage to extract hereunder the relevant portion of Section 194A of the IT Act :

> "***194A.*** *(1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, 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 issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force :*
>
> ***Provided*** *that an individual or a Hindu undivided family, whose total sales, gross receipts or turnover from the business or profession carried on by him exceed [49][one crore rupees in case of business or fifty lakh rupees in case of profession] during the financial year immediately preceding the financial year in which such interest is credited or paid, shall be liable to deduct income-tax under this section.]*
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> *Explanation.—For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.*
>
> *…*"

15. The IT Act defines "interest" under section 2(28A) as:

> "***2.*** *In this Act, unless the context otherwise requires,—*

> ...
>
> *(28A) "interest" means interest payable in any manner in respect of any moneys borrowed or debt incurred (including a deposit, claim or other similar right or obligation) and includes any service fee or other charge in respect of the moneys borrowed or debt incurred or in respect of any credit facility which has not been utilised.*"

16. While analysing the issue of payment of interest as compensation by a builder and consequent deduction of tax at source thereon, the Calcutta High Court in the case of *PCIT v West Bengal Housing Infrastructure Development Corporation (supra),* held in paragraph 16, that

> "from the definition of interest as occurring in section 2(28A) of the IT Act, it appears that the term "interest" has been made entirely relatable to money borrowed or debt incurred and various gradations of rights and obligations arising from either of the two.. "

It further held in paragraph 18 that,

> "We accordingly are of the view that the payment made by the assessee to the allottee was in terms of the agreement entered between them where the liability of the assessee would arise only if it failed to make the plots available within the stipulated time. Hence, the payment made under the relevant clause was purely contractual and as rightly held by the Tribunal, in the nature of compensation or damages for the loss caused to the allottee in the interregnum for being unable to utilise or possess the flat. The flavour of compensation becomes evident from the words used in the particular clause. The expression 'interest' used in Clause 7 (reproduced above) may be seen merely as a quantification of the liability of the assessee in terms of the percentage of interest payable by the State Bank of India. Since there is neither any borrowing of money nor incurring of debt on the part of the assessee, in the present factual scenario, interest as defined under Section 2 (28A) of the Act can have no application to such payments. Consequently, there was no obligation on the part of the assessee to deduct tax at source and consequently no disallowance could have been made under Section 40 (a)(ia) of the Act.
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> In view of the above, we confirm the decision of the Tribunal dated 2nd December 2015. I.T.A. No. 84 of 2018 is accordingly dismissed."

A Special Leave Petition against the order of the Hon'ble Calcutta High Court was

dismissed by the Hon'ble Supreme Court (*PCIT v. West Bengal Housing Infrastructure Development Corporation (supra)*.

17. In the case of *Beacon Projects (P) Ltd v CIT* (supra), the Kerala High Court held at paragraphs 11 and 12 that:

> "From the principles laid down in the decisions referred to above, it is obvious that section 2(28A) is not attracted to every payment made and that the provision can be attracted only in cases where there is debtor-creditor relationship and that payments are made in discharge of a pre-existing obligation.
>
> In so far as these cases are concerned, facts stated by us itself would show that the purchaser had paid certain amounts to the appellant. At a later point of time, the purchaser opted out of the agreement and the appellant entered into fresh agreements with new buyers for prices that are higher than what was agreed with the purchasers. Out of the receipts from the new buyers, the appellant refunded to the purchasers the amount paid by them and a portion of the excess amount received. The amount thus refunded to the purchasers represents the consideration the purchasers paid towards the undivided shares in the property agreed to be purchased and also the cost of construction of the apartment, which work was entrusted to the appellant, being the builder. Such a relationship does not spell out a debtor-creditor relationship nor is the payment made by the appellant to the purchaser one in discharge of any pre-existing obligation to be termed as interest as defined in section 2(28A)"

18. It has also been held by the Hon'ble Supreme Court in the case of *All India Reporter Ltd vs Ramchandra D Datar* (supra) that when the claim is merged in the decree of the court, the claim assumes the character of a judgment debt, which is not liable to deduction of tax at source.

19. In *Madhusudan Shrikrishna v Emkay Exports* (supra), a Single Judge of this Court held that once a decree is passed, it is a judgment and the order of the court which culminates into a final decree being passed which has to be discharged only on payment of the amount due under the said decree. The judgment debtor, therefore,

cannot deduct tax at source, since it is an order and direction of the court and, as such, would not be liable for penal consequences for non-deduction of the tax due.

20. We have also gone through the judgments tendered by the Respondent Nos. 4 to 7 and find them supportive of the proposition that provision of interest by way of compensation falls outside the purview of Section 194A and Section 2(28A) of the Income Tax.

21. In the case of *Central India Spinning and Weaving and Manufacturing Co. Ltd., the Empress Mills, Nagpur v Municipal Committee, Wardha (supra)*, with respect to interpretation of taxing statutes, a Constitutional bench of the Hon'ble Supreme Court held as follows –

> **"28.** If "terminal" besides the above meaning has an additional meaning also and that meaning signifies the termini or the jurisdictional limits of the municipal area even then the construction to be placed on the term should be the one that favours the tax-payer, in accordance with the principle of construction of taxing statutes, which must be strictly construed and in case of doubt must be construed against the taxing authorities and doubt resolved in favour of the taxpayer. In Crawford on Statutory Constructions in para. 257, at p. 504 the following passage pertaining to construction of taxing statutes taken from Bedford v. Johnson[17] is quoted:
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> > "Statutes levying taxes or duties upon citizens will not be extended by implication beyond the clear import of the language used, nor will their operation be enlarged so as to embrace matters not specifically pointed out, although standing upon a close analogy, and all questions of doubt will be resolved against the government and in favour of the citizen, and because burdens are not to be, imposed beyond what the statute expressly imparts".

22. In the case of *Commissioner of Income-tax Shimla vs. M/s HP Housing Board, Shimla (supra),* wherein the assessee Board was liable to pay interest to allottees for the delay in construction, the High Court of Himachal Pradesh held as follows –

> "8. In the case in hand it stands proved that in case the houses were ready within

the stipulated period the Board would not be liable to pay interest. When construction of a house is delayed there can be escalation in the cost of construction. The allottee looses the right to use the house and is deprived of the rental income from such house. He is also deprived of the right of living in his own house. In these circumstances the amount which is paid by the Board is not payment of interest but in our view is payment of damages to compensate the allottee for the delay in the construction of his house/flat and the harassment caused to him. It may be true that this compensation has been calculated in terms of interest but this is because the parties by mutual agreement agreed to find out a suitable and convenient system of calculating the damages which would be uniform across the Board for all the allottees.

9. While taking this view we are relying upon the judgement of the Apex Court in Bikram Singh v. Land Acquisition Collector [1997] 224 ITR 551 /[1996] 89 Taxman 119 . In the case before the Apex Court the question was whether the interest paid to the persons whose land had been compulsory acquired under Sections 28 and 31 of the Land Acquisition Act was a revenue receipt or a capital receipt. The Apex Court held that though it was termed as interest on delayed payment, it was actually a revenue receipt and therefore the provisions of Section 194A of the Income tax Act would have no application. It would be pertinent to mention that the National Consumer Dispute Redressal Commission in Revision Petition No. 2244 of 1999 titled as G.D.A. v. Dr. N.K. Gupta under similar situation held that when the State Commission directed payment of interest to the allottees for delayed completion of flats the same did not fall within the purview of Section 194A of the Income-tax Act.

10. In the present case the allottees had not given the money to the Board by way of deposit nor had the Board borrowed the amount from the allottees. The amount was paid under a self financing scheme for construction of the flat and the interest was paid on account of damages suffered by the claimant for delay in completion of the flats."

23. The aforesaid judgment further relies upon a judgment of the National Consumer Dispute Redressal Commission, *Ghaziabad Development Authority v. Dr. NK Gupta (supra),* wherein a bench of 4 members of the Commission held as follows:

"It would, therefore, appear to us that the provisions of the Land Acquisition Act where interest is payable under Sections 28 and 34 and tax is deducted at source under Section 194-A of the Income Tax Act would not apply in the present case where GDA has been asked to pay interest on the amount refunded to the Complainant because of its failure to construct the promised flat and to provide necessary facilities. The amounts which were paid to the GDA by the Complainant were not paid by way of any deposit or GDA had not borrowed that money. And, as a matter of fact, interest as defined in sub-section (28) of Section 2 of the Income Tax Act is not that interest as was directed to be paid to the Complainant by the GDA.

> Interest to the Complainant (here Dr.Gupta) has not been awarded on the basis of any deposit made by the Complainant or GDA being the borrower of any money of the Complainant. Here interest payment is by way of damages. Merely describing the damages as by way of interest do not make them as interest under the Income Tax Act.
> .....
> The word interest used in the order of the State Commission is not what interest is as defined in Section 2(28-A). There in the order of the State Commission interest means compensation or damages for delay in construction of the house or handing over possession of the same causing consequential loss to the Complainant by way of escalation in the price of the property and also on account of distress, disappointment faced by him. Interest in the order has been used merely as a convenient method to calculate the amount of compensation in order to standardise it. Otherwise, each case of the allottee will have to be dealt with differently. Nomenclature does not decide the issue.
> In our view, therefore, considering the definition of 'interest' as contained in Section 2(28-A) of the Income Tax Act, provisions of Section 194-A were not applicable and the GDA was clearly wrong in deducting the TDS from the interest payable to the Complainant.
> Accordingly, the order of the State Commission is upheld and this Revision Petition is dismissed."

24. The Learned Senior Counsel for Respondent Nos. 4 to 7 submits that the National Consumer Disputes Redressal Commission ("**NCDRC**") has passed several orders clarifying the position in all such matters wherein flat purchasers have executed agreements to sell/ flat buyer agreements but have not received physical possession of their flats in the committed period. Therefore, the NCDRC has directed refund of the amount paid by the buyers, along with interest for the loss or injury suffered by the buyers on account of delayed possession. In one such judgment of *Rajnish Bhardwaj vs CHD Developers Ltd. (supra)*, the NCDRC held –

> *"30. Before parting, we may make it clear that the interest @ 12% p.a. on the refund of the amount which has been awarded as compensation and not factually as interest on refund and, therefore, there is no question of deducting any tax on source."*

25. From a consideration of the case law cited before us, we are of the view that the

amount so payable is in the nature of a judgment debt or akin to a judgment debt, the payment of which cannot establish a debtor-creditor relationship between the parties. As such, the said sum or any part thereof cannot be liable to tax deducted at source under the relevant provisions of the IT Act. This is in line with the decision of the Hon'ble Supreme Court in *All India Reporter Ltd vs Ramchandra D Datar* (supra) as also the judgment of our Court in *Madhusudan Shrikrishna v Emkay Exports* (supra). Further, we are also of the considered view that the amounts payable are in the nature of compensation to the Petitioners on account of the Respondent Nos. 4 to 7's failure to comply with their statutory and contractual obligations. Such a situation is covered by the judgments of *Commissioner of Income-tax Shimla vs. M/s HP Housing (supra), Ghaziabad Development Authority v. Dr. NK Gupta (supra)* and *PCIT v West Bengal Housing Infrastructure Development Corporation* (supra) with which we are in respectful agreement. It is of some significance that the Supreme Court declined to interfere and dismissed the SLP filed by the Department against this judgment. In coming to this conclusion we are also supported by the well settled principle that taxing statutes must be read strictly and in the event of there being any ambiguity an interpretation favouring the tax payer ought to be adopted.

26. Coming to the admitted facts of the present case we hold that the amounts payable being in effect a refund of the amounts paid by the Petitioners to the Respondent No. 4 to 7, along with compensatory interest thereon, such a relationship

does not spell out a debtor-creditor relationship nor is the payment made by the Respondent Nos. 4 to 7 to the Petitioners one in discharge of any pre-existing obligation, so as to attract Section 2(28A) of the IT Act. We are in respectful agreement with the Judgment of the Kerala High Court in *Beacon Projects (P) Ltd v CIT (supra)* which takes the same view, in facts similar to those that we are dealing with in the present matter.

27. In view of the above, we hold that the compliance of the Respondent Nos. 4 to 7 with the Schedule of Payments under the Consent Terms dated 4th March, 2021 and our Order dated 4th March 2021, is to be made without making any deduction of tax at source. The Respondent Nos. 4 to 7 are directed to pay to the Petitioners the balance sum of Rs. 5,05,989/- deducted from the 5th instalment which became due on 20th July 2021, in compliance with the Consent Terms, within a period of one week from today.

28. As regards compliance with the payment of the 6th instalment due on 20th August 2021 as per the Consent Terms, the Learned Senior Counsel for the Respondent Nos. 4 to 7 submits that an amount a sum of Rs. 25,00,000/- lying with Respondent Nos. 1 to 3 (being part of the Recovery Warrant as deposited by Respondent Nos. 4 to 7) has been deposited by the Respondent Nos. 1 to 3 in the Registry of this Court on 11th November 2020 in compliance with the Order of this Court dated 6th November 2020. The Petitioners have filed Interim Application No. 2545 of 2020 and the Respondent Nos. 4 to 7 have filed Interim Application No. 1151

of 2021, seeking withdrawal of the amount so deposited. The Learned Government Pleader appearing for the Respondent Nos. 1 to 3 states that Reply has been filed and she would be taking instructions and making submissions in respect of such Applications.

29. Place the Interim Application No. 2545 of 2020 and Interim Application No. 1151 of 2021 on 25th August 2021 for consideration.

(MILIND N. JADHAV, J.) **(S.J. KATHAWALLA, J.)**