

(2016) 08 AHC CK 0260
In the Allahabad High Court
Case No : Writ Tax No. 870 of 2006

Ghaziabad Development Authority

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 03-08-2016

Acts Referred:

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

Citation : (2017) 3 ADJ 420

Hon'ble Judges : Sudhir Agarwal and Kaushal Jayendra Thaker, JJ.

Bench : Division Bench

Advocate : Dhruv Agarwal and Dev Kant Pandey, Advocates, for the Petitioner in Writ Tax No. 870 of 2006.; A.N. Mahajan, B. Agrawal, D. Awasthi, G. Krishna and S. Chopra, S.C, for the Respondent in Writ Tax No. 870 of 2006.; Dhruv Agarwal and Dev Kant Pandey, Advocates

Final Decision : Allowed

Judgement

1. Heard Sri Dhruv Agarwal for petitioner, Sri Krishna Agrawal for respondent no.1, Sri Manish Goyal for respondent nos. 2 and 3, and Sri Shambhu Chopra for respondent No.5.

2. In both these writ petitions, dispute relates to validity of orders passed by Income Tax Officer (TDS and Survey) (hereinafter referred to as "ITO (TDS)") in purported exercise of powers under Section 201 (1) of Income Tax Act, 1961 (hereinafter referred to as "Act, 1961") demanding amount of tax deductible at source (hereinafter referred to as "TDS") and interest under Section 201 (1A) in respect to Financial Year 2000-01 (Assessment Year 2001-02) and Financial Year 2001-02 (Assessment Year 2002-03).

3. The facts in brief giving rise to present dispute are as under.

4. Petitioner ? Ghaziabad Development Authority (hereinafter referred to as "GDA") is a Statutory body constituted under provisions of U.P. Urban Planning and Development Act, 1973 (hereinafter referred to as "Act, 1973") for the

purpose of undertaking planned development within area of Ghaziabad and others as notified by State Government while constituting GDA.

5. Petitioner in order to provide housing accommodation etc. borrows funds from various institutions from time to time. It also pays interest on said borrowed sum. For disputed period, petitioner paid interest to "Punjab National Bank Housing Finance Limited" (hereinafter referred to as "PNBHFL") and "Life Insurance Corporation Housing Finance Limited" (hereinafter referred to as "LICHFL") as follows:-

Sl.No.

Financial Year/ Assess. Year

Amount of interest paid to lichfl

Amount of interest paid to pnbhfl

1

2000-01/ 2001-02

Rs.8,13,07,509/ -

Rs.2,05,11,232/ -

2

2001-02/ 2002-03

Rs.6,64,22,867/ -

Rs.1,67,00,556/ -

6. GDA did not deduct any TDS on the aforesaid amount of interest paid to aforesaid two bodies. ITO (TDS) issued notice dated 13.2.2006 to GDA to show cause, why GDA be not treated as "assessee in default" and order under Section 201 (1) and (1A) of Act, 1961, be not passed. Petitioner vide reply dated 3.3.2006 informed ITO (TDS) that no TDS was deductible under Section 194A hence GDA cannot be held to be an "assessee in default" under Section 201 (1).

7. ITO (TDS) thereafter passed orders dated 5.4.2006 in respect to both assessment years demanding amount of TDS as tax, and, interest under Section 201 (1A) and also surcharge to the following effect:-

Sl. No.

Assess. Year

Amount of tds

Surcharge

Amount of interest

Total

1

2001-02

Rs.2,03,63,740/ -

Rs.1,71,80,520/ -

Rs.26,47,281/ -

Rs.4,01,91,541/ -

2

2002-03

Rs.1,66,24,683/ -

Rs.3,32,496/ -

Rs.99,90,446/ -

Rs.2,69,47,625/ -

8. Petitioner has also stated that in respect to assessment orders passed by Assessing Officer for disputed period of assessment in respect to PNBHFL and LICHFL, tax on the amount of interest received by both bodies was already paid by them and in support thereof copy of assessment orders of both aforesaid PNBHFL and LICHFL have been filed.

9. Respondents have filed counter-affidavit stating that petitioner was under statutory obligation of deduction of TDS under Section 194A on the amount of interest paid to PNBHFL and LICHFL. Since no TDS was deducted and deposited with the department, therefore, competent authority was entitled to demand amount of TDS and interest thereon from GDA in exercise of powers under Section 201 of Act, 1961.

10. The rival submissions advanced by both the parties have given rise to following questions:-

(i) Whether GDA was under an obligation to deduct TDS under Section 194A?

(ii) Whether non-deduction of TDS was bona fide and for valid reasons?

(iii) Whether ITO (TDS) had any power to demand amount of TDS from petitioner when principal assessee i.e. PNBHFL and LICHFL to whom amount of interest was paid, had themselves paid due tax on said amount of interest.?

(iv) Whether ITO (TDS) was justified in imposing liability of interest under Section 201 (1A) of Act, 1961?

11. Section 194A(1) reads as under:-

"194A. (1) Any person, not being an individual or a Hindu undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rates in force.

Explanation. - For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly."

(emphasis added)

12. Sub-section (3) of Section 194A provides circumstances where TDS is not deductible, and, at the relevant time, it read as under:-

"(3) The provisions of sub-section (1) shall not apply -

(i) where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year by the person referred to in sub-section (1) to the account of, or to, the payee, does not exceed five thousand rupees:

Provided that in respect of the income credited or paid in respect of -

(a) time deposits with a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act); or

(b) time deposits with a co-operative society engaged in carrying on the business of banking;

(c) deposits with a public company which is formed and registered in India with the main object of carrying on the business of providing long-term finance for construction or purchase of houses in India for residential purposes and which is eligible for deduction under clause (viii) of sub-section (1) of section 36,

the aforesaid amount shall be computed with reference to the income credited or paid by a branch of the banking company or the cooperative society or the public company, as the case may be;

(ii) [***]

(iii) to such income credited or paid to -

(a) any banking company to which the Banking Regulation Act, 1949 (10 of 1949), applies, or any co-operative society engaged in carrying on the business of banking (including a co-operative land mortgage bank), or

(b) any financial corporation established by or under a Central, State or Provincial Act, or

(c) the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956 (31 of 1956), or

(d) the Unit Trust of India established under the Unit Trust of India Act, 1963 (52 of 1963), or

(e) any company or co-operative society carrying on the business of insurance, or

(f) such other institution, association or body or class of institutions, associations or bodies which the Central Government may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette;

(iv) to such income credited or paid by a firm to a partner of the firm;

(v) to such income credited or paid by a cooperative society to a member thereof or to any other co-operative society;

(vi) to such income credited or paid in respect of deposits under any scheme framed by the Central Government and notified by it in this behalf in the Official Gazette.

(vii) to such income credited or paid in respect of deposits (other than time deposits made on or after the 1st day of July, 1995) with a banking company to which the Banking Regulation Act, 1949 (10 of 1949) applies (including any bank or banking institution referred to in section 51 of that Act);

(viiia) to such income credited or paid in respect of -

(a) deposits with a primary agricultural credit society or a primary credit society or a co-operative land mortgage bank or a co-operative land development bank;

(b) deposits (other than time deposits made on or after the 1st day of July, 1995) with a co-operative society, other than a co-operative society or bank referred to in sub-clause (a), engaged in carrying on the business of banking;

(viii) to such income credited or paid by the Central Government under any provision of this Act or the Indian Income-tax Act, 1922 (11 of 1922), or the Estate Duty Act, 1953 (34 of 1953), or the Wealth-tax Act, 1957 (27 of 1957), or the Gifttax Act, 1958 (18 of 1958), or the Super Profits Tax Act, 1963 (14 of 1963), or the Companies (Profits) Surtax Act, 1964 (7 of 1964), or the Interest-tax Act, 1974 (45 of 1974).

Explanation. - For the purposes of clauses (i),(vii) and (viiia), "time deposits" means deposits (excluding recurring deposits) repayable on the expiry of fixed periods."

(emphasis added)

13. Learned counsel for Revenue submitted that PNBHFL and LICHFL are neither

banking companies to which Banking Regulations Act, 1949 (hereinafter referred to as "BRA, 1949") is applicable nor Financial Corporation established by or under a Central, State or Provincial Act nor LIC Housing Finance Limited can be said to be LIC of India itself established under LIC Act, 1956, nor is a company carrying on business of insurance and both were not covered by any of the exception under sub-section (3), therefore, liability of deduction of tax under Section 194A(1) was clear and unambiguous, still GDA made default in not deducting TDS on huge amount of interest paid to aforesaid two companies hence it is an "assessee in default" under Section 201 (1) of Act, 1961.

14. After going carefully through provisions of Section 194A (1) & (3), we are satisfied that neither PNBHFL nor LICHFL comes within any of the exceptions in respect where to TDS deductible under sub-section (1) of Section 194A was excepted. Therefore, GDA was in default when it did not deduct TDS on the amount of interest paid to these two companies. Issue 1 is answered in affirmative.

15. However, matter does not rest here for the reason that Section 201 takes care where some default has been committed in deduction of TDS. The liability or consequences of failure in deduction of TDS is neither unlimited nor undefined nor unspecific. To appreciate it, we may refer to Sections 200, 201 and 202 of Act, 1961, as they stood at the relevant time:-

"200. Any person deducting any sum in accordance with the provisions of sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194I, section 194J, section 194K, section 194L, section 195, section 196A, section 196B, section 196C and section 196D shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs.

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 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, 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 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 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.

(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).

202. The power to recover tax by deduction under sections 192 to 194, section 194A, section 194B, section 194BB, section 194C, section 194D, section 194E, section 194EE, section 194F, section 194G, section 194H, section 194I, section 194J, section 194K, section 194L, section 195, section 196A, section 196B, section 196C and section 196D shall be without prejudice to any other mode of recovery."

(emphasis added)

16. Section 200 requires a person, deducting any sum under Section 194A and others, to pay the same within prescribed time to the credit of Central Government or as Board directs. Therefore, if TDS has been deducted, it is more serious matter, if amount of TDS is kept by person, who has deducted it and fails to deposit same with income tax department.

17. Here is not a case where TDS was deducted by GDA but not paid within time with income-tax department. Here is a case where no TDS was deducted under Section 194A(1) at all.

18. Sub-section (1) of Section 201, by applying fiction, declares that the person who fails to deduct tax at source or deducted but not deposited as required under Act, 1961, is deemed to be an "assessee in default" in respect of tax without prejudice to any other consequence which he or it may incur. Therefore, sub-section (1) declares such a person, an "assessee in default", in respect of tax, if TDS is not deducted, and, if deducted, but not paid.

19. Section 201 however itself provides two consequences, i.e. penalty under Section 221; and interest under Sub-section (1A) of itself. Proviso to sub-section (1), however, exempts a person from liability of penalty under Section 221 under certain conditions. It takes care of a person, who has committed default in deduction of TDS. Power has been conferred upon Assessing Officer to impose penalty but provision says that no such penalty shall be charged from such person, who is deemed to be an "assessee in default" in respect of tax, unless Assessing Officer is satisfied that such failure of deduction in tax is without good and sufficient reasons. After declaring a person, who has failed to deduct tax, deemed "assessee in default", by virtue of sub-section (1) of Section 201, the Statute, though provided for imposition of penalty upon such person under Section 221 but a safeguard is also provided in section 201 itself that such penalty shall not be leviable unless a positive finding is recorded by Assessing Officer that failure to deduct tax was without good and sufficient reasons. This satisfaction is a jurisdictional issue for the purpose of imposing penalty upon

such defaulter. In other words the language of Statute makes it clear that failure to deduct tax, even if render such defaulter, an "assessee in default", still such default will be treated to have been committed for valid and good reasons, unless otherwise recorded by Assessing Officer for the purpose of imposing penalty.

20. In the present case, we are not informed that any procedure for imposition of penalty under Section 221 has been initiated by Assessing Officer against GDA meaning thereby we can safely assume that Assessing Officer has not found any ground to hold that default on the part of GDA in non deduction of TDS was without good and sufficient reasons.

21. Then comes sub-section (1A) of Section 201 which empowers income-tax department to demand interest on the amount of such tax i.e. tax which was deductible but not deducted or deducted but not deposited. Liability of interest is confined to the period on which date tax was deductible to period when tax was/ is actually paid. Meaning thereby if tax has actually been paid, may be by "assessee in default" or by assessee to whom interest was actually paid, but TDS was not deducted, liability of interest under sub-section (1A) will be confined only to the period of date of deduction of TDS or when it was deductible, and date of actual payment of tax, irrespective of fact, who has paid tax to department. The reason is quite obvious. Tax deducted at source is not a tax or income of person who is deducting tax at source while making payment. Deduction at source is only to secure tax payable to Government. It is not a fresh levy. Income remains same. There may be occasions when person to whom payment is made, may be exempted from payment of tax. Deduction of tax at source is not a liability of tax under Act. It is only a mode of recovery of tax deducted. Section 201, by deeming fiction, failure to deduct tax by a person declares him or it an "assessee in default", so as to impose penalty and charge interest. But if tax is actually paid, it is not to be realized again from such person liable to deduct tax at source. In fact, Section 201 itself no where authorizes any authorities of Tax Department to demand or realize amount of TDS from the person who has failed to deduct or if deducted failed to deposit with Government.

22. We also find substance in the submission of learned counsel for petitioner that any other interpretation would make such demand, a case of double taxation by Revenue in respect to same transaction. On income of interest received from GDA by PNBHFL and LICHFL, they have already paid due tax to department. If under impugned orders, again tax is allowed to be recovered from GDA, it will amount to realizing tax twice, which is not permissible in law.

23. This question, we find, has specifically been considered by some courts. In CIT v. Manager, M.P. State Co-operative Development Bank Ltd. (1982) 137 ITR 230 (MP) there was a default in deduction of TDS tax on salary paid to employee by the employer. Regular assessment of employee was completed and he paid the entire tax due. Court, however, held that principal liability for payment of income-tax is on that person who receives income. Chapter XVII of Act 1961,

provides for deduction of tax at source. Under Section 201(1) Income Tax Officer could not demand tax from the employer in respect of alleged default in deduction of TDS when due tax was already paid by employee and his regular assessment was completed.

24. Again a similar controversy arose in CIT, Bhopal v. Divisional Manager, New India Assurance Co. Ltd. (1983) 140 ITR 818 (MP) wherein there was a default on the part of employer in deduction of TDS on salary paid to employee. Regular assessment of employee was completed and whatever amount of tax was found due, paid by him. ITO (TDS), however, demanded further tax from employer in respect of tax, short deducted, relating to such employee. Court negated the said demand of ITO (TDS) and held that it had no jurisdiction under Section 201 of Act, 1961 to demand further tax from employer in respect of tax, short deducted, when regular assessment of employee was completed in respect of him. There was no jurisdiction under Section 201 to demand further tax from employer in respect of tax, short deducted, relating to such employer. This case has been followed and reiterated in CIT v. Life Insurance Corporation (1987) 166 ITR 191 (MP).

25. Similar view was taken by Calcutta High Court in Grindlays Bank Ltd. v. CIT (1992) 193 ITR 457 (Cal.) wherein Court said that if tax has been realized once, it cannot be realized again, but that does not mean that assessee will not be liable for payment of interest or any legal consequence for its failure to deduct or to pay in accordance with law to Revenue.

26. In CIT v. Dhanalakshmy Weaving Works (2000) 245 ITR 13 (Ker), Court read Section 201 of Act 1961 in the manner that sub-section (1) talks of levy of penalty for non-deduction or failure in deposit of deducted TDS while sub-section (1A) deals with levy of interest. It also held that sub-section (1A) which talks of interest is mandatory provision and if there is default in deduction of TDS, interest shall be leviable.

27. Learned counsel for Revenue also could not dispute that recently Amritsar Bench of Income Tax Appellant Tribunal has followed the same view in M.S. Chahal v. Income Tax Officer (2004) 82 ITJ 841 (Asr) decided on 31.12.2003 and that judgment has become final. Tribunal has found that deduction of tax at source is different from tax on total income. Any amount of TDS is liable to be adjusted against actual demand. Since demands of recipient (in that case contractors) have been finalized and there remains no tax liability as per Revenue's own version, no recovery can be made from Assessee in this regard to the amount of which assessee failed to deduct, as that will amount to realization of tax, twice.

28. Under Section 201, person liable to deduct TDS, if has failed to do so, by a legal fiction, stands declared an "assessee in default" but Section 201 by itself imposes only liability of interest under sub-section (1A) and penalty under sub-section (1). There is no provision under Section 201 which permits any Income

Tax Authority to demand amount of TDS or tax from such person unless and until a situation contemplated by sub-section (2) of Section 201 is found to exist, meaning thereby if tax is deducted but not paid at all. In such a case, amount of tax as well as interest payable under sub-section (1A) shall be a charge upon assets of such "assessee in default" but not otherwise, and not more than that.

29. The issue in our view has been finally settled in Hindustan Coca Cola Beverage Pvt. Ltd. v. CIT (2007) 293 ITR 226 (SC). Therein M/s. Hindustan Coca Cola Beverage Pvt. Ltd. (hereinafter referred to as "HCCBPL") entered into an agreement with M/s. Pradeep Oil Corporation for use of their premises for receipt, storage and dispatch of goods belonging to aforesaid company. It also deducted tax under Section 194C on warehousing charges paid to M/s. Pradeep Oil Corporation treating it to be a contractual demand hence deduction of TDS admissible under Section 194C was 2%. Assessing Officer, however, took the view that warehousing charges are in the nature of rent as defined in explanation to Section 194 of Act, 1961 therefore tax ought to have been deducted 20% and not 2% under Section 194C as that was not applicable. Assessing Officer held HCCBPL as "assessee in default" and accordingly demanded amount of tax which was deductible and interest under Section 201 (1A). In appeal preferred by HCCBPL, Commissioner upheld the view taken by Assessing Officer that HCCBPL was "assessee in default" in respect of amount of short deduction on tax and liable to pay interest under Section 201 (1A). Further appeal was dismissed by High Court also. HCCBPL then submitted a rectification application before Tribunal stating that it has no objection regarding levy of interest under Section 201 (1A) but since warehouse owner namely M/s. Pradeep Oil Corporation was assessed on its income and due tax was recovered by Revenue from it, therefore no further tax towards alleged shortage of TDS could have been demanded from HCCBPL and this aspect was not considered earlier hence there is mistake. Tribunal allowed this application of HCCBPL and held that amount of tax was not leviable from M/s. Pradeep Corporation by Assessing Officer. Revenue came in appeal before High Court which was allowed by holding that Tribunal could not have reopened the matter. Supreme Court referring to circular No. 275/201/95 - IT(B) dated 29.01.1997 issued by Central Board of Direct Taxes held that no recovery on tax could have been made from HCCBPL and set aside the judgment of High Court. Para 10, 11 & 13 of the judgment, referring to Circular dated 29.01.1997, read as under:-

"10. Be that as it may, the circular No. 275/201/95 - IT(B) dated 29.01.1997 issued by 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 deducted-assessee. However, this will not alter the liability to charge interest under Section 201(1A) of the Act till the date of payment of taxes by the deducted-assessee or the liability for penalty under Section 271C of the Income-tax Act."

11. In the instant case, the appellant had paid the interest under Section 201(1A) of the Act and there is no dispute that the tax due had been paid by deductee-assessee (M/s Pradeep Oil Corporation). It is not disputed before us that the circular is applicable to the facts situation on hand.

13. The impugned judgment of the High Court is accordingly set aside. The appeal is allowed with no order as to costs."

30. This Court has also now sealed the issue finally in the judgment, Jagran Prakashan Limited v. The Deputy Commissioner of Income Tax (Tds) (2012) 345 ITR 288 (All). The judgment was delivered by Hon"ble Ashok Bhushan, J. (as His Lordship then was) and have answered the aforesaid question, in para 87, as under:-

"87. From the above provision, it is thus, clear that wherever the liability to pay tax was fastened on the person who failed to deduct the tax at source a specific provision was made for that purpose. In view of the forgoing discussions, we are of the considered opinion that in a case where tax has not been deducted at source, the short deducted tax cannot be realized from the deductor and the liability to pay such tax shall continue to be with the assessee direct, whose income is to be charged and a person who fails to deduct the tax at source, at best is liable for interest and penalty only. The above issues thus, are decided in favour of the petitioner."

31. In the present case, it is not disputed even by respondents that whatever tax was due on the amount of interest paid by GDA to PNBHFL and LICHFL, the same was paid by two recipient companies to Revenue. Final assessment orders in respect thereto were also passed. Income of GDA on it's own was not taxable during relevant period by virtue of Section 10 (20A) though subsequently it has been omitted.

32. So far as status of PNBHFL and LICHFL is concerned, there was some genuine doubt regarding their status. Both companies are public limited companies and subsidiaries of Punjab National Bank and Life Insurance Corporation of India. This caused some doubt whether TDS was deductible or not. However, for the purpose of adjudication of dispute in the present writ petition, we have not given any leverage or advantage to petitioner for alleged doubt and we have proceeded to decide the matter holding petitioner defaulter by violating requirement of deduction of TDS under Section 194A so as to attract action by concerned authority under Section 201 of Act, 1961.

33. In view of above, demand of tax is patently illegal and without jurisdiction.

34. Moreover, ITO (TDS) has also demanded surcharge on the amount of TDS but has failed to appreciate that tax deductible at source is different from tax on total income and in absence of any specific provision, "assessee in default" under legal fiction by virtue of Section 201(1) cannot be saddled with liability of surcharge on the amount of TDS.

35. Petitioner has also challenged vires of Section 201 of Act, 1961, but when commenced arguments, gave up this plea and stated that he is confining his challenge only to validity of orders passed by ITO (TDS), impugned in writ petitions, and same may be considered in the light of relevant provisions of Act, 1961, and matter be decided accordingly. Hence, we have not looked into vires of Section 201 since that plea has been given up.

36. In view of above discussion, impugned orders cannot be sustained. ITO (TDS) is required to find out whether there is any liability of interest on the amount of TDS deductible under Section 194A but not deducted and then from the date on which such amount was deductible and the date when actual tax was paid, to compute amount of interest payable by petitioner. In this regard, he will have to pass a fresh order.

37. In the result, both writ petitions are partly allowed. Impugned orders dated 5.4.2006 are set aside. ITO (TDS) shall pass fresh orders in the light of above directions.

38. In view of above, parties shall bear cost equally.