
(2004) 08 KL CK 0010

In the High Court Of Kerala

Case No : IT Appeal No's. 149, 156, 164, 169 and 211 of 2000 24 August 2004

Ernakulam District Co-operative Bank

APPELLANT

Vs

ACIT

RESPONDENT

Date of Decision : 24-08-2004

Acts Referred:

Income Tax Act, 1961 — Section 192, 201

Citation : (2005) 142 TAXMAN 98

Hon'ble Judges : S. Sankarasubban, J; A.K. Basheer, J

Bench : Full Bench

Advocate : T.M. Sreedharan, N. Unnikrishnan and Smt. M. Lalitha Nair, George K. George,, for the appearing parties;

Judgement

Sankarasubban, J.

These appeals are filed by the same assessee for different assessment years and the common question arises in all these cases and hence, they are heard together. The assessee is the Ernakulam District Co-operative Bank Limited engaged in the business of banking. The assessee is a deductor of tax within the meaning of section 192 of the Income Tax Act, 1961. During the previous years relevant to the assessment years 1986-87, 1987-88, 1988-89, 1989-90 and 1990-91, the assessee deducted tax at source from the salary paid to the employees on regular basis. Subsequently, the Income Tax Officer noted that no tax had been deducted or paid on the salary advance paid to the employees. The Income Tax Officer (TDS), therefore, passed two separate proceedings u/s 201(1) dated 16-1-1992 and 22-4-1992 demanding Rs. 94,276 as the total tax deductible on the salary advance for 1986-87. The assessee paid the above sum of Rs. 94,276 for 1986-87 on 10-3-1992 and 20-6-1992. The appeal against the order u/s 201(1) was dismissed by the Commissioner (Appeals) and the matter has become final. Similar demands for the tax deductible at source on salary advance were made for 1987-88, 1988-89, 1989-90 and 1990-91 assessments and appeals against those years were also dismissed.

2. For the failure to deduct and pay tax as required u/s 192, a show-cause notice was issued on 18-1-1993 proposing to levy of interest u/s 201(1A). The assessee filed a written reply dated 9-2-1993 explaining that no tax was deductible at source on advances given to employees. According to the assessee, the amount paid was not in the nature of adjustable advance. The assessee also explained that there were specific agreements with the employees for recovering the advances, that the assessee was under the bona fide belief that the payments were not salary advance on which tax was deductible under the Income Tax Act. The assessee objected to the levy of interest u/s 201(1A) and contended that the above section is attracted only where no tax has been deducted at source or where there was failure to pay the tax deducted as required by the Act.

3. The Income Tax Officer passed identical orders u/s 201(1A) of the Income Tax Act on 24-9-1993 for the assessment years 1986-87 to 1990-91 rejecting the explanation given by the assessee and levying interest. Appeals filed before the Commissioner (Appeals) were allowed and the levy of interest u/s 201(1A) was cancelled. The First Appellate Authority found that the assessee has deducted the tax from the salary of the employees on the salary income honestly estimated by it and had also paid the tax as required. Against the order passed by the Commissioner (Appeals), appeals were filed before the Tribunal. The Tribunal set aside the order passed by the Appellate Authority and restored the order passed by the assessing officer. It is against that these appeals are filed.

4. We heard learned counsel for the appellant and learned counsel for the respondents.

5. Learned counsel for the appellant submitted that the appellant had deducted amount from the salary of all employees, who were assessable to tax. The appellant was under the bona fide belief that what was paid was only advance. It was not necessary to deduct because that amount was given on condition that it will be recovered. In these circumstances, according to him, it cannot be said that the appellant intentionally refused to deduct tax. Learned counsel for the respondents submitted that insofar orders have been passed to deduct tax with regard to the amount paid as advance, the appellant cannot now say that the action taken u/s 201(1A) is not proper. Section 201(A) of the Income Tax Act says thus

"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 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 such tax was deductible to the date on which such tax is actually paid".

Learned counsel for the assessee submitted that sub-section (1A) of section 201 can be invoked only if it is found that the assessee had acted mala fide. In this case, the assessee acted bona fide and hence, this section should not be invoked

against it. We are not able to appreciate this argument.

6. In *Pentagon Engineering Pvt. Ltd. Vs. Commissioner of Income Tax*, , it was held as follows: "use of the word "shall" in section 201(1A) made the liability to pay interest in the circumstances mentioned, mandatory and there was no pre-condition of consideration of "reasonable cause" for non-payment in time of tax deducted u/s 192. Therefore, the Income Tax Officer was not required to take into consideration the "reasonable cause" for non-payment of taxes deducted u/s 192". In *CIT v. Prem Nath Motors (P) Ltd.* 170 CTR 424 (Delhi), it was held as follows :

"The levy of interest u/s 201(1A) is of a compensatory measure for withholding tax which ought to have gone to the exchequer. The provision makes it clear that the levy is mandatory. It is true that the use of the expression shall is not always determinative of the fact whether a provision is directory or mandatory in nature. But the context in which the expression shall is used in section 201(1A) makes it unambiguously clear that the levy is mandatory. The purpose of the levy is to claim compensation on the amount which ought to have been deducted and deposited and has not been done. The use of the word shall raises a presumption that the particular provision is imperative. But this prima facie inference may be regarded by other considerations such as the object and scope of the enactment and consequences flowing from such construction. Liability to pay interest arises by operation of law, being automatic. Looking at the nature of levy, it is clear that it is compensatory in character and not in the nature of penalty...." (p. 424)

To the same effect is the case reported in *Commissioner of Income Tax Vs. Dhanalakshmy Weaving Works*, . In another Division Bench of this court of which one of us was a party (Sankarasubban, J) in *Commissioner of Income Tax Vs. K.K. Engineering Co.*, , it was held that the levy of interest u/s 201(1A) is automatic.

7. In the above view of the matter, we are of the view that the order passed by the Tribunal is correct and all the appeals are dismissed.