
(2015) 08 GUJ CK 0006

In the Gujarat High Court

Case No : Tax Appeal Nos. 1970 and 1971 of 2006

Commissioner of Income Tax

APPELLANT

Vs

Labh Construction & Ind. Ltd.

RESPONDENT

Date of Decision : 03-08-2015

Acts Referred:

Income Tax Act, 1961 — Section 133, 133(A), 194, 194C, 200

Citation : (2015) 235 TAXMAN 102

Hon'ble Judges : A.J. Desai and Abdullah Gulamahmed Uraizee, JJ.

Bench : Division Bench

Advocate : M.R. Bhatt, Sr. Advocate for Mauna M. Bhatt, Advocate, for the Appellant; B.S. Soparkar for Swati Soparkar, Advocates, for the Respondent

Judgement

A.J. Desai, J.—These two appeals filed by the Commissioner of Income Tax, Ahmedabad under Section 260A of the Income Tax Act, 1961 (herein after referred to as "the Act" for short) came to be admitted by this Court and the following common question of law was framed as substantial question of law.

"Whether the Appellate Tribunal is right in law and on facts in confirming the order passed by the CIT (A) directing the A.O. To recalculate the interest payment under Section 201(1A) from the date of deduction of TDS to the date of assessment of payee or after the date of actual payment of TDS, whichever is earlier?"

2. The issue involved in the present case is with regard to interest payable by the respondent assessee company under the provisions of 201(1A) of the Act for the assessment year 1997-98 and 1998-99.

3. The brief facts arise from the record are as under:

3.1. That survey was conducted on respondent assessee company under the provisions of Section 133(A) of the Act on 06.03.2000, wherein the statement of the director of the company under Section 133 of the Act was recorded. The director had admitted that the company had committed a default in respect of its

liability with regard to payment tax deducted at source (herein after referred to as "TDS" for short), which tax was already deducted from the account of two other parties and was not credited to the Government within a prescribed period. It was noticed that the assessee company had paid interest to other companies amounting to Rs. 2,99,98,853/- and also paid the interest other than company amounting to Rs. 23,66,890/-. It was also noticed that those two parties namely Labh Estate Organizers Pvt. Ltd. and M/s. Labh Organizer Pvt. Ltd., though tax was deducted at source to the tune of Rs. 4,46,120/- and Rs. 5,23,770/- respectively, the same was not deposited with the Government.

3.2. The Assessing Officer treated the assessee company in default and demanded of Rs. 14,39,835/- (amount of Rs. 9,69,890/- as TDS + Rs. 4,69,945/- as interest by its order dated 13.09.2000). The assessee, being aggrieved with the said order, preferred an appeal before the Commissioner of Income Tax (Appeals) (herein after referred to as the CIT (Appeals), for short) and challenged levability of interest under Section 201(1A) of the Act to the tune of Rs. 4,69,945/-. The CIT (Appeals), by its order dated 11.06.2001, partly allowed the appeal and held that the respondent assessee company would be liable to pay interest under Section 201(1A) of the Act till the assessment of those two companies were made and not subsequent to the said date i.e. till the date when the TDS was deposited by the respondent assessee company.

3.3. The said decision was challenged by the revenue by way of preferring the appeal before the Income Tax Appellate Tribunal (Ahmedabad), Bench "B" (herein after referred to as "the Tribunal" for short). The said appeal was heard along with other appeals preferred by the respondent assessee company. However, a common order was passed by the Tribunal on 21.04.2006. The appeals for the assessment year 1997-98 and 1998-99 were numbered as ITA Nos. 1900 & 1901/A/2001. These two appeals came to be dismissed by the Tribunal. Hence, present appeals.

4. Mr. M.R. Bhatt, learned Senior Advocate assisted by Ms. Mauna Bhatt, learned advocate has vehemently submitted that the Tribunal has grossly erred in interpreting the mandatory provisions of Section 201(1A) of the Act. He would further submit that the respondent company was duty bound to credit since the same was deducted at the time of payment to those two companies (herein after referred to as "the payee companies" for short). He would further submit that it is an undisputed fact that though the assessee company had paid the amount after deducting the TDS, the said tax was not credited with the revenue within prescribed period.

5. Since the respondent assessee company had deposited the said TDS at belated stage, the provisions of Section 201(1A) of the Act would be applicable. He would further submit that the defaulting assessee company is bound to pay the interest at the rate prescribed under Section 201(1A)(2) of the Act from the date of which such tax was deducted and on the date on which such tax was actually paid. The CIT (Appeals) as well as Tribunal have erred in holding that

since assessment of the payee companies was made before delayed payment when the payee companies were not liable to pay any tax under the Act, the assessee company would be liable to pay interest till that date.

6. He would further submit that plain reading of Section 201(1A) of the Act makes it clear that the defaulting assessee company in depositing the tax at belated stage is bound to pay the tax till the tax is actually paid by him and not till the date of the assessment made with regard to the payee companies.

7. By relying upon the decision in case of Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others, , he would submit that the Tribunal has erred in expanding the definition or the provisions of Section 201(1A) of the Act.

8. He, therefore, would submit that the appeals be allowed and the orders of the CIT (Appeals) as well as the Tribunal be quashed and set aside.

9. On the other hand, Mr. B.S. Soparkar, learned advocate appearing for the respondent vehemently opposed this appeal. He would submit that the respondent assessee company has already paid the TDS, however, at later stage. He would submit that the decision of the CIT (Appeals) as well as the Tribunal interpreting the portion of Section 201(1A) of the Act, that interest would be leviable only upto the date of the assessment of the payee companies, is not required to be disturbed since it has been accepted by the Assessing Officer that both the payee companies were running in the losses and were not required to pay any tax under the provisions of the Act.

10. It was argued by Mr. Soparkar, learned advocate that on behalf of the assessee company that the assessee company is paying the tax and it has been held that the payee company is not liable to pay any tax, the revenue cannot charge any interest under Section 201(1A) of the Act from the date subsequent to the assessment made by the department itself with regard to liability to pay any tax by the payee companies or not. By elaborating his submissions, it was argued that the payee companies were not held liable to pay any tax since the same were running in the losses and the same was accepted by the department, the assessee company cannot be compelled to pay any interest on the TDS subsequent to such decision. By relying upon the decision in case of Commissioner of Income Tax Vs. Rishikesh Apartments Co-operative Housing Society Ltd., , he would submit that there is no loss, whatsoever in nature, caused to revenue on account of delay payment of TDS and therefore, would not be entitled to charge any interest subsequent to assessment of payee companies. He would further submit that in the said decision, the payee company had already paid taxes, which the said company is liable to pay and therefore, it was held that the assessee company cannot be charged with any interest under Section 201(1A) of the Act. Here is the case where the payee company is not at all taxed with any liability and therefore, the assessee company would not be liable to pay interest subsequent to the assessment made qua the payee company.

11. By relying upon the decision in case of Hindustan Coca Cola Beverage Pvt. Ltd. Vs. Commissioner of Income Tax, , he would submit that it has been held by the Apex Court that there cannot be double taxation if the department has already received tax from the payee company since the payee company had to pay the tax. He would further submit that in the present case, the Assessing Officer has held that the payee company was not liable to pay any tax and therefore, the CIT (Appeals) and the Tribunal have not committed any error in holding that the interest under Section 201(1A) of the Act would be payable by the assessee company till the assessment of the payee companies were made. He, therefore, would submit that present appeals be dismissed.

12. We have heard learned advocates for the respective parties. Perused the orders of the CIT (Appeals) as well as the Tribunal along with some details of delayed payment of TDS produced for perusal of this Court. It is an undisputed fact that those two companies namely Labh Estate Organizers Pvt. Ltd. and M/s. Labh Organizer Pvt. Ltd. were assessed for two years i.e. 1997-98 and 1998-99 and the Assessing Officer has held that the said companies were not liable to pay any tax under the provisions of the Act. It was accepted by the officers that both the companies were running in losses and considering their income and expenditure, it was held that they are not liable to pay any tax.

13. As far as respondent assessee company is concerned, it is an admitted position that the assessee company has made payment to those two companies after deducting at TDS to the tune of of Rs. 4,46,120/- and Rs. 5,23,770/- respectively. The assessee Company was bound to credit the said TDS with the revenue within prescribed period, which has not been done in the present case. The assessee company was duty bound to credit the said TDS with the Tax Authority under Section 200 of the Act. Since the assessee company has collected the TDS and has failed to pay the same within prescribed period, the case would fall under Section 201(1A) of the Act. For ready reference, the relevant part is produced as under:

"201(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 under section 221 from such person, principal officer or company unless the [Assessing] Officer 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 subsection (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 this Act, he or it shall be liable to pay simple interest at [fifteen] per cent per annum on the

amount of such tax from the date on which 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)."

14. It is true that plain reading of Section 201(1A) of the Act would prima facie read that the defaulter has to pay the interest from the date of deducting the TDS till the said amount of tax is actually paid by the concerned person.

15. However, as stated herein above, both the payee companies have been held that they were not liable to pay any tax and therefore, whether the revenue can ask the interest on such delayed payment of TDS even though, subsequent to the date of the declaration that the payee companies had not to pay any tax for those financial years. In our opinion, when the assessee company had to pay the tax on behalf of the payee companies and when the payee companies themselves had not to pay any tax, subsequent to such declaration with regard to payee companies, no interest can be leviable against the company since there would be no loss of revenue in whatsoever manner. The case of Commissioner of Income Tax V. Rishikesh Apartments Co-op. Housing Society Ltd. (supra) is comparable with the case of the present case on hand since there is no loss of revenue on account of non-payment of TDS within prescribed period. Even if TDS, which was subsequently deposited with the department on behalf of payee company must have been refunded in view of losses suffered by them and on declaration that they were not liable to pay any tax. In the above referred case, the payee companies might have paid the taxes as it was liable to pay the same. It was held that no interest can be refunded under Section 201(1A) of the Act on the delayed payment or on non-deduction of TDS by the assessee. In the present case, the respondent assessee company had already paid the TDS with interest. However, in our opinion, the CIT (Appeals) and the Tribunal had not committed any error in holding that the assessee was liable to pay the interest under Section 201(1A) of the Act.

16. It cannot say that though the payee companies have not to pay any taxes, the assessee company is bound to pay the interest under Section 201(1A) of the Act till the same is actually paid to the department. In our considered opinion that when the Assessing Officer completes the formality of the assessment qua the payee companies with regard to their tax liability and it comes to conclusion that the payee company either would be liable to pay tax or not, would be the crucial point with regard to the payment of interest under Section 201(1A) of the Act, as far as the assessee company is concerned.

17. Para - 11 and 12 of the case of Commissioner of Income Tax V. Rishikesh Apartments Co-op. Housing Society Ltd. (supra) are relevant and the same is reproduced as under:

"11. If one looks at the facts of the present case, it is not in dispute that Ravi Builder, on whose behalf the tax was to be deducted and paid under Section 194C, had paid more amount of tax by way of advance tax and than what was payable and had also paid tax on self-assessment. Thus, it is not at all in dispute that for the relevant two years that amount of tax was paid by Ravi Builder, on its income as per the provisions of the Act, and for other two years, was paid by Ravi Builder little late. So far as the late payment is concerned, the AAC held that the assessee had to pay interest under Section 201(1A) for the said years and the assessee accepted the said finding. Thus, it can very well be seen that the facts of the case which have been relied upon by Mr. Qureshi cannot help the revenue for the reason that in the said case it was not known whether the person on whose behalf the tax was to be paid to the revenue had in fact paid the tax payable by him. In the instant case, the contractor, viz., Ravi Builder, had admittedly paid the amount of tax payable by it and, thus, no loss of whatsoever nature had been caused to the revenue on account of non-deduction of tax at source by the assessee.

12. From the legal provisions discussed herein above, it is crystal clear that in the instant case Ravi Builder, on whose behalf the tax was to be paid by the assessee, had duly paid its tax and was not required to be pay any tax to the revenue in respect of the income earned by it from the assessee. If the tax was duly paid and that too at the time when it had become due, it would not be proper on the part of the revenue to levy any interest under Section 201(1A) of the Act especially when Ravi Builder had paid more amount of tax by way of advance tax than what was payable by it. As the amount of tax payable by the Contractor had already been paid by it and that too, in excess of the amount which was payable by way of advance tax, in our opinion, the Tribunal was absolutely right in holding that the tax paid by the Contractor in its own case, by way of advance tax and self-assessment tax, should be deducted from the gross tax that the assessee should have deducted under Section 194C while computing interest chargeable under Section 201(1A) of the Act. If the revenue is permitted to levy interest under the provisions of section 201(1A) of the Act, even in the case where the person is liable to pay the tax has paid the tax on the date due for the payment of the tax, the revenue would derive undue benefit or advantage by getting interest on the amount of tax which had already been paid on the due date. Such a position, in our opinion, cannot be permitted."

18. In the present case, it has been held that when the assessment qua the payee companies was completed and it was held that both the companies were not liable to pay any tax, the liability to pay interest upon the late payment of TDS by assessee would stop running. In our opinion the case of Commissioner of Income Tax V. Anjum M.H. Ghaswalla & Ors. (Supra) would not be applicable to the present case.

19. In view of the above observations, the substantial question is answered accordingly against the appellant revenue and in favour of respondent - assessee.