IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 22.03.2016 & Delivered on: 04.4.2016

CORAM

THE HON'BLE MR. JUSTICE V.RAMASUBRAMANIAN
and
THE HON'BLE MR. JUSTICE N.KIRUBAKARAN

TAX CASE APPEAL NO.801 OF 2013

M/s.Foxconn India Developer (P) Ltd.,
Sipcot Hi Tech SIPCOT,
Sunguvarchatram TK,
Kancheepuram District. .. Appellant's

Vs.

The Income tax Officer,
TDS Ward-II(3),
Chennai - 600 034. .. Respondent's

Tax Case Appeal filed under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal 'C' Bench, Chennai, made in ITA No.492 /(Mds.)/2010 dated 30.4.2012.

For Appellant .. Mr.Arvind P.Datar, Sr.Cl. for
Mr.R.Venkata Narayanan
For Respondent .. Mr.J.Narayanaswamy, Standing Counsel

JUDGMENT

V.RAMASUBRAMANIAN,J

This Tax Case Appeal filed under Section 260-A of the Income Tax Act, 1961, by the assessee, raises the following substantial

questions of law:

(i) Whether the upfront payment made by an assessee, under whatever name including premium, for the acquisition of leasehold rights over an immovable property for a long duration of time say 99 years, could be taken to constitute rental income at the hands of the lessor, obliging the lessee to deduct tax at source under Section 194-I of the Act?

(ii) Whether in the facts and circumstances of the case and in law, the Tribunal was right in confirming the levy of interest under Section 201(1-A) of the Act?

2. We have heard Mr.Arvind P.Datar, learned senior counsel appearing for the appellant and Mr.J.Narayanaswamy, learned Standing Counsel appearing for the respondent.

3. The crucial facts that are necessary for the determination of the substantial questions of law arising in this appeal, can be briefly stated as follows:

(i) The State Industries Promotion Corporation of Tamil Nadu Limited (SIPCOT), registered under the Companies Act, 1956, as a Government of Tamil Nadu Undertaking, acquired a vast extent of land measuring about 2469 acres, in various villages of Sriperumbudur Taluk, Kancheepuram District, for the purpose of developing the same

as an Industrial Park.

(ii) After developing the said land, SIPCOT laid out the said land into various plots, after setting apart the lands for the purpose of laying roads, drains and other common works for the benefit of the allottees of the plots.

(iii) Thereafter, by G.O.Ms.No.27 Industries dated 1.3.2006, the Government of Tamil Nadu chose the assessee as a "Developer" to establish a project known as "Product-Specific Special Economic Zone" in the Sriperumbudur Hitech Special Economic Zone, in partnership with SIPCOT.

(iv) Pursuant to the said Government Order, the assessee signed a Memorandum of Understanding with the Government of Tamil Nadu on 3.3.2006, regarding the possibility of establishing several manufacturing bases with all infrastructural facilities to include electronic hardware manufacturing and supporting services facilities.

(v) Thereafter, the assessee signed another Memorandum of Understanding on 11.1.2007 with SIPCOT, agreeing to be a co-developer along with SIPCOT, for the development of the aforesaid project namely "Product Specific SEZ".

(vi) In continuation of the above, the assessee made an application on 25.9.2006. On the basis of the said application, SIPCOT issued two

orders of allotment, one on 11.1.2007 and another on 10.4.2007. The first order of allotment was for the land of an extent of 100 acres and the second order was for the allotment of 51.85 acres.

(vii) Under the first order of allotment, the assessee was required to pay an amount of Rs.10.50 crores at the rate of Rs.10.50 lakhs per acre towards upfront lease rent. Under the second order of allotment, the assessee was liable to pay Rs.17,59,20,000/- at the rate of Rs.32 lakhs per acre.

(viii) The order of allotment stipulated that the amount indicated therein was to be paid as Non-refundable One Time Upfront charges and that a lease deed would be executed only after payment of 100% of the Upfront charges.

(ix) Therefore, the assessee paid the upfront charges, as per the conditions stipulated in the order of allotment. After the payment was so made, the SIPCOT executed two lease deeds both dated 30.4.2008, granting a lease of the land of an extent of 100 acres and 51.85 acres respectively.

(x) Under both the lease deeds, the assessee was entitled to enjoy the land for a period of 99 years, upon payment of annual lease rent of Re.1/- per year for 98 years and Rs.2/- per year for the 99th year.

(xi) Both the lease deeds contain two important indicators namely (a)

that the payment of upfront charges as fixed under the orders of allotment were actually non-refundable one time upfront charges and that even the annual lease rent of Re.1/- per year for the 98 years and Rs.2/- per for the 99th year should be paid in advance.

(xii) Since the non-refundable one time upfront charges was considered by both SIPCOT as well as the assessee, not to be part of the rent, the assessee did not deduct tax at source.

(xiii) This was found out in the course of an inspection conducted on 19.2.2006. Therefore, the Assessing Officer passed an order on 16.3.2009 holding that the upfront charges constituted rent on which tax should have been deducted at source under Section 194-I and that since the assessee did not do so, they were liable to pay Rs.6,43,84,991/- together with interest of Rs.1,73,86,623/-. The demand was made under Section 201(1) and Section 201(1-A).

(xiv) As against the order of the Assessing Officer, the assessee filed a First Appeal before the Commissioner of Income Tax (Appeals). The Commissioner of Income Tax (Appeals) held that the Assessing Officer was justified in treating the appellant as an assessee in default, due to their failure to deduct tax at source. However, taking note of the fact that SIPCOT had already included these upfront charges in their income and also paid the tax thereon, the Appellate Commissioner

held that no TDS can be recovered from the assessee. But the demand for interest was sustained. The demand for interest was directed to be calculated from the date of payment of the upfront charges by the assessee to SIPCOT, up to the date of payment of advance tax by SIPCOT. Thus, the appeal of the assessee stood partly allowed.

(xv) It is against the said order, that the above appeal is filed by the assessee.

4. The main contentions of Mr.Arvind P.Datar, learned senior counsel for the appellant/assessee are:

(i) that a definite distinction between the price paid for the acquisition of the transfer of a right to enjoy a property, normally called premium and the rent paid periodically is recognized under Section 105 of the Transfer of Property Act, 1882, that if a premium is paid for the acquisition of a right to have a long term lease of immovable property, the same cannot be treated as part of rent, as it is for the acquisition of an enduring benefit for a long duration of time and

(ii) that since the payment of premium is capital in nature while payment of rent is revenue in nature, even the Explanation under Section 194-I would not get attracted.

5. In support of the above contentions, the learned senior counsel for the appellant/assessee relied upon the following decisions:

(1) Raja Shiva Prasad Singh v. King Emperor [AIR 1924 Patna 679]

(2) Board of Agricultural Income-tax v. Sindhurani [AIR 1957 SC 729]

(3) CIT v. Panbari Tea Co. Ltd. [(1965) 57 ITR 422 (SC)]

(4) R.K.Palshikar v. CIT [(1988) 172 ITR 311 (SC)]

(5) A.R.Krishnamurthy v. CIT [(1989) 176 ITR 417 (SC)]

(6) Bharat Steel Tubes Ltd. v. CIT [(2001) 252 ITR 622 (Del)

6. Responding to the above submissions, Mr.J.Narayanaswamy, learned Standing Counsel for the Department submitted

(i) that the Explanation under Section 194-I is so wide that it includes any and whatever payment;

(ii) that the payment of upfront charges by the assessee was made under the lease agreement and hence it is not open to the assessee to describe the payment by any other term than what is stated in the lease deed;

(iii) that as per the Halsbury's Laws of England, premium is nothing but capitalised rent and hence a payment made for the use of a land, will surely be treated as rent; and

(iv) that the assessee cannot take advantage of Section 105 of the Transfer of Property Act, since the lease deeds do not contain the expression "premium".

7. Apart from the above submissions, Mr.J.Narayanaswamy,

learned Standing Counsel also submitted that even if for any reason this Court came to the conclusion that the upfront charges paid by assessee could not entirely be treated as advance rent, a portion of the same should be treated as the cost of acquisition and the balance treated as lease rent. If this has to be done, the matter has to be remitted back to the Assessing Officer.

8. We have carefully considered the rival submissions.

Section 105 of the Transfer of Property Act:

9. Let us first take for consideration, the argument revolving around Section 105 of the Transfer of Property Act. It reads as follows:-

> *"105. Lease defined- A lease of immovable property is a transfer of a right to enjoy such 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 or by the transferee, who accepts the transfer on such terms.*
>
> *Lessor, lessee, premium and rent defined-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."*

10. All that Section 105 does is just to define what a lease of immovable property is. To constitute a lease of immovable property, Section 105 lays down the following conditions:

(i) there must be a transfer of a right to enjoy immovable property;

(ii) such enjoyment may be for a certain duration of time or any perpetuity;

(iii) such transfer should be for consideration paid or promised;

(iv) the consideration could be of money or a share of crops or service or any other thing of value; and

(v) such consideration should be rendered periodically or on specified occasions.

11. Once the above ingredients of Section 105 are understood, it would be clear that first part of Section 105 makes a distinction between two types of consideration, for acquiring the transfer of a right to enjoy an immovable property. The first type of consideration is described in the first part of Section 105 as "price". The second type of consideration is indicated by the use of the expressions "money", "share of crops", "service" or "any other thing of value". In the first instance, the words "in consideration" appearing in the first part of Section 105 go along with the word "price". In the second instance, the words "in consideration" go along with a series of expressions such

as "money", "a share of crops", "service" or "any other thing of value". If properly read, the relevant portion of Section 105 would read as follows:

"In consideration---

of a price paid or promised

or

of money, a share of crops, service or any other thing of value"

12. The use of the disjunction "***or***" between the first part dealing with the words "price paid or promised" and the second part dealing with the series of other words, make it clear that Section 105 recognizes two different types of consideration. This is made clear by the second part of Section 105 which defines the expression "price" as the "premium" and the other expressions such as "money, a share of crops, service or any other thing of value" as "rent".

13. Therefore, it is clear that the consideration payable for the acquisition of a lease of an immovable property can take different forms. One such form is termed as the price or premium and the other termed as rent. Hence, we do not think that a distinction can really be made between premium and rent, solely on the basis of Section 105 of the Transfer of Property Act, as sought to be projected by the learned senior counsel for the appellant.

Explanation under Section 194-I and Halsbury's Laws:

14. The obligation to deduct tax at source, primarily arises under Section 194-I, out of the responsibility of a person (not being an individual or a HUF) to pay "***any income by way of rent***" to a resident. Clause (i) of the Explanation under Section 194-I, defines rent, for the purpose of that Section as follows:

> *" (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;]"*

15. Thus, the definition of the expression "rent" appears to be quite exhaustive. It includes "***any payment by whatever name called***". But two conditions are to be satisfied. They are: (1) the payment should be under any lease, sub-lease, tenancy or any other

agreement or arrangement and (2) the payment should be for the use of one or more of certain things such as land, building, machinery etc. Even if the person to whom the payment is made, does not happen to be the owner of what is allowed to be used, the payment could still be rent within the meaning of Section 194-I.

16. Therefore, what is indicated by the word "***price***" or ***"premium"*** in Section 105 of the Transfer of Property Act, would certainly constitute rent within the meaning of Section 194-I, by virtue of the exhaustive definition contained in Clause (i) of the Explanation.

17. As rightly contended by Mr.J.Narayanaswamy, learned Standing Counsel for the Department, premium, in many cases could take different forms such as "***security deposit", "rental advance",*** etc. This is why, it is treated as capitalised rent. Halsbury's Laws of England defines a premium as follows:

> *"Premium means a sum of money paid as consideration for grant of lease. It represents capitalized rent and is different from the actual rent which otherwise be obtained by the lessee. It also includes any like sum whether payable to the intermediate or a superior landlord and any sum (other than rent) paid on or in connection with the granting of a tenancy".*

18. In the case of normal lease of a property, one can conceive

of any number of situations, where premium paid at the inception of the lease, could be part of the rent. For instance, there may be cases where a premium is collected at the inception of the tenancy, as a refundable security deposit or as refundable rental advance. There may also be cases where such premium is collected as advance that could be adjusted towards the last few months of the lease. Many times, the amount of the premium collected, is equivalent to the rent for a fixed number of months. It is only then that the same becomes either adjustable or refundable upon the termination of the lease.

19. Therefore, a general proposition that premium collected as a lump sum at the time of inception of the lease, is completely different from rent, can never be accepted. If such a proposition is accepted, no tax can be deducted at source, even from the rent payable towards the last few months of the lease, in cases where the premium is adjustable towards the last few months. Therefore, we cannot go so far as to accept the contention of Mr.Arvind P.Datar, learned senior counsel for the appellant that a premium is different from rent and that therefore, no tax is to be deducted at source from the premium, under Section 194-I.

Citations

20. In *Raja Shiva Prasad Singh*, the Division Bench of the Patna

High Court was concerned with the payment of "salami" or premium for the grant of leases of mineral rights on a portion of the estate of the Raja. On facts, the court found that the salami paid was in the nature of a premium for the grant of the lease itself. The court pointed out that in that case salami represented the purchase price of a leasehold interest. Moreover, the leases were for a period of 999 years. Therefore, the court concluded that it was more in the nature of an out and out sale.

21. But we do not think that the above decision can be of any assistance to the assessee. A lease of a property such as land, building, plant, machinery etc. would stand on a different footing than the lease of mineral rights. When someone takes a land on lease, he merely uses the land. But when someone takes the lease of mineral rights, he excavates the land, carries out mining operations and takes away the minerals so mined.

22. The decision of the Supreme Court in ***Board of Agricultural Income Tax Act,*** has also to be understood in the context of the facts out of which the case arose. As seen from paragraph 12 of the said decision, the Supreme Court found on facts in that case that salami was a payment by a tenant to the landlord antecedent to the constitution of the relationship of landlord and

tenant. This finding was reiterated in para 24 of the decision also.

23. In ***Panbari Tea Co. Ltd.,*** the lease deed contained both the expressions "premium" and "rent". The arrangement made between the lessor and the lessee, as seen from para 1 of the decision of the Supreme Court in *Panbari*, was as follows:

> *"By a registered lease deed dt.31st March, 1950, the assessee-company, respondent herein, leased out two tea estates named "**Panbari** Tea Estate" and "Barchola Tea Estate", along with machinery and buildings owned and held by it, in Darrang, in the State of Assam, to a firm named M/s Hiralal Ramdas for a period of 10 years commencing from 1st Jan., 1950. The lease was executed in consideration of a sum of Rs.2,25,000 as and by way of premium and an annual rent of Rs.54,000 to be paid by the lessee to the lessor. The premium was made payable as follows: Rs.45,000 to be paid in one lump sum at the time of the execution of the lease deed and the balance of Rs.1,80,000 in 16 half yearly instalments of Rs.11,250 on or before 31st January and 31st July of each year. The annual rent of Rs.54,000 was payable as follows: Rs.1,000 per month to be paid on or before the last day of each month, making in all Rs.12,000 per year, and the balance of Rs.42,000 on or before 31st December of each year."*

24. On the basis of the above facts, the Supreme Court pointed out the distinction between premium and rent, in paragraph 9 of its decision, to the following effect:

> *"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 a 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".

25. Therefore, what could be deduced from *Panbari* is that we must actually go by the substance of the transaction and not its form. We cannot even go by the nomenclature. The contingencies that we have pointed out in paragraphs 17 and 18, are indicated, to some extent in paragraph 9 of the decision of the Supreme Court in *Panbari.*

26. Moreover, the decision of the Supreme Court in *Panbari* should not be applied blindfold to the case on hand. The only question that arose before the Supreme Court in *Panbari* was whether the amount described as premium in the lease deed was really rent and therefore a revenue receipt or not. The question that arises in the case on hand is not about the nature of the receipt but about the obligation under Section 194-I. Section 194-I was not there when *Panbari* was decided. Section 194-I was inserted by Finance Act, 1994. The definition of the expression "rent" under Clause (i) of the Explanation itself underwent a change under Taxation Laws (Amendment) Act, 2006 with effect from 13.7.2006. Therefore, the question on hand has to be decided on the basis of the statutory provision now available and

not solely based upon the ratio in *Panbari.*

27. In *R.K.Palshikar* (HUF), the Supreme Court considered a lease for a period of 99 years to be the parting of an asset of an enduring nature. Therefore, the grant of lease was held to tantamount to transfer of capital asset. Interestingly, the Assessing Officer took a stand in *Palshikar* that the assessee was liable to pay capital gains tax on the amount of salami or premium received. In the facts and circumstances of the case, the Supreme Court held in *Palshikar* that the grant of those leases for 99 years amounted to transfer of capital assets in terms of Section 12-B of the 1922 Act.

28. Therefore, it is clear from *Palshikar* that at times, the grant of leasehold rights for 99 years could be taken to be equivalent to the transfer of capital assets. As a matter of fact, even the Indian Stamp Act and the Registration Act, at times treats such leases as tantamounting to conveyances.

29. The decision in *Palshikar* was reaffirmed in *A.R.Krishnamurthy*, where even the assessee proceeded on the admitted position that the grant of a lease would constitute transfer of asset. But it was sought to be projected in *A.R.Krishnamurthy* that since there was a right to mine minerals, inherent in the leasthold right of land, a distinction had to be made between the cost of

acquisition of the land and the cost of acquisition of the mining rights.

30. But fortunately the case on hand, the leasehold right of land does not include any other benefit such as the right of mine minerals. Therefore, the question of apportionment, as sought to be argued by Mr.J.Narayanaswamy, learned Standing Counsel, does not arise.

31. In Rane Brake Linings Limited, a Bench of this Court construed permanent lease to be as much as an alienation as a sale. This is so in a manority of the cases and we have no doubt about the same. But unfortunately, different branches of law tend to treat the same kind of transfer differently. This is why one has to keep in mind the statutory provisions with respect to which the interpretation is sought to be given.

32. In Bharat Steel Tubes Limited, the Delhi High Court formulated the indicia of salami to be (i) simple non-recurring character; and (ii) payment prior to creation of tenancy. After extracting the broad principles summarised by the Calcutta High Court on the question of salami, the Delhi High Court made it clear that the question whether a particular receipt like salami can be regarded as revenue or capital, cannot be decided in the abstract and that each case is to be decided on its own facts.

Argument based on Chapter XX-C

33. In support of his contention that premium stands apart from rent, Mr.Arvind P.Datar, learned senior counsel for the appellant/assessee also drew our attention to the definition of the expression "apparent consideration" appearing in Clause (b) of Section 269-UA in Chapter XX-C of the Income Tax Act, 1961, which were inserted by Finance Act, 1986, but which have since been repealed. In Clause (b) of Section 269-UA, the Act made a distinction between cases where the consideration for the transfer of immovable property by way of lease consisted only of premium or consisted only of rent or consisted of both premium and rent.

34. But despite the fact that Clause(b) of Section 269-UA uses both the expressions "premium" and "rent", Chapter XX-C did not make a distinction between both. For the purpose of determining what is apparent consideration in relation to the transfer of any immovable property, Clause (a) of Section 269-UA took into account (i) the entire amount of premium or (ii) the aggregate of the moneys payable by way of rent or (iii) the aggregate of the premium and the moneys payable by way of rent, according as whether the consideration consisted only of premium or only of rent or both premium and rent. In other words, even the rent was treated as part of the consideration. Therefore, the argument does not take us anywhere.

Questions of law arising in the case:

35. Having seen (a) the legal contentions revolving around (i) Section 105 of the Transfer of Property Act, (ii) the Explanation under Section 194-I (iii) the decisions making a distinction between the salami and rent and (iv) the indicators available in Chapter XX-C, let us now turn our attention to the questions of law arising for consideration.

36. The first question of law that we have formulated in paragraph 1 of the decision is: Whether the upfront payment made by an assessee, under whatever name including premium, for the acquisition of leasehold rights over an immovable property for a long duration of time say 99 years, could be taken to constitute rental income at the hands of the lessor, obliging the lessee to deduct tax at source under Section 194-I of the Act.

37. We have already seen from the law on the point that the substance of the transaction is of importance and the answer to the question would depend upon the agreement between the parties. Therefore, we may have get back to the facts of the case.

38. As we have indicated in paragraph 3 above, SIPCOT acquired a vast extent of land measuring about 2469 acres. The purpose of the acquisition was to develop the area into an industrial park. The

requisitioning body namely the SIPCOT thus became a developer. The assessee was chosen as the co-developer under G.O.Ms.No.27 (Industries) dated 1.3.2006 and the Memorandum of Understanding that they entered into with the Government of Tamil Nadu dated 3.3.2006, for establishing the Sriperumbudur Hi-Tech Special Economic Zone. After becoming a co-developer by virtue of the Government Order dated 1.3.2006 and the Memorandum of Understanding dated 3.3.2006, the assessee signed another Memorandum of Understanding with SIPCOT on 11.1.2007. Based upon these, two orders of allotment dated 11.1.2007 and 10.4.2007 were issued. The orders of allotment prescribed the payment of One Time Non-refundable Upfront Charges by the assessee to SIPCOT. It was only after these payments were made that two lease deeds were executed on 30.4.2008.

39. Keeping the above facts in mind, if we have a look at a letter dated 9.3.2009, issued by SIPCOT to the assessee, it can be seen as to how the parties wanted the payment of upfront charges to be treated. In paragraph 1 of the letter dated 9.3.2009, SIPCOT stated the following:

> *"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 Financial year 2006-07 (Assessment year 2007-08) is accounted in that year.

b. Rs.1659.20 lakhs paid for 51.85 acres of land in SEZ area allotted on 10.4.2007 relating to the Financial year 2007-08 (Assessment year 2008-09) is accounted in the year."

40. Therefore, it is clear that the lessor as well as the lessee intended to treat the transaction as "deemed sale". This is one indicator for arriving at the answer to the substantial question of law.

41. There is also intrinsic evidence in the two deeds of lease themselves to suggest that the assessee was chosen not merely as a lessee of the land, but as a co-developer along with SIPCOT to establish a project in the "Product Specific Special Economic Zone". The relevant portion of the preamble to the lease deeds is extracted as follows:-

"WHEREAS the Government of Tamil Nadu issued G.O.Ms.No.27 Industries (MIB.1) Department dated 01.03.2006 in relation to the party of the second part to establish the project in the "Product-Specific Special Economic Zone"named Sriperumbudur Hi Tech ZEZ and jointly develop with the party of the first part for the activities to be carried out with

unfettered right of usage in the area earmarked by the party of the first part.

WHEREAS the party of the second part has signed a Memorandum of Understanding with the Government of Tamil Nadu dated 03rd March 2006 [hereinafter referred to as "TN MOU"] regarding the possibility of establishing several manufacturing bases with all infrastructure facilities to include electronic hardware manufacturing and supporting services facility in the State of Tamil Nadu. The said TNMOU has offered the related concessions and incentives to the party of the second part.

WHEREAS the party of the second part as "Developer" signed a Memorandum of Understanding with the party of the first part on 11.01.2007 [hereinafter referred to as "SIPCOT MOU"] to establish its project and as a co-developer the party of the second part shall develop its project in product-Specific SEZ jointly with the party of the first part along with its customers and vendors in HI-Tech SEZ."

42. As a matter of fact, the Government of India, Ministry of Commerce and Industry also issued a letter of approval dated 13.2.2007 for the proposal jointly made by the assessee and SIPCOT. The relevant portion of the letter of approval dated 13.2.2007 issued by the Government of India reads as follows:-

"With reference to your above mentioned application, Government of India is pleased to approve your proposal as Co-Developer for providing infrastructure facilities in the SIPCOT Hi tech SEZ for electronics/telecom hardware and support services, including trading and logistics activities at Sriperumbudur, Tamil Nadu, as per the details given below:

(1) Name of the Co-Developer - Foxconn India Developer Private Limited.

(3) Details of facilities proposed to be provided: Providing following infrastructure facilities in the SEZ:

A list of facilities to be provided in the SEZ is at Annexure-I."

43. Therefore, it is crystal clear that the One Time Non-refundable Upfront Charges paid by the assessee was not (i) under the agreement of lease and (ii) merely for the use of the land. The payment made for a variety of purposes such as (i) becoming a co-developer (ii) developing a Product Specific Special Economic Zone in the Sriperumbudur Hi-Tech Special Economic Zone (iii) for putting up an industry in the land. The lessor as well as the lessee intended to treat the lease virtually as a deemed sale giving no scope for any confusion. In such circumstances, we are of the considered view that the upfront payment made by the assessee for the acquisition of

leasehold rights over an immovable property for a long duration of time say 99 years could not be taken to constitute rental income at the hands of the lessor, obliging the lessor to deduct tax at source under Section 194-I. Hence, the first substantial question of law is answered in favour of the appellant/assessee.

44. Once the first substantial question of law is answered in favour of the appellant/assessee, by holding that the assessee was not under an obligation to deduct tax at source, it follows as a corollary that the appellant cannot be termed as an assessee in default. As a consequence, there is no question of levy of interest under Section 201(1-A) of the Act.

45. In the result, the appeal is allowed, the first substantial question of law is answered in favour of the appellant/assessee. In view of our answer to the first substantial question of law, the second substantial question of law does not arise. No costs.

(V.R.S., J) (N.K.K., J)
4.4.2016

Index:Yes
Internet:Yes
gr.

To
The Income Tax Appellate Tribunal 'C' Bench, Chennai

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JUDGMENT IN
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