
(2016) 12 P&H CK 0003
In the Punjab And Haryana At Chandigarh
Case No : Income Tax Appeal 73 of 2016

Commissioner of Income Tax (TDS)	Vs	APPELLANT
M/s. Punjab Infrastructure Dev. Board		RESPONDENT

Date of Decision : 20-12-2016

Acts Referred:

Income Tax Act, 1961 — Section 194C, Section 201(1A)

Citation : (2017) 394 ITR 195 : (2017) 245 Taxman 183

Hon'ble Judges : Mr. S.J. Vazifdar, CJ. and Mr. Deepak Sibal, J.

Bench : Division Bench

Advocate : Mr. Denesh Goyal, Advocate, for the Appellant; Mr. Deepak Agarwal and Mr. Rohit Gupta, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Mr. S.J. Vazifdar, C.J.—This is an appeal against the order of the Income Tax Appellate Tribunal, allowing the respondent-assessee's appeal against the order of the Assessing Officer in respect of the assessment year 2007-08.

2. The appeal is admitted on the following substantial question of law as framed by us: -

"Whether a person who fails to deduct at source under section 194C is not liable to pay interest under section 201(1A) if the payee of such amounts has files a nil return or a return showing a loss?"

The Tribunal answered this question in the affirmative in favour of the assessee/ respondent. We have overruled the order answering the question in the negative in favour of the Revenue/ Appellant.

3. The question arises in the following facts.

The assessee is a Board established under Section 18 of the Punjab Infrastructure (Development and Regulation) Act, 2002 (Punjab Act) and for the purposes of that Act. It is wholly controlled and managed by the Government of

Punjab.

The agreements which are the subject matter of this appeal have not been produced. That, however, need not detain the decision in the appeal. The facts stated in the orders of the authorities under the Income Tax Act, 1961 and the appeal are sufficient for the decision of the appeal. Suffice it to state that the assessee entered into a contract with a party for achieving its objects under the Punjab Act under various models such as the Build Operate and Transfer, Design Build Operate and Transfer and Operation and Management models. Under these models-contracts the payments are made to private parties referred to therein as concessionaires.

4. The first question that arises is whether under these contracts the assessee was bound to deduct tax at source (TDS) under Section 194C? The second question arises on the assessee's alternate submission that even assuming that it was liable to deduct tax at sources under Section 194C, it is not liable to pay interest under Section 201(1A) as the payee of the amounts in respect of which the tax was allegedly to be deducted at source had filed their returns declaring a nil income and on account of which no tax was in fact paid or payable by them.

5. The AO held that the assessee was liable to deduct tax at source and having failed to do so levied interest under Section 201(1A).

The appeals filed by the assessee against the assessment orders were allowed by the CIT(A) on the basis of the assessee's first submission namely that the provisions of Section 194C were not applicable to the assessee's case. In other words, the CIT(Appeals) held that the assessee was not liable to deduct tax at source at all and accordingly deleted the levy of interest under Section 201(1A). As the CIT(A) has decided the first issue in favour of the assessee by holding that Section 194C was not applicable to the case, he did not consider it necessary to decide the second issue raised by the assessee which was in the alternative.

The Tribunal dismissed the appeals but on the basis of the assessee's alternate contention namely that the assessee was not liable to interest under Section 201(1A) on account of the payees of the amounts in respect whereof tax was allegedly deductible at source having filed their returns which were nil returns/ returns showing a loss.

6. The Tribunal by the same order disposed of several other appeals as well. These appeals included those on the same issue but for different assessment years as well as appeals arising out of orders imposing penalty and orders under Section 206C(7) which relates to tax collectable at source. Although the impugned order before us is a common order, we will restrict our judgment to the question on which this appeal has been admitted. We will not in this judgment deal with the questions that arise in some of these appeals. We will deal with these questions in separate judgments against which also appeals are before us.

7. If we answer the questions of law in favour of the assessee, the entire matter ends there. If, however, we answer the question in favour of the Revenue, as we have, it would be necessary to remit the matter to the Tribunal to decide the assessee's main contention that the provisions of Section 194C are not applicable to the case at all. We refrain from answering that question in this appeal as in our view, it ought to be decided by the Tribunal in the first instance. There is a possibility of questions of fact arising. For instance, it would be necessary to consider whether the assessee was merely a nodal agency for the Government of Punjab or whether it was acting on its own on a principle to principle basis with the concessionaire. The answer to this issue may not depend only upon the terms of the agreement.

8. We will, therefore, proceed to answer the question raised in this appeal on the basis that Section 194C of the Act applies to the case requiring the assessee to deduct tax at source.

9. It would be convenient to set out Section 201 as it stood upto the assessment year 2011-12 from time to time for these appeals on the question before us concern the assessment years 2007-08 to 2011-12.

We will first set out Section 201 as it applied upto the assessment year 2010-11 and then as it applied for the assessment year 2011-12. While doing so, we will include the first proviso to sub section (1) which was inserted by the Finance Act, 2012 with effect from 1st April, 2012 for it was contended on behalf of the assessee that this proviso has retrospective effect.

(A) Section 201 including the first proviso to sub section (1) thereof as applicable to assessment years 2007-08, 2008-09, 2009-10, insofar as it is relevant, reads as under: -

"201. Consequences of failure to deduct or pay.- (1) Where 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-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident-

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed.

Provided that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such 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 the whole or any part of the tax 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 one per cent for every month or part of a month 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 and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200....."

(B) Section 201 as applicable to the assessment year 2011-12, insofar as it is relevant, reads as under: -

"201. Consequences of failure to deduct or pay. - (1) Where 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-section (1A) of section 192, being an employer,

does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident -

(i) has furnished his return of income under section 139;

(ii) has taken into account such sum for computing income in such return of income; and

(iii) has paid the tax due on the income declared by him in such return of income, and the person furnishes a certificate to this effect from an accountant in such

form as may be prescribed]

Provided that no penalty shall be charged under section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such 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 the whole or any part of the tax 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,-

(i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200."

Provided that in case any person including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident."

10. The first proviso to sub section (1) and the proviso to sub section (1A) were inserted by the Finance Act, 2012 with effect from 01.07.2012. It is, however, contended that the first proviso to sub section (1) is clarificatory in nature and, therefore, has retrospective effect whereas the proviso to sub section (1A) is prospective in nature and, therefore, operates only with effect from 01.07.2012. The submission was sought to be supported on the basis of the memorandum of Finance Bill, 2012, the relevant part whereof reads as under: -

"E. Rationalization of tax deduction at source (TDS) and tax collection at source (TDS) provisions

I. Deemed date of payment of tax by the resident payee

Under the existing provisions of Chapter XVII-B of the Income-tax Act, a person is required to deduct tax on certain specified payments at the specified rates if the payment exceeds specified threshold. In case of non-deduction of tax in accordance with the provisions of this Chapter, he is deemed to be an assessee in default under section 201(1) in respect of the amount of such non-deduction.

However, section 191 of the Act provides that a person shall be deemed to be

assessee in default in respect of non/short deduction of tax only in cases where the payee has also failed to pay the tax directly. Therefore, the deductor cannot be treated as assessee in default in respect of non/short deduction of tax if the payee has discharged his tax liability.

The payer is liable to pay interest under section 201(1A) on the amount of non/short deduction of tax from the date on which such tax was deductible to the date on which the payee has discharged his tax liability directly. As there is no one-to-one correlation between the tax to be deducted by the payer and the tax paid by the payee, there is lack of clarity as to when it can be said that payer has paid the taxes directly. Also, there is no clarity on the issue of the cut-off date, i.e. the date on which it can be said that the payee has discharged his tax liability.

In order to provide clarity regarding discharge of tax liability by the resident payee on payment of any such received by him without deduction of tax, it is proposed to amend section 201 to provide that the payer who fails to deduct the whole or any part of the tax on the payment made to a resident payee shall not be deemed to be an assessee in default in respect of such tax if such resident payee -

- (i) has furnished his return of income under section 139;
 - (ii) has taken into account such sum for computing income in such return of income; and
 - (iii) has paid the tax due on the income declared by him in such return of income;
- and the payer furnishes a certificate to this effect from an accountant in such form as may be prescribed.

The date of payment of taxes by the resident payee shall be deemed to be the date on which return has been furnished by the payer.

It is also proposed to provide that where the payer fails to deduct the whole or any part of the tax on the payment made to a resident and is not deemed to be an assessee in default under section 201(1) on account of payment of taxes by the such resident, the interest under section 201(1A)(i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident payee.

Amendments on similar lines are also proposed to be made in the provisions of section 206C relating to TCS for clarifying the deemed date of discharge of tax liability by the buyer or licensee or lessee.

These amendments will take effect from 1st July, 2012."

We will presume that the first proviso to sub section (1) operates retrospectively and that the proviso to sub section (1A) does not. As the amendment of 2009 is with effect from 01.07.2010, a question may arise in a given case whether it applies only from the next assessment year i.e. From 01.04.2011 or whether it

applies to the assessment year 2010-11 only from 01.07.2010 and prior to that i.e. From 01.04.2009 to 30.06.2010 the unamended provisions applies. The issue, however, does not affect the result of this appeal.

11. Even if the proviso to sub section (1) is not retrospective, it would make no difference to the assessee's case in view of the judgment of the Supreme Court in Hindustan Coca Cola Beverage P. Ltd. v. Commissioner of Income Tax [2007] 293 ITR 226 (SC). The supreme Court held as follows:-

"10. Be that as it may, Circular No. 275/201/95-IT(B) dated 29.01.1997 issued by the Central Board of Direct Taxes, in our considered opinion, should put an end to the controversy. The circular declares "no demand visualized under Section 201(1) of the Income Tax Act should be enforced after the tax deductor has satisfied the officer in charge of TDS, that taxes due have been paid by the deductee-assessee. However, this will not alter the liability to charge interest under Section 201(1-A) of the Act till the date of payment of taxes by the deductee-assessee or the liability for penalty under Section 271-C of the Income Tax Act".

The last sentence makes it clear that even if the deductee-assessee has paid the tax dues, it would not alter the liability to charge interest under Section 201(1A) till the date of payment of taxes by the deductee-assessee. It is further held that the same would not even affect the liability for penalty under Section 271C. Thus, even prior to the amendment on 1st July, 2012, the liability to pay interest under Section 201 (1A) was there even in cases where the deductee-assessee had paid the tax dues.

12. This was also the view of a Division Bench of the Madras High Court in Commissioner of Income Tax v. Ramesh Enterprises [2001] ITR 465. The assessee had not deducted the tax at source in respect of interest paid by it to its sister concern. Penalty was, therefore, levied under Section 201(1A). The question that arose was whether the Tribunal was right in holding that it was not a fit case for levying the interest under Section 201 (1A). The Division Bench has held as follows:-

"5. The provision requiring deduction of tax on interest payment does not make the duty to effect deduction contingent upon the assessee's valuation of the likely liability for tax of the recipient of interest payment. It is only in cases where the recipients of interest is in a position to file any certificate or declaration to show that the person's total income is below the taxable limit that the tax on the interest payment made to such person is not to be deducted. In all other cases, it must be deducted as required under section 195 of the Act.

6. It is not the convenience of the assessee, and its assessment of the likely extent of the liability for payment of interest of the recipients of the interest, that determines the extent of the assessee's obligation to deduct tax at source on the interest paid by it. The provision requiring deduction of tax at source on interest payment is applicable to all persons paying such interest and it is not left to the

individual assessee to decide the extent of compliance that it will make with regard to the obligation imposed by the statutory provision.

7. The obligation to deduct tax at source is imposed with a view to ensure that on an interest payment made in respect of which tax is required to be deducted at source, the State promptly receives the amount so required to be deducted. The provision providing for penalty is to ensure that persons who are required to deduct tax at source in fact comply with that provision and remit the amount of tax to the Government. The person who pays the interest at the time interest is paid, is not in any way concerned with the extent of the liability for tax of the recipients except in cases where the recipients furnish the requisite declaration or certificate to show that the recipient's income is below the taxable limit. No such declaration was filed with the assessee by either of the two sister concerns.

8. They could not have filed any such declaration, having regard to the substantial amount received by them as income during these assessment years, on which they have been assessed to tax.

9. The fact that the recipients pay advance tax is not an excuse for not deducting the tax at source. It is for the recipients of the interest payment to claim refund of the amount after such refund is found to be due after the assessment is made."

We are in respectful agreement with the judgment and would only add a few words of our own.

13. The language of Section 201 is clear and unqualified. It indeed does not permit an assessee to decide for itself what the liability of the deductee-assessee is or is likely to be. That is a matter for the assessing officer who assesses the returns of the deductee-assessee. It is in fact not even possible for him to do so. He cannot ascertain with any degree of certainty as to the financial position of the deductee-assessee. A view to the contrary would enable an assessee to prolong the matter indefinitely. If accepted, it may even entitle the assessee to contend that it is not liable to pay interest till the finalisation of the assessment of the deductee-assessee. This could never have been contemplated by the Legislature. The language of Section 201 does not even suggest such an intention.

14. Even if the assessee is in a position to ascertain the tax liability of the deductee-assessee, it would make no difference for the reasons already stated. The section does not distinguish between cases where an assessee is in a position to determine the tax liability of the deductee-assessee and cases where it is not in a position to do so. This view is supported by the following further observations of the Madras High Court in the above judgment: -

"10. The Tribunal was clearly in error in accepting the case pleaded for the assessee that it had no duty to pay tax at source solely on the ground that one of its sister concerns had filed a loss return and the other sister concern had

claimed refund. The concern which had filed the loss return was at the time of assessment found liable to pay tax and the concern which had claimed refund at the time of original assessment was found not entitled to the refund, though such refund was directed in appeal.

The assessee had a duty to deduct tax at source. It apparently did not do so as payments were made to its own sister concerns and it did not wish to part with any part of that interest to the Revenue at that point of time. That however cannot be an acceptable reason for its failure to deduct tax at source and remit the same to the Government."

15. This judgment was followed by another judgment of a Division Bench of the Madras High Court in Commissioner of Income Tax v. Chennai Metropolitan Water Supply and Sewerage Board [2012] 348 ITR 530 (Mad.). It was contended that as the recipient i.e. the deductee-assessee was a loss-making entity, the question of payment of interest did not arise. The contention was negated on the basis of the judgment in Commissioner of Income Tax v. Ramesh Enterprises. Paragraphs 15 to 18 of the judgment, read as under: -

"15. As far as the present case is concerned, while the assessee had short deducted the tax under Section 195 of the Income Tax Act, it did not make good the shortfall on the ground that the payee company was a loss making company and had filed a return so. In the circumstances, the question of it further making a deduction and remitting to the State did not arise. The Circular referred to recognises the fact that once the payee remits the differential tax, the question of further recovery of the self-same sum from the payer did not arise and till the payment made by the deductee-assessee, interest would be charged.

16. Applying the said circular herein, with no liability thus arisen at the hands of the payee, the terminal point as regards the calculation of interest necessarily has to be given a meaningful interpretation. Given the fact that the interest levy is an automatic one, the determination on the ultimate liability of the payee company to pay or not to make payment being a procedural exercise has nothing to do with the liability of the assessee to deduct TDS. As such, the loss return filed by the payee company cannot be treated as a circumstance to be taken in favour of the assessee company from not applying the provisions of Section 201(1A) of the Income Tax Act. On the facts herein, the only reasonable interpretation one can give to the provision under Section 201(1A) as regards the terminal point upto which interest has to be calculated would be the date on which the return has to be filed by the payee, so that the calculation of interest under Section 201(1A) of the Income Tax Act in such case would really be meaningful.

17. In the circumstances, conforming to the object of the provisions regarding the levy of interest under Section 201(1A) of the Income Tax Act on the failure to deduct tax in accordance with Section 195 of the Income Tax Act, the starting point for the levy of interest thus to commence from the date on which the

assessee should have deducted the tax, the terminal point herein has to be taken as the date on which the payee should have filed its return, so that the calculation of interest under the said provision does not suffer any illegality.

18. As already pointed out, the payee company is stated to have filed a loss return. Nevertheless, this fact needs to be verified by the Assessing Officer and if it is found to be so, the question of further recovery from the hands of the assessee company herein does not arise - vide (2007) 293 ITR 226 (Hindustan Coca Cola beverage P. Ltd. v. Commissioner of Income-Tax). However, as far as levy of interest is concerned, it being an automatic one, the order of the Tribunal merits to be set aside as far as this aspect of the question is concerned. Accordingly, the assessment order regarding levy of interest has to undergo necessary modification to the effect that interest under Section 201(1A) of the Income Tax Act has to be calculated from the date on which tax should have been deducted to the date on which the payee should have filed its return under the provisions of the Income Tax Act. Accordingly, both the Tax Cases stand disposed of. No costs."

We are in respectful agreement with these observations as well. In particular, we agree with the judgment insofar as it holds that the terminal point has to be taken as a date on which the payee/deductee should have filed returns. Thus, even before and de hors the amendment of 1st July, 2012, the assessee would be liable to pay interest under Section 201(1A).

16. The amendment which introduced inter-alia the first proviso to Section 201(1) is of no assistance to the assessee either. We would apply the ratio of the judgment in Commissioner of Income Tax v. Chennai Metropolitan Water Supply and Sewerage Board to the proviso to sub section (1A) of Section 201.

17. Mr. Goyal's reliance upon Section 197 of the Act is well founded. Section 197 reads as under: -

"Certificate for deduction at lower rate. 197. - (1) Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of section 194C, the Assessing Officer is satisfied that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.

(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.

(2A) The Board may, having regard to the convenience of assesseees and the

interests of revenue, by notification in the Official Gazette, make rules specifying the cases in which, and the circumstances under which, an application may be made for the grant of a certificate under sub-section (1) and the conditions subject to which such certificate may be granted and providing for all other matters connected therewith."

18. Section 197 militates against the contentions on behalf of the assessee that the assessee is entitled to assess the liability to tax of the deductee-assessee. Section 197 establishes that where the deductor-assessee wishes to reduce its liability on account of a possible absence of liability or a reduced liability of the deductee-assessee, the deductee-assessee must obtain a certificate. In the event of such a certificate being issued in favour of the deductee-assessee, the person responsible for paying the income i.e. the deductor-assessee would be entitled to deduct tax at the rates specified in such certificate or deduct no tax as the case may be.

Section 197 thus, militates against the deductor-assessee unilaterally not paying or paying an amount less than the specified amount of TDS. It militates against the deductor-assessee deciding for itself the deductee-assessee's liability to tax.

19. Sub section (1A) as amended by Finance Act, 2010 with effect from 1st July, 2010 is applicable in respect of the assessment year 2010-11. The section as amended also does not make any difference to the assessee's liability to pay interest.

20. Mr. Agarwal's reliance upon paragraphs 90 and 91 the judgment of the Supreme Court in Commissioner of Income Tax, New Delhi v. Eli Lilly and Company (India) Private Ltd. (2009) 15 SCC 1 is not well founded.

In Eli Lilly's case (supra) the respondent-assessee was a joint venture in India and engaged in manufacturing and selling of pharmaceutical products. A foreign company had seconded four expatriates etc. to the respondent who was, therefore, the tax deductor-assessee. The AO held the respondent to be an assessee in default under Section 201 for failure to deduct tax at source from out of the home salary paid by the foreign company outside India to the four expatriates. The question was whether the TDS provisions were applicable to payments made abroad by the foreign company which payments were made for income chargeable under the head "salary" and which are made to the expatriates who have rendered services in India. The Supreme Court held as follows: -

"88. From the above analyses two conclusions flow. Firstly, it cannot be stated as a broad proposition that the TDS provisions which are in the nature of machinery provisions to enable collection and recovery of tax are independent of the charging provisions which determine the assessability in the hands of the assessee employee. Secondly, whether the home salary payment made by the foreign company in foreign currency abroad can be held to be "deemed to accrue or arise in India" would depend upon the in-depth examination of the facts in

each case. If the home salary/special allowance payment made by the foreign company abroad is for rendition of services in India and if as in the present case of M/s. Eli Lilly & Co. (India) (P) Ltd. no work was found to have been performed for M/s. Eli Lilly Inc., Netherlands then such payment would certainly come under Section 192(1) read with Section 9(1)(ii).

89. As stated above, the post-survey operations revealed that no work stood performed for the foreign company by the four expatriates to the joint venture company in India and that the total remuneration paid was only for services rendered in India. In such a case the tax deductor-assessee was statutorily obliged to deduct tax under Section 192(1) of the 1961 Act."

What the Supreme Court, therefore, considered was the liability to deduct tax at all. The Supreme Court was not concerned with the question whether a person who fails to deduct tax at source though liable to do so is not deemed to be an assessee in default for the purpose of the first proviso to Section 201 and is, therefore, absolved of the liability to pay interest under sub section (1A) of Section 201. It is in this context that the observations of the Supreme Court in paragraphs 90 and 91 relied upon by Mr. Agarwal must be read. We do not read these observations to be contrary to the view we have taken for the Supreme Court did not deal with the same at all. Paragraphs 90 and 91 of the judgment read as under: -

"90. A perusal of Sections 201(1) and 201(1-A) 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, interest under Section 201(1-A) 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 principal liability is of the person who is taxable.

91. A bare reading of Section 201(1) shows that interest under Section 201(1-A) read with Section 201(1) can only be levied when a person is declared as an assessee-in-default. For computation of interest under Section 201(1-A), there are three elements. One is the quantum on which interest has to be levied. Second is the rate at which interest has to be charged. 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 Section 201(1-A) itself. Sub-section (1-A) specifies "on the amount of such tax" which is mentioned in subsection (1) wherein, it is the amount of tax in respect of which the assessee has been declared in default."

It would be convenient, however, to reproduce paragraph 92 as well. It reads as under: -

"92. The object underlying Section 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 above-stated period only. It may be clarified that the date of payment by the employee concerned can be treated as the date of actual payment."

It is true that in the first sentence of paragraph 91 the Supreme Court held that interest under Section 201(1A) can only be levied when a person is declared as an assessee in default. Mr. Agarwal relied upon this sentence and invited us to read the same with the first proviso to sub section (1) of Section 201 which provides that the persons mentioned therein shall not be deemed to be an assessee in default in respect of such tax if he has complied with the conditions stated in clauses (i) to (iii). It is necessary, however, to note the first sentence in paragraph 90 which states that sub sections (1) and (1A) of Section 201 are without prejudice to each other which 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. Indeed sub section (1A) as it stood even prior to its amendment with effect from 1st July, 2010 opens with the words "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....." The words "such person" in sub section (1A) refers to the persons who are liable to deduct the tax. The words "such person" include those persons who are not to be deemed to be assesseees in default under the first proviso to sub section (1) of section 201. The ambit of the words "such person" was not meant to be curtailed by excluding therefrom persons who are not deemed to be assesseees in default in the event of the conditions in the proviso being complied with. That exclusion is for a different purpose altogether. It is only with respect to the liability to deduct tax at source at all.

21. Their exclusion from the ambit of the words "such person" is not warranted for another reason. Sub section (1) considers the persons mentioned therein "to be deemed to be an assessee in default in respect of such tax". The words "such tax" refer to the liability for the principal sum of the tax. The liability for interest is provided for separately in sub section (1A). The language of section 201 draws a distinction between tax and interest thereon. The proviso only specifies that in the event of the conditions of clauses (i) to (iii) thereof being complied with the person referred to in the main part of sub section (1) shall not be deemed to be an assessee in default "in respect of such tax". The proviso does not specify that the persons referred to in the main part of sub section (1) shall not be deemed to be assesseees in default in respect of the interest on such tax.

22. That the Legislature drew a distinction in section 201 between tax and interest is also clear from the definition of the word "tax" in Section 2(43), which reads as under: -

"Definitions. 2. -

(43) "tax" in relation to the assessment year commencing on the 1st day of April, 1965, and any subsequent assessment year means income-tax chargeable under the provisions of this Act, and in relation to any other assessment year income-tax and super-tax chargeable under the provisions of this Act prior to the aforesaid date and in relation to the assessment year commencing on the 1st day of April, 2006, and any subsequent assessment year includes the fringe benefit tax payable under section 115WA."

The definition of tax under Section 2(43) does not include interest. Even otherwise, considering the language of Section 201, it would have made no difference for tax and interest are provided for and dealt with separately. Thus, the liability of a person to pay interest under sub section (1A) as the main part stood prior to the amendment by Finance Act, 2010 w.e.f. 1st July, 2010 or upon the said amendment makes no difference. The only thing is that the liability to pay interest would be in accordance with sub section (1A) as it stood at the relevant time and for the assessment year concerned.

23. This view is not contrary to the observations of the Supreme Court in *Eli Lilly's* case (*supra*) in the first sentence of paragraph 91 that interest can only be levied when a person is declared as an assessee in default. In other words, the Supreme Court held that the liability to deduct the tax arises only in a case where the taxable income falls within the purview of the relevant section requiring the deduction of tax at source. The issue that we have just decided was neither raised before nor decided in *Eli Lilly's* case (*supra*). In *Eli Lilly's* case (*supra*) the AO held that the respondent who was the tax deductor-assessee was an assessee in default under Section 201 for failure to deduct tax at source from out of the home salary paid by the foreign company outside India and levied interest under sub section (1A) of Section 201. The Tribunal and the Supreme Court held that the tax deductor was not under a statutory obligation to deduct tax at source at all on the home salary paid by the foreign company under Section 192 as it was not paid by the joint venture company in India and that consequently the joint venture was not an assessee in default under Section 201(1).

24. In these circumstances, the judgment of the Tribunal upholding the assessee's alternative contention is set aside.

As we mentioned earlier, the Tribunal only considered the assessee's alternative contention and having upheld the same did not consider the assessee's main contention namely that the provisions of Section 194C are not applicable at all. It is necessary, therefore, to afford the assessee an opportunity of raising that contention before the Tribunal. In the event of same being upheld, there would be no question of the assessee being liable to pay interest.

25. In the circumstances, the question of law is answered in favour of the appellant-revenue and against the respondent-assessee. The impugned order of the Tribunal is set aside. The appeal is allowed. The matter is, however,

remanded for a decision on the assessee's main contention that Section 194C is not applicable.