(2013) 09 AHC CK 0038

In the Allahabad High Court

Case No : IT Appeal No. 44 of 2002

Commissioner of Income Tax and Another APPELLANT

Vs

I.T.C. Ltd. RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Citation : (2013) 263 CTR 241 : (2014) 220 TAXMAN 414

Hon'ble Judges : Surya Prakash Kesarwani, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : R.S. Agrawal, Sujeet Kumar and Rupesh Jain, for the Appellant; A.N. Mahajan and R.K. Upadhyay, for the Respondent

Judgement

1. We have heard Shri R.K. Upadhyay, learned counsel appearing for the appellant. Shri Rupesh Jain and Shri R.S. Agrawal appear for the respondent-assessee. This income tax appeal under s. 260A of the IT Act arises from an order of Tribunal. Delhi Bench "C", New Delhi dt. 12th June. 2001 in respect of asst. yr. 1992-93. The appeal was admitted on 11th July. 2007 on the questions of law as follows:

(i) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law, that the assessee should not be treated as assessee in default in terms of s. 201 of the IT Act, 1961?

(ii) Whether on the facts and in the circumstances of the case, the Tribunal is justified in law in deleting interest under s. 201(1A) of the Act, which is automatic and mandatory under the provisions of the Act?

(iii) Whether the Tribunal could draw adverse inference against the Department on the so-called discussion between the assessee and the ITO (TDS) which was never took place in coming to the conclusion that the assessee was under bona fide belief that the conveyance allowance was exempt under s. 10(14) of the Act in not deducting tax at source?"

2. The respondent-assessee was treated as assessee in default and was made liable to pay the interest on the amount of income tax, which was not deducted by the assessee from the conveyance allowance given to its employees under s. 192(1) of IT Act (in short "the Act")

3. The AO passed an order under s. 201(1A) r/w sub-s. (1) dt. 7th Feb., 1994 for the asst. yr. 1992-93, directing the assessee to pay interest under s. 201(1A) @ 15 per cent which worked out at Rs. 1,07,640 after treating the respondent as assessee in default and rejecting the explanation given by it that it was under fair and bona fide belief not to deduct the TDS on conveyance allowance. The AO held that it was obligatory on the part of company to deduct tax on source on conveyance allowance for which there was no exemption under s. 10(14) of the Act. The AO did not accept the explanation that as per CBDT Circular No. 196, dt. 31st March, 1976 [1976 CTR (Jour) 312], that the tax is not to be deducted on actual travelling expenses for which the employee has given declaration/ certificate, on the ground that all the employees of the assessee are paid the conveyance allowance, and that in the financial year 1991-91, the assessee was deducting tax on the conveyance allowance.

4. The CIT(A) did not accept the explanation of the assessee-company that it had held a meeting with Shri Karan Singh, the then ITO (TDS) on 22nd/27th Jan., 1993 on which the assessee was advised that the conveyance allowance was not taxable. No written intimation was issued by ITO (TDS). The letter of the assessee dt. 29th Jan., 1993 addressed to the ITO, Saharanpur referring to the discussions held with him, could not be relied upon in proof of any such information or assurance given to the assessee that the conveyance allowance was not liable to: be included for the purpose of deduction of tax at source.

5. The Tribunal allowed the appeal. It accepted the explanation of the assessee to be bona fide and recorded its findings as follows:

10. We have considered the rival submissions in the light of the material placed before us and precedents relied upon. The brief question that falls for our adjudication is as to whether the assessee-company should be deemed to be the assessee in default in terms of s. 201(1) and consequently liable to interest under s. 201(1A) or not. Sec. 192(1) of the Act makes employer responsible for deducting tax at source from salary paid to its employees by estimating the income chargeable under the head ''Salaries'' at average rate of income tax. Sub-s. (3) of the same section stipulates that the person responsible for making deduction may increase or reduce the amount to be deducted under this section for the purposes of adjusting any excess or deficiency arising out of any previous deduction. Sec. 201 casts duty on the person deducting tax to deposit the same within the prescribed time. If the tax has not been properly deducted or has not been properly paid after deducting, the person who is responsible is to be deemed to be an assessee in default in respect of the tax. On the perusal of these sections which are relevant to the issue under consideration, it becomes obvious that primarily the employer had to deduct tax from the salary paid to its

employees on the basis of the estimated income of such employees. It thus follows that so long as the estimate made by the employer is bona fide, it cannot be faulted for not deducting tax. If, on the other hand, it is found that the estimate made by the employer was mala fide then, the provisions of s. 201 can be rightly applied. The sole question that now stands to be decided is as to whether the assessee company had bona fide belief that the conveyance allowance payment to its employees was not the subject matter of deduction of tax at source or not. The issue as to whether the conveyance allowance is taxable or not, is not the subject-matter of adjudication before us. But we are confined only to the point as to whether the assessee should be deemed to be in default for non-deduction of tax at source on conveyance allowance paid to its employees or not. Admitted facts are that upto January, 1993 the assessee had been deducting tax at source on conveyance allowance paid to its staff. Thereafter on meeting held by the representatives of the assessee company with the then ITO (TDS), Saharanpur on 22nd and 27th Jan., 1993, from which the assessee inferred that the conveyance allowance paid to its workmen was not to be included for calculating their taxable salaries. Consequently, the assessee obtained declarations from its employees that the amount received by the staff was actually spent on coming to office from residence and vice versa, which were furnished to the Revenue authorities during the course of proceedings. Although no conclusive evidence is placed on the record to establish that the ITO(TDS) advised the assessee company not to deduct tax on conveyance allowance, yet a reasonable inference can be drawn from the letter written by the assessee-company to the said ITO on 29th Jan., 1993 in this regard. This shows that the action of the assessee in not deducting tax at source from conveyance allowance paid to its workmen, was based on bona fide belief. This, in our opinion, fulfils the conditions as specified in s. 192 r/w s. 200. Further our view is fortified by the decision of the Delhi High Court in the case of Nestle India Ltd. (supra). Under these peculiar circumstances, we are satisfied that the assessee should not be treated as assessee in default in terms of s. 201. With these observations, we confirm the action of the CIT(A) insofar as it was decided in favour of the assessee and reverse the other part which was decided in favour of the Revenue.

11. In the result, the assessee''s appeal is allowed and that of the Revenue''s stand dismissed.

6. Shri R.K. Upadhyay appearing for the Revenue submits that the assessee was deducting tax on the estimated income of the employees including the travelling allowance upto January, 1993. For a period of two months, the assessee stopped deducting the amount on the ground that he held discussions with the ITO. There was no proof of any discussion or advice given by the ITO that the amount of travelling allowance is not taxable and thus the tax may not be deducted on such amount. He submits that if the amount of tax is not deducted in accordance with s. 192, s. 201 is attracted as a consequence and that in such case the assessee is treated as the assessee in default. There was no exception nor any explanation, whether bona fide or not, can be entertained to avoid liability of

interest under s. 201(1A). The explanation given by the assessee was not accepted by the AO and CIT(A). The Tribunal committed gross error in accepting the explanation to be bona fide, against the strict provisions of the Act, introduced for collection of tax.

7. Shri Rupesh Jain, on the other hand, relied upon a judgment of Supreme Court in Commissioner of Income Tax and Another Vs. Larsen and Toubro Ltd., , the judgments of Delhi High Court in Commissioner of Income Tax Vs. HCL Info System Ltd., and in Commissioner of Income Tax Vs. Nestle India Ltd., in which a bona fide explanation is considered to be relevant for not deducting the tax under s. 192.

8. In CIT vs. HCL Info System Ltd. (supra) the Delhi High Court was faced with similar question as to whether if there was any bona fide doubt and that the conduct of the employer was not mala fide, the interest liability could be imposed after treating the assessee as the assessee in default under s. 201(1A) of the Act. Following the judgments of Gujarat High Court in COMMISSIONER OF INCOME TAX Vs. OIL and NATURAL GAS CORPORATION LTD., , Income Tax Officer Vs. Gujarat Narmada Valley Fertilizers Co. Ltd., and the judgment of its own Court in CIT vs. Nestle India Ltd. (supra) it was held that the deduction of tax on the estimated income reflected by the employer under s. 192(1) is based on bona fide estimation and in the absence of any specific direction by the AO, if the conduct of the assessee was not mala fide, the assessee cannot be treated as assessee in default. In this case also the assessee company dealing in computer hardware did not deduct the tax on an amount of conveyance allowance paid to its employees. The Court found that there is no specific format and guidelines issued by the CBDT for obtaining relevant details to perform that the journey has actually been performed by the employees. The computation of taxable salary income was found to be in order with reference to deduction availed by the employees. Relying upon P.V. Rajgopal and Others Vs. Union of India and Others, it was held that the assessee cannot be converted into an ITO or an adjudicating authority for estimating the income of its employees. All that it means that the assessee must declare his claim so that with reference to s. 201, proviso he can say that he had good and sufficient reasons not to deduct tax at source in respect of any income to avoid imposition of penalty. Where the assessee had accepted claim of employees of having performed journey and allowed them the leave travel concession and considered the same to be exempt from taxation as per s. 10(5) r/w r. 2(b) of the IT Rules and further that the assessee had no reason to suspect or doubt that the declaration given by the employees particularly when no specific detail or format has been prescribed, the assessee could not be treated as assessee in default. The employer cannot be given responsibility of the adjudicating authority or to sit in judgment over the claim of the employee which can only be done by the AO. In the absence of any mala fide conduct the interest cannot be charged.

9. In CIT us. Larsen & Toubro Ltd. (supra) the Supreme Court on a similar

question held:

A short question, which arises for determination in these civil appeal(s) is whether the assessee(s) was under statutory obligation under IT Act, 1961, and/ or the Rules to collect evidence to show that its employee(s) had actually utilized the amount(s) paid towards leave travel concession(s)/conveyance allowance ?

It may be noted that the beneficiary of exemption under s. 10(5) is an individual employee. There is no circular of CBDT requiring the employer under s. 192 to collect and examine the supporting evidence to the declaration to be submitted by an employee(s).

For the above reasons there is no merit in the civil appeals and the same are dismissed with no order as to costs.

10. In the present case also we find that though the assessee was deducting the tax on the conveyance allowance upto January, 1993, a bona fide doubt was felt as to whether the tax is to be deducted on the conveyance allowance paid for reimbursement of travelling expenses for which declaration/certificates were given by the employees. The assessee obtained declaration from the employees and on such declaration, the tax was not deducted. The assessee in its estimation of the income of its employees did not find, in consultation with ITO(TDS), in the circumstances accepted by the Tribunal did not find it obligatory to deduct tax on such allowance on source. The assessee-company took up the plea that if had discussions with the ITO and submitted a proof of letter dt. 29th Jan., 1993 in this regard. On these facts, the findings of the Tribunal, that the action of assessee for not deducting the tax at source was based on bona fide belief, is a finding of fact, which does not call for interference in this appeal.

11. For the aforesaid reasons we are of the view that the assessee could not be treated as assessee in default for charging interest under s. 201(1A) of the Act. The questions of law, as framed and on which the appeal was admitted, are decided in favour of assessee and against the Revenue. The income tax appeal is dismissed.