

(2002) 11 CAL CK 0001
In the Calcutta High Court
Case No : Writ Petition No. 655 of 1996

C.E.S.C. Ltd. and Another

APPELLANT

Vs

Income Tax Officer (TDS) and Others

RESPONDENT

Date of Decision : 13-11-2002

Acts Referred:

Income Tax Act, 1961 — Section 10(5), 192, 201, 206

Citation : (2003) 183 CTR 110 : (2004) 134 TAXMAN 511

Hon'ble Judges : Barin Ghosh, J

Bench : Single Bench

Advocate : Debi Prasad and M. Seal, for the Appellant; P.K. Mullick and J. Saha, for the Respondent

Final Decision : Dismissed

Judgement

Barin Ghosh, J.—The point at issue in the instant writ petition is covered by a Division Bench judgment of this Court in Reckitt and Colman of India Ltd. and Another Vs. Assistant Commissioner of Income Tax (TDS) and Others, . This judgment was brought to my notice by the learned counsel appearing on behalf of the petitioner at the time when I concluded the hearing.

2. As pleaded in para. 8 of the petition, the petitioner had been filing annual returns u/s 206 of the IT Act in Form No. 24 with the IT'0 (TDS), ward-21(1), Calcutta. The petitioner is also a regular Income Tax assessee under the said Act and the AO of the petitioner is the Dy. CIT, Special Range-11, Calcutta. The ITO (TDS) made enquiry in relation to some of such returns, called for records, clarifications and explanations and also made survey. Subsequently by the impugned letters dt. 17th Jan., 1996, and 4/5th March, 1996, he called upon the petitioner to furnish certain details in respect of 20 employees of the petitioner in order to verify whether the claim of the petitioner as regards, payment of leave travel allowance to its employees is correct with a note that exemption on account of tax deducted at source is allowable where the evidence of actual expenditure is submitted by the person concerned and not on the basis of a mere

declaration. In the petition it is the case of the petitioner that it had allowed such exemption to its employees on the basis of declarations alone. It has been stated that only a few tickets could be had and particulars in relation thereto had been duly submitted. Although the stand in the petition is that there is no provision in the said Act to oblige preservation of evidence in respect of exemptions, nor the Act specifies that unless such evidence is available the exemption cannot be granted and accordingly evidence could not be insisted upon by the ITO (TDS), but at the hearing the principal ground upon which the learned counsel for the petitioner relied was that neither the Act, nor the Rules authorises the ITO (TDS) to go into these aspects of the matter and if necessary, the same can be gone into only by the AO of the petitioner.

3. I think both the contentions should be dealt with, although the last contention has been substantially dealt with by the Division Bench in the aforementioned judgment against the petitioner. At the relevant time by reason of the then Sub-section (5) of Section 10 of the IT Act, the value of any travel concession or assistance received by or due to an individual from his employer for self, his spouse and children in connection with his proceeding on leave to his home district in India was not to be included in computing the total income of such an individual. In order to avail of the said benefit three ingredients were required, namely, receipt of the travel concession or assistance from the employer, for the purpose of proceeding to his home district in India and on the occasion of the leave. All the three ingredients, if available, could entail the benefit of exemption. Receipt of assistance from the employer if established, in order to obtain the benefit it was required to establish that such assistance was received to facilitate proceeding to the home district in India during the leave period. If the individual was proceeding to his home at a place outside India, he would have no benefit, He was, therefore, required to establish that he did proceed to his home district in India. This could be done by production of appropriate evidence to that effect. If railway tickets were bought for the purpose of proceeding to the home district in India of the person concerned, but train journey pursuant to such ticket could not be availed of and in consequence the ticket was wasted, that would tantamount to making an attempt to proceed to the home district, but would not be proceeding to his home district in India. The journey on the basis of such ticket is thus required to be completed. That apart it has to be established that such journey was undertaken during the period of leave. This, however, is required to be established by the individual when his tax liability is being assessed. The question, however, is whether the employer too is required to be satisfied to that extent while not deducting tax at source on the amount of such assistance and if so, whether it was obligatory upon him to keep evidence in support thereof.

4. At the relevant time Section 192 of the Act imposed an obligation upon the employer paying to his employees income chargeable under the head "salaries" to deduct Income Tax at the time of payment and to deposit the same with the Revenue. By reason of the then Sections 15, 16 and 17 of the Act any such

assistance would be part of salary and accordingly tax by law was required to be deducted on the amount of such assistance at the time of payment.

This obligation of the employer being a statutory obligation it could only be avoided by taking recourse to the then Sub-section (5) of Section 10 of the Act, but in order to do so it was obligatory on the part of the employer not only to satisfy himself that all the three ingredients of Sub-section (5) of Section 10 of the Act has been complied with, but also to preserve evidence in relation thereto so as to show and establish that the employer has not neglected to discharge his statutory obligation of deducting Income Tax at source inasmuch as the income itself could not be taken into account as an income of the employee concerned chargeable under the head "salaries". Therefore, the obligation to satisfy that such assistance was not taxable in view of Sub-section (5) of Section 10 of the Act, the employer was not only required to be satisfied as to the three ingredients of the said sub-section, as referred to above, but also to keep and preserve evidence in support thereof to establish that in the matter of discharging his statutory obligation u/s 192 of the Act he has not failed.

5. The then Section 192 of the Act used the expression "Any person responsible for paying any income chargeable under the head "salaries"" It did not use the expression "any assessee responsible for paying any income chargeable under the head salaries". Therefore, even if, a person "responsible for paying any income chargeable under the head "salaries" is not an assessee, he is also statutorily obliged to deduct Income Tax at the time of payment of such salaries and to pay the same to the Revenue. The then Section 206 of the Act obliged the person paying salary to furnish prescribed return. The then Section 201 of the Act was as follows :

"201. Consequences for failure to deduct or pay.--(1) If any such person and in the cases referred to in Section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax :

Provided that no penalty shall be charged u/s 221 from such person, principal officer or company unless the ITO is satisfied that such person or principal officer or company, as the case may be, has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of Sub-section (1), if any such, person, principal officer or company as is referred to in that sub-section does not deduct or after deducting fails to pay the tax as required by or under the Act, he or it shall be liable to pay simple interest at twelve per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

(2) Where the tax has not been paid as aforesaid after it is deducted, the amount

of the tax together with the amount of simple interest thereon referred to in Sub-section (1A) shall be a charge upon all the assets of the person, or the company as the case may be, referred to in Sub-section (1)."

Thus, a person responsible to pay salary, if did not deduct income tax at the time of payment or after deduction failed to pay the tax to the Revenue, such person was not only deemed to be an assessee in default and accordingly became personally obliged to pay the tax not deposited to the Revenue together with simple interest thereon at the rate of 12 per cent p.a. but also incurred penalty if there was no good or sufficient reason to justify the action of not deducting or not depositing and in addition to that all his assets stood charged for discharging the liability for payment of tax and interest thereon.

6. It is true that in terms of the then Section 202 of the Act deduction of tax at source was one of the mode of recovery and accordingly if deduction was not effected by the employer, the employee was required to pay the tax at or before or upon assessment of his individual income. That payment by the employee could not, however, absolve the defaulting employer, and the same is clear from the then Section 201 of the Act, for any deduction as had been made, in terms of the then Section 199 of the Act, was to be treated as payment of tax on behalf of the person from whose income the deduction was made for the immediately following assessment year and not beyond. The logical conclusion, therefore, would be that for failure to deduct or for failure to pay after deduction, the person responsible to deduct and pay would be penalized in the manner provided in the then Section 201 of the Act for he had failed to discharge his statutory obligation of deducting tax and paying the same to the Revenue in terms of Section 192 of the Act. Payment made by such a defaulting employer in terms of the then Section 201 of the Act would not entail any benefit to the person for whose accounts such deduction was required to be made but had not been made or after having had deducted, payment had not been made to the Revenue.

7. When a penal provision had been made with a statutory obligation of furnishing prescribed return, it goes without saying that the person furnishing the prescribed return was obliged to substantiate the truth and substance thereof to avoid such penalty. The question is to whom such truth and substance was required to be established ? Was it to the person to whom the return was to be furnished or to the officer who had been authorized to assess the Income Tax of the person furnishing such prescribed return ? The person responsible to deduct tax and to pay the same to the Revenue, as aforesaid, might not be an assessee himself. In such circumstances before whom the truth and substance of the particulars furnished in the prescribed return was to be established ? When the Act imposed an obligation and made it clear that in default of discharging such obligation, the person liable to discharge such obligation would be penalized and compelled such person to furnish a return in the prescribed form for the purpose of establishing that he has discharged his such obligation, unless a contrary intention is shown in the Act itself, it should be deemed that it was obligatory

upon the person concerned to demonstrate and establish to the satisfaction of the officer concerned to whom such return had been filed that the particulars furnished in the return are correct, otherwise such provisions of the Act would be otiose. For that purpose too it was obligatory upon the employer to keep and preserve necessary evidence to establish the three ingredients of the then Sub-section (5), Section 10 of the Act. In the aforementioned judgment, therefore, the Division Bench has observed that the officer authorized to receive TDS returns is not a rubber stamp affixing officer. Inasmuch as deduction of tax at source and payment thereof to the Revenue was a statutory obligation and entailed penalty in the event of non-compliance, it was also obligatory by the statute itself for the officer concerned, who had been authorized to accept the returns of such deduction and payment, to satisfy himself that the person concerned has discharged his such statutory obligations. In order to do so he could take recourse to all such known powers, which the Act has vested upon the officers responsible for collecting tax.

8. For the reasons as above, there remains nothing further to be done in this writ petition and, accordingly, the same is dismissed.

There shall be no order as to costs.

After I had delivered the judgment I was told that an interim order was passed by this Court which authorised officer concerned to pass an appropriate order in accordance with law but not to give effect thereto without leave of the Court. Inasmuch as the writ petition has been dismissed it shall now be open for the officer concerned to communicate the same and to take further steps thereon in accordance with law.