

(2006) 03 DEL CK 0100

In the Delhi High Court

Case No : IT Appeal No's. 355, 356, 374, 375, 380, 385, 388, 389, 391, 392, 394 to 398, 401, 403, 404, 407 and 409 of 2006

Commissioner of Income Tax

APPELLANT

Vs

SENCMA SA

RESPONDENT

Date of Decision : 22-03-2006

Acts Referred:

Income Tax Act, 1961 — Section 271C

Citation : (2007) 288 ITR 76

Hon'ble Judges : T.S. Thakur, J;J.M. Malik, J

Bench : Division Bench

Advocate : R.D. Jolly and Sonia Mathur, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

T.S. Thakur, J.—In the course of survey operations, it was noticed that the respondent-assessed had not deducted tax at source on the

amount of salaries paid by it to its expatriate employees working in India. The AO was of the view that the salaries paid outside India for services

rendered in India were chargeable to tax and that since no deduction of tax at source in regard to the said salaries had been made, the assessed

was liable to suffer a penalty in terms of Section 271C of the IT Act, 1961. Penalties for the financial years 1991-92 to 1998-99 were accordingly

imposed upon the respondent-assessed, SENCMA, India. Similarly, penalties for the financial years 1989-90 to 1998-99 were imposed upon the

respondent-assessed, SENCMA, France.

2. Aggrieved by the said orders, the respondent-assessed appealed to the CIT(A), inter alia, contending that the assesseds were under a bona fide

belief that salaries paid to expatriate employees outside India were not taxable and that no deduction at source was required to be made by the office that was making the said payment. It is also urged that non-deduction of tax from hardship allowance and educational allowance was also justified especially when such allowances were not taxable in France where the companies were registered. The CIT(A) partly allowed the appeals filed by the assesseds and held that the levy of penalties qua the hardship and educational allowance was not warranted. Insofar as the non-deduction of tax at source from the salaries paid to the expatriate employees outside India was concerned, the CIT(A) upheld the order passed by the AO holding that the Explanation offered by the assesseds was not acceptable.

3. Aggrieved by the said orders, the Revenue as also the assesseds preferred appeals before the Tribunal, Delhi, which have been disposed of by the said Tribunal in terms of a common order dt. 11th Aug., 2005. The Tribunal was of the view that the Explanation offered by the assesseds for the non-deduction of tax at source from out of the salaries paid to the expatriate employees in France was acceptable and that the failure to make the deduction was for bona fide reasons. The Tribunal held that there was certain amount of confusion in regard to the applicability of the provisions regarding deduction at source from out of salaries paid to expatriate employees in their countries of origin. It referred to four different batches of cases which were decided by the Tribunal involving similar questions and held that the fact situation in those cases was similar to the cases at hand. Following the view taken in the said cases, the Tribunal held that the levy of penalty was not justified. It, accordingly, dismissed the appeals filed with the Revenue, while allowing those filed by the respondent-assessed. The present appeals filed by the Revenue assail the correctness of the said order.

4. We have heard at considerable length Mr. Jolly, counsel appearing for the Revenue and perused the record. The Tribunal has on consideration of the facts and circumstances of the cases and relying upon the decisions rendered by it earlier, some of which have even met the approval of this Court in appeal, held that the non-deduction of tax at source by the assesseds from out of the salaries paid to the expatriate employees in the country of their origin was bona fide and arose out of certain confusion that

existed in relation to the obligations to make such deductions. That finding is, in our view, a mixed finding of fact and law if not, a pure finding of fact. The Tribunal has while arriving at the said finding, inter alia, taken into consideration the fact that the shortfall in the deduction was made up by the assesseds no sooner the same was pointed out by the authorities including the interest livable on the same without any contest on merits.

5. Mr. Jolly strenuously argued that the facts of the present case are different from those of the cases relied upon by the Tribunal. He urged that the Tribunal has not meticulously examined the factual aspect attendant upon the present batch of cases while holding that the assesseds had a reasonable cause not to make deductions.

6. We regret our inability to accept that submission. The Tribunal has, as already seen earlier, recorded in clear terms a finding that a certain amount of confusion was prevalent among foreign companies working in India regarding their obligations to deduct tax at source from out of the component of the salary paid by the companies outside India. It had, in similar other cases, referred to by it in para 7 of its order, similarly concluded that the said state of confusion provided a reasonable justification for the companies not to make the deduction. The fact that the respondent-assessed company is a foreign company with its employees working in India, who are paid salaries in India as also in France is not in dispute. That being so, there was no real or material difference in the fact situation in which companies from Japan were held not liable to penalty for non-deduction of tax at source. The respondent-company in the present batch of cases had, for identical reasons, failed to make the deduction which would call for a similar treatment to them also. Inasmuch as the Tribunal has adopted the same yardstick and standard for determining the liability to pay penalty to the companies from Japan as those from France, it committed no error to warrant our interference. No substantial question of law arises for our consideration. The appeals fail and are hereby dismissed.