
(2000) 06 BOM CK 0008

In the Bombay High Court

Case No : ITA No. 2309/Mum of 1997 A.Y. 1993-94 6 June 2000

ASSOCIATED CEMENT CO. LTD.

APPELLANT

Vs

INCOME TAX OFFICER

RESPONDENT

Date of Decision : 06-06-2000

Acts Referred:

Income Tax Act, 1961 — Section 201
Income Tax Rules, 1962 — Rule 2B

Citation : (2000) 68 TTJ 220

Hon'ble Judges : Pradeep Parikh, A.M.

Bench : Division Bench

Advocate : Dinesh Vyas and P.C. Thpathi and Vijayan Nair, for the Appellant;

Judgement

Pradeep Parikh, A.M.

This appeal by the assessee is directed against the order of the learned Commissioner (Appeals) dated 27-1-1997, and pertains to the financial year 1992-93. The main grievance of the assessee in this appeal revolves around the order passed by the Income Tax Officer, TDS, Thane, u/s 201 of the Income Tax Act, 1961 (hereinafter referred to as "the Act"), whereby a demand of Rs. 2,49,305 has been raised against the assessee, being short deduction of tax at source from salaries of certain employees.

2. The assessee is a public limited company carrying on business of manufacturing cement. For the assessment year 1993-94 i.e. during the financial year 1992-93 the assessee had paid salaries to its employees and had deducted tax at source on the basis of estimated incomes of the respective employees. Survey operations were carried out u/s 113A of the Act on 5-12-1994, at the business premises of the assessee. In the course of survey proceedings, it was observed that the assessee had allowed exemption of Leave Travel Allowance (hereinafter referred to as "LTA") without verifying the actual incurrence of the expenditure as required by the provisions of section 10(5) read with rule 2B of the IT Rules, 1962. Similarly, it was noticed that the assessee had reimbursed

drivers" salary to some of the employees but the same had not been valued at cost while considering its perquisite value. According to the Income Tax Officer, therefore, assessee had committed default within the meaning of section 201 of the Act. Before the Income Tax Officer assessee had pleaded that it had acted on the declarations from the employees with regard to the details of the travel and was, therefore, justified in not deducting tax thereon. As regards reimbursement of drivers" salary, assessee relied on rule 3(c)(ii) of the IT Rules, 1962, and contended that there was no short deduction of tax, The "Income Tax Officer rejected the argument of the assessee- company and accordingly passed an order u/s 201 directing the company to pay the tax which was short deducted along with the interest.

3. An appeal was preferred before the Commissioner (Appeals) and the above contentions were reiterated before him by the company. Reliance was placed on the decision of the Madhya Pradesh High Court in the case of Gwalior Rayon Silk Co. Ltd. Vs. Commissioner of Income Tax, . In the said decision, it was held by the High Court that the responsibility cast on an employer u/s 192 is to form a fair and honest opinion about the tax liability of the employee. If the employer has acted reasonably and fairly, no default can be found with him. With regard to the drivers" salary it was reiterated that rule 3(c)(ii) was applicable to the facts of the case and no breach was committed in compliance of section 192. The assessee relied on several decisions including those of Madhya Pradesh High Court and also the Mumbai and Madras Benches of the Tribunal.

4. The contentions of the assessee did not find favour with the Commissioner (Appeals). With regard to the LTA, Commissioner (Appeals) was of the view that it was the assessee- company"s duty to satisfy itself that the concerned employee had actually performed the journey or not. According to him, physical verification of tickets had to be made by the company, in the absence of which, it had to be held that the company had failed to make fair and honest estimate of the employees" income. With regard to the decision of the Madhya Pradesh High Court (supra) Commissioner (Appeals) observed that the company had not acted honestly and fairly and, therefore, the decision was not applicable to the present case. With regard to the drivers" salary, Commissioner (Appeals) was of the view that valuation of perquisite under rule 3 was not permissible because, the company had not paid the drivers" salary but it was only reimbursed to the concerned employee. Accordingly, he dismissed the appeal of the company, and it is against this order of the Commissioner (Appeals) that the company is in appeal before us.

5. Shri Dinesh Vyas, Senior Advocate appeared for the assessee- company and contended that the orders passed by the Income Tax Officer and the Commissioner (Appeals) were erroneous and without jurisdiction and, therefore, needed to be quashed. With regard to the LTA, it was contended that the company had, on the facts and circumstances of the case, acted fairly and honestly. Even the reimbursement of driver"s salary was included in the total

computation of salary on a fair interpretation of rule 3(c)(ii) and tax was deducted therefrom on the basis thereof. Our attention was also drawn to the various decisions which were cited before the Commissioner (Appeals). In addition, reliance was also placed on the decision of the Punjab & Haryana High Court in the case of State Bank of Patiala Vs. Commissioner of Income Tax and Another, in support of the proposition that section 192 did not vest any power in the employer to disbelieve the genuineness of the declarations filed by the employee. Support was also drawn from the decision of the Chandigarh Bench of the Tribunal in the case of (1995) 55 ITD 429 wherein, it was held that the employer was bound by the declarations filed by the employees. Similarly, reliance was placed on the decision in (1997) 61 ITD 444 and Commissioner of Income Tax Vs. Nestle India Ltd., . Our attention was also drawn to the order of the Bombay High Court dated 13th June, 1997 in IT Appln. Nos. 39, 40 and 41 of 1997, wherein the Hon"ble High Court had declined to interfere with the order of the Tribunal (ITA No. 6201 to 6203/Bom/1989, dated 4-10-1995), wherein it had been held that there was a bona fide belief for not deducting tax with respect to any perquisite or any part of remuneration, assessee could not be directed to pay such amount. On facts, it was contended by Shri Vyas that it was established that the company had acted fairly and honestly and consequently, in view of clear position in law, no order u/s 201 could have been passed against it.

6.The second argument of Shri Vyas was based on the decision of the Andhra Pradesh High Court in the case of P.V. Rajgopal and Others Vs. Union of India and Others, , wherein, at p. 694 of the judgment, the following observations have been made.

"This section has two limbs, one is where the employer does not deduct tax and the second where after deducting tax, the employer fails to remit it to the Government. There is nothing in this section to treat the employer as the defaulter where there is a shortfall in the deduction. The department assumes that where the deduction is not as required by or under the Act, there is a default. But the fact is that this expression "as required by or under this Act" grammatically refers only to the duty to pay the tax that is deducted and cannot refer to the duty to deduct the tax. Since this is a penal section, it has to be strictly construed and it cannot be assumed that there is a duty to deduct the tax strictly in accordance with the computation under the Act and if there is any shortfall due to any difference of opinion as to the taxability of any item the employer can be declared to be an assessee in default."

It was contended that even in the present case, there was only a shortfall in the deduction of tax and, therefore, conditions necessary for the applicability of sections 201(1) and 201(A) did not apply and consequently, neither tax nor interest can be recovered from the company.

7. The third and the main argument of Shri Vyas was that in view of section 191, tax cannot be recovered from the employer- company and that under the said section, in any case, where Income Tax has not been deducted in accordance

with the provisions of the Act, Income Tax shall be payable by the assessee employee directly. It was argued that u/s 201 there was no jurisdiction at all to recover tax from the payer of the income, even if he had failed to deduct tax for any reason whatsoever. At this stage Shri Vyas relied upon certain fundamental principles of taxing statute that a strict interpretation is required on a provision which seeks to levy a charge or on a provision which creates a vicarious liability or on a provision which is penal in nature. Section 201 is a deeming provision with regard to a person who may be deemed to be an assessee in default in the event of failure to deduct tax, but confers no power, express or implied, on the IT authority to collect from such person tax payable by any person. If such was the intention of the legislature, section 201(I) would have been enacted in a manner similar to section 206C(6) or section 179 or section 161(I) and in the absence of such express provision in Chapter XVII, according to Mr. Vyas Courts were forbidden from adding any words to the statute, in view of the decision of the Supreme Court in the case of Smt. Tarulata Shyam & Ors. v. CIT 1977 CTR (SC) 275 : (1978) 108 ITR 345. Our specific attention was drawn to section 190(2) which, according to him, had not effected the primary charge of tax on the assessee- employer in relation to the tax which was not deducted. The tax which could be recovered from the employer- company was only that which was deducted by it and not the tax which was not deducted by it and this statement of law was sought to be supported on the strength of sections 200, 201(2) and 205. The departmental interpretation, it was submitted, would result in an absurd situation whereby tax, interest and penalty could be recovered by them from the assessee- employee as well as the employer company and that such absurd interpretation resulting in double taxation should be avoided.

8. The learned departmental Representative obviously supporting the orders of the lower authorities, reiterated that the company should not have relied solely on the declarations made by the employees. According to him, the company should have verified whether the employees had actually undertaken travel and this ought to have been done by physically verifying the tickets. As regards reimbursement of drivers' salary, it was submitted that the company was not justified in relying on rule 3(c)(ii) of the Rules.

9. A thoughtful consideration has been given to the detailed arguments made by both sides. With regard to the first argument raised by the learned counsel, it cannot be disputed that the company has deducted some tax while making payment. In other words, this is not a case where no tax at all has been deducted in complete breach and violation of law. Thus, at the most, it may be a case of short deduction of tax. On the other hand, section 201 does not envisage a situation of short deduction of tax in order to deem an assessee to be in default. Section 192 is very categorical to state that tax has to be deducted from the head I salaries" computed on the estimated income of the assessee under this head for the concerned financial year. The Delhi High Court in the case of Nestle India Ltd. (supra) confirmed this position of law by observing that "deduction of tax at source by an employer is always a contingent deduction of

Income Tax subject to regular assessment in the hands of the payer/recipient." Therefore, what has to be seen is whether the employer- company has acted bona fide or not while computing the tax liability of its employees for the purposes of deducting tax at source. This view is confirmed by the Madhya Pradesh High Court in the case of Gwalior Rayon Silk Mills Co. Ltd. (supra) wherein it is held as follows :

"A duty is cast on an employer to form an opinion about the tax liability of his employees in respect of the salary income. While forming this opinion, the employer is undoubtedly expected to act honestly and fairly. But if it is found that the estimate made by the employer is incorrect, this fact alone, without anything more, would not inevitably lead to the inference that the employer has not acted honestly and fairly. Unless that inference can be reasonably raised against an employer, no fault can be found with him."

In this view of the matter, considering the facts of the present case, it cannot be gainsaid that the assessee- company did not act fairly and in a bona fide manner. In the case of State bank of Patiala (supra) it has been held that it was not open for the employer- company to suspect that several assessee- employees had filed bogus declaration. The same view can be taken with regard to the action of the assessee- company in relying upon rule 3(c)(ii) for adopting the amount with regard to the taxability of reimbursement of drivers' salary. Thus, on the facts of the case, it has to be held that in the present case, the company has honestly and fairly formed an opinion and arrived at the estimated income of the employees for the purposes of section 192. Thus, the first argument of the assessee-company is accepted.

10. The second argument of Shri Vyas that section 201 does not apply to short deduction of tax, has also to be accepted in view of the decision of the Andhra Pradesh High Court in the case of R.V. Rajagopal (supra). It may be pertinent to note that both, sub-section (1) as well as sub-section (1A) of section 201 speak only of two situations viz., (a) where the company has failed to deduct tax at an; (b) where having deducted the tax, the company has failed to pay the tax to the credit of the Central Government. In the instant case, neither situation exists. It is a case where company has deducted tax and paid to the Central Government, at the most it is a case of short deduction of tax, for which section 201 cannot be applied.

11. The last argument raised by the learned counsel is an important contention raised before us and gives a new dimension to the entire gamut of the provisions of Chapter XVII of the Act. As per section 191 there is a mandate on the taxing authority to recover tax which is not deducted only from the assessee and not from the payer of the income. The legal proposition that charging provision has to be strictly construed is an established position of law in view of several Supreme Court pronouncements in Commissioner of Income Tax, Gujarat Vs. Vadilal Lallubhai, etc. etc., , Commissioner of Income Tax, Patiala and Others Vs. Shahzada Nand and Sons and Others, and 1977 CTR (SC) 275 : (1978) 108 ITR

345 (supra). In the present case, we are dealing with Chapter XVII of the Act. The chapter is entitled as "collection and recovery of taxes". As the title itself suggests the chapter contains machinery provisions and does not deal with substantive law of creating a charge. It is section 4(l) which creates substantial charge on the person who earns the income. Primarily, it is his duty to pay tax on that income. The provisions of Chapter XVII are merely to accelerate the process of collection and recovery of tax and therefore, these provisions cast an obligation on the payers of certain incomes to deduct tax at source. However, this does not denude the primary charge put on the recipient of the income. The primary charge on the recipient of the income is, therefore, not transferred to the payer of the income, It is with a view to clarify the basic legal position, section 191 is enacted and placed just before the machinery for deducting tax at source starts rolling. This is also confirmed by sub-section (2) of section 190 which makes it clear that the collection and recovery of tax will not prejudice the charge created by section 4(1) of the Act. Thus, at the cost of repetition it has to be emphatically stated that there is nothing in section 191 whereby the primary obligation of the assessee is transferred to the payer of the income in the event of failure to deduct tax thereon under Chapter XVII.

12. Let us see the provisions of section 201. As observed by the Andhra Pradesh High Court (supra), section 201 is penal in nature. Therefore, the provision of section shall also have to be construed very strictly. A fair reading of section 201 indicates that it just serves the purpose of creating a fiction whereunder a person is deemed to be in default. In addition to this, section does not confer any further power of any nature whatsoever on the taxing authority. It simply prescribes a particular situation, viz. that when the company fails to deduct or after deducting fails to pay the tax it shall be deemed to be an assessee in default.

Similar fictions are created u/s 218 for default in demand of advance tax and u/s 220 for default in payment of regular tax. The deeming provisions incorporated in these sections may lead us to section 221. However, going back to section 201, with which we are concerned in this appeal, it is sufficient to observe that the fair reading thereof does not take one beyond the legal fiction created therein. It is, therefore, not possible to reject the contention of Shri Vyas, the learned counsel for the assessee- company, that section 191 read with section 201 does not authorize the taxing authority to collect tax from the payer of the income if tax has not been deducted by him at source. The object of Chapter XVII, as mentioned earlier, is to accelerate the pace of collecting tax, but where the tax is not deducted, the primary liability to pay such tax remains with the person receiving the income. It is only when the payer of the income has deducted tax, tax to the extent has to be paid by him u/s 200. u/s 201(2), tax which is deducted but not paid to the Government, it shall be a charge upon the assets of the person who deducted the tax. The present case is not such where the company deducted the tax and did not pay it to the Government. Section 205 fortifies the view we are taking. Under the said provisions the bar against a direct

demand on the assessee is only to the extent to which tax has been deducted by the payer of the income. It obviously means that there is no bar against a direct demand from the assessee in respect of the tax which is not deducted by the payer of the income. Section 201 does not contain express provision as are contained in section 206C(6), section 179 and section 161(I) of the Act. In view of the above discussion, it is clear that tax which is not deducted under Chapter XVII cannot be recovered from payer of the income and that such tax has to be recovered from the assessee direct.

13. In the foregoing discussions, we have observed that there is nothing in law which prevent the department to recover the tax not deducted from the assessee direct. In such a situation, if the department is allowed to proceed to recover tax from the payer of the income also, then an absurd situation of having collected tax twice on the same income would arise. The Supreme Court in the case of State of Uttar Pradesh and Another Vs. Raza Buland Sugar Co. Ltd., Rampur, held as follows .

"The principle that is applicable in tax statutes is that the income is subject to tax in the hands of the same person only once. Thus, if an association or a firm is taxed in respect of its income the same income cannot be charged again in the hands of the members individually and vice versa- The trust income cannot be taxed in the hands of the settlor and also in the hands of the trustee as well as the beneficiary. These principles are, of course, subject to any special provision enabling double taxation in the statute.

14. In the present case, upon the completion of the assessment of the assessee-employee, nothing prevents the department from passing reassessment order u/s 147 after including above two items in disputes and recover tax, penalty and interest from them such absurd reasons resulting in double taxation must be avoided. Accordingly, the third argument raised by Shri Vyas also requires to be accepted.

15. In view of the above, it is held that the order passed by the Income Tax Officer u/s 201(I) and (1A) is hereby quashed as being bad in law and without jurisdiction.

16. In the result, the appeal of the assessee is allowed.