(2011) 01 KAR CK 0002

In the Karnataka High Court

Case No : IT Appeal No. 433 of 2009 A.Y. 2004-05

CIT and Another — APPELLANT

Vs

Intel Tech India (P) Ltd. — RESPONDENT

Date of Decision : 12-01-2011

Acts Referred:
Finance Act, 1988 — Section 191, 195, 201, 201 (1), 201 (1A)

Citation : (2011) 01 KAR CK 0002

Hon'ble Judges : Ravi Malimath, J;N. Kumar, J

Bench : Division Bench

Advocate : K.V. Aravind for M.V. Seshachala, for the Appellant;

Final Decision : Dismissed

Judgement

N. Kumar, J.—This appeal is by the revenue challenging the order passed by the Tribunal which upheld the order of the CIT(A) cancelling the demand under s. 201 and directing payments of interest on the amount of tax to be deducted from the date of deduction till 1-11-2004 under s. 201(1A).

2. The assessee is carrying on the business of development of software. During the asst. yr. 200405 the assessee entered into assests and liabilities transfer agreements on 15-3-2003 with M/s Intel Asia Electronics Inc., USA. All the assets were transferred in terms of the said agreements to the assessee on 1st April, 2003, Rs. 2,60,00,000 was the consideration. The assessee failed to deduct tax in accordance with s. 191/195 of the Act and remit the same to the Central Government. Therefore notice under ss. 201(1) and 201(1A) of the Act was issued. The assessee contested the said notice by contending that the sale of assets resulted in loss. Therefore no tax was liable to be paid and accordingly TDS was not deducted. The Ap held that at the time of the payment of sale consideration, the assessee was bound to deduct the tax based on payments made to non-residents. It was not open to the assessee to come to the conclusion that there is a loss on account of sale. Therefore the assessee was directed to pay tax as well as interest on such tax under the aforesaid two

provisions. In appeal, the CIT(A) held that when the payee filed a return of income and paid taxes, the liability of the assessee stood extinguished and therefore it held the provisions of s. 201(1) and 201 (1A) were not applicable. The revenue preferred an appeal against the said order before the Tribunal. The Tribunal upheld the order of the CIT(A) insofar as his finding that the payee had filed a return of income and subsequently paid tax and that there was no liability to pay tax under s. 201(1) of the Act. However, it directed the assessee to pay interest under s. 201(1A) of the Act. Aggrieved by the order of the Tribunal holding that no tax is paid under s. 201(1) of the Act, the Revenue is in appeal.

3. The learned counsel for the appellant assailing the order contended that once the assessee did not deduct the tax at source, in law he is deemed to be an assessee in default. It is only when he is an assessee in default that he is liable to pay not only tax but also interest. The finding of the Tribunal that he ceases to be an assessee in default the moment the payee paid the tax, is incorrect if it is so, the order directing the assessee to pay interest under s. 201(1A) would not arise. We do not see any merit in the said contention. The Apex Court in the case of Commissioner of Income Tax, New Delhi Vs. Eli Lilly and Company (India) Pvt. Ltd., at p. 251, on the scope of s. 201(1) and s. 201 (1A) has held as under :

A perusal of s. 201(1) and s. 201(1A) shows that both these provisions are without prejudice to each other. It means that the provisions of both the sub-sections are to be considered independently without affecting the rights mentioned in either of the sub-sections. Further, inteYest under s. 201(1A) is a compensatory measure for withholding the tax which ought to have gone to the exchequer. The levy of interest is mandatory and the absence of liability for tax will not dilute the default. The liability of deducting tax at source is in the nature of a vicarious liability, which presupposes existence of primary liability. The said liability is a vicarious liability and the principat liability is of the person who is taxable. A bare reading of s. 201(1) shows that interest under s. 201(1A) r/w s. 201(1) can only be levied when a person is declared an assesseein-default. For computation of Interest under s. 201 (1A), there are three elements. One is the quantum on which interest has to be levied. The second is the rate at which interest has to be charged. The third is the period for which interest has to be charged. The rate of interest is provided in the 1961 Act. The quantum on which interest has to be paid is indicated by s. 201 (1A) itself. Sub-s. (1A) specifies on the amount of such tax which is mentioned in sub-s. (1), wherein, it is the amount of tax in respect of which the assessee has been declared in default. The object underlying s. 201(1) is to recover the tax. In the case of short deduction, the object is to recover the shortfall. As far as the period of default is concerned, the period starts from the date of deductibility till the date of actual payment of tax. Therefore, the levy of interest has to be restricted for the abovestated period only. It may be clarified that the date of payment by the concerned employee can be treated as the date of actual payment.

The Explanation to s. 191 by Finance Act of 2008 which came into effect on

1-6-2003 reads as under :

For the removal of doubts, it is hereby declared that if any person including the principal officer of a company-

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-s. (17) of s. 192, being an employer,

does not deduct, or after so deducting fails to pay, or does not pay, the whole or any part of the tax, as required by or under this Act, and where the assessee has also failed to pay such tax directly, then such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default within the meaning of sub-s. (1) of s. 201, in respect of such tax.

From the aforesaid judgment and the Explanation to s. 191, it is clear that once the payee acknowledges the receipt of the sale consideration, files a return assessing the said amounts in his hands and pays tax, which is accepted by the Department, the payer ceases to be an assessee in default. He is not liable to pay tax under s. 201(1) of the Act. However, that does not absolve his liability to pay interest on TDS amount which he has not deducted. Therefore in order to foist the liability of payment of tax under s. 201 (1A) it is not necessary that on the date when the demand is made, the assessee should be an assessee in default. As held by the Apex Court, both these sections are independent and mutually exclusive. They could be operated independent of each other. In that view of the matter, the Tribunal was justified in holding that on payment of tax due by the payee, the liability of the payer under s. 201(1) ceases, he ceases to be an assessee in default. But he has to pay interest under s. 201(1A) of the Act. Therefore the reasoning and finding recorded by the appellate authority is legal and valid and does not suffer from infirmity, which calls for interference.

No merit. Appeal is dismissed.

