

(1987) 02 KL CK 0037

In the High Court Of Kerala

Case No : Income Tax R. No. 303 of 1980

Traco Cable Co. Ltd.

APPELLANT

Vs

Commissioner of Income Tax

RESPONDENT

Date of Decision : 25-02-1987

Acts Referred:

Income Tax Act, 1961 — Section 156, 195, 200, 201, 201(1)
Income Tax Rules, 1962 — Rule 30

Citation : (1987) 62 CTR 174 : (1987) 166 ITR 278

Hon'ble Judges : T. Kochu Thommen, J; K.P. Radhakrishna Menon, J

Bench : Division Bench

Advocate : M. Ramachandran, for the Appellant; P.K.R. Menon, for the Respondent

Judgement

T. Kochu Thommen, J.—The following question has been, at the instance of the assessee, referred to us by the Income Tax Appellate Tribunal, Cochin Bench :

" Whether, on the facts and in the circumstances of the case, the order passed by the Income Tax Officer u/s 201 on February 25, 1977, was barred u/s 231 of the Income Tax Act, 1961 ?"

2. During the previous year relevant to the assessment year 1973-74, the assessee paid a total sum of Rs. 45,403 to the representative of General Engineering Co. (Radcliffe) Ltd., United Kingdom, for certain services which he rendered to the assessee in India. The assessee did not deduct Income Tax on the said amount in terms of Section 195(1) of the Income Tax Act, 1961. The Income Tax Officer computed the tax payable on the said sum at Rs. 35,973, by his order dated February 25, 1977, which was purportedly made u/s 201. The assessee preferred an appeal against this order. The Appellate Assistant Commissioner, accepting the contention of the assessee, that no tax was liable to be deducted by it at source, allowed the appeal. On appeal by the Revenue, the Tribunal held that tax was deductible at source and that the assessee was, therefore, liable to pay the tax demanded. The assessee had contended before

the Tribunal that, in any view, the sum demanded as tax was no longer payable as recovery of the same had become barred by limitation by virtue of Section 231 which prescribed a period of one year from the last day of the financial year in which the assessee was deemed to be in default. Although the Revenue resisted the contention on the ground that it had not been raised before the Appellate Assistant Commissioner, the Tribunal allowed the assessee to urge the same. Dealing with the merits of the contention, the Tribunal, however, held that the period of limitation did not begin to run in terms of Section 231, until an order was made deeming the assessee to be in default.

3. The sole question which arises for consideration is whether recovery proceedings in respect of the tax deductible and payable by the assessee are barred in terms of Section 231. Counsel for the assessee, Mr. M. Ramachandran, submits that the liability arose on the expiry of the period within which the assessee was liable to deduct tax at source and pay the same to the credit of the Central Government. He refers to the relevant provisions and contends that no order is contemplated u/s 201 to fasten liability upon the person responsible for the deduction u/s 195, for the liability does not depend on any order. The liability arises de hors an order and on account of the default in the deduction of the tax and/or payment of the same as required by the statute. Time for recovery, therefore, began to run, according to him, from the last day of the financial year in which the default occurred. Counsel for the Revenue, on the other hand, submits that no liability for recovery arises in respect of the tax deductible u/s 195 and payable u/s 200 until an order is made u/s 201 treating the person responsible for the deduction to be an " assessee in default". The order in question of the Income Tax Officer is, according to him, not an order of recovery, but an order treating the person responsible to be an assessee in default in terms of Section 201, and time for recovery began to run only from the last day of the financial year in which that order was made.

4. We shall read the relevant provisions in so far as they are material. Section 195 says :

" 195. Other sums.--(1) Any person responsible for paying to a nonresident, not being a company, or to a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India, any interest, not being "Interest on securities", or any other sum, not being dividends, chargeable under the provisions of this Act, shall, at the time of payment, unless he is himself liable to pay any Income Tax thereon as an agent, deduct Income Tax thereon at the rates in force :....."

5. Admittedly, the sum of Rs. 45,403 had been paid by the assessee and he was not the agent of the payee. It is no longer disputed in the present proceeding that Income Tax was deductible on the said sum in terms of Section 195. Section 200 reads :

" 200. Duty of person deducting tax.--Any person deducting any sum in accordance with the provisions of.....Section 195 shall pay within the prescribed time, the sum so deducted to the credit of the Central Government or as the Board directs."

6. The time has been prescribed under Rule 30 of the Income Tax Rules, 1962, the relevant portion of which reads :

" in any other case, within one week from the last day of the month in which the deduction is made :....."

7. Section 201 reads :

"201. Consequences of failure to deduct or pay.--(1) If any such persondoes not deduct or after deducting fails to pay the tax as required by or under this Act, he.....shall, without prejudice to any other consequences which he.....may incur, be deemed to be an assessee in default in respect of the tax :

Provided that no penalty shall be charged u/s 221 from such person,unless the Income Tax Officer is satisfied that such person..... has without good and sufficient reasons failed to deduct and pay the tax.

(1A) Without prejudice to the provisions of Sub-section (1), if any such person.....does not deduct or after deducting fails to pay the tax as required by or under this Act, he.....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,referred to in Sub-section (1)."

8. This section, read with Sections 195 and 200, would indicate that a person responsible for deduction of tax at source in terms of Section 195 is deemed to be in default if he does not either deduct the tax at source, or having deducted it, does not pay it as required by Section 200 within the time prescribed under Rule 30. Section 201 further shows that the failure of such a person makes him an assessee in default, although he would not, but for the default, be an assessee in respect of the sum referred to in Section 195. It is his failure to discharge his statutory obligation that visits him with the liability of " an assessee in default ". This liability is cast upon him under the aforesaid provisions, not because of any order or notice of demand, but because of the operation of the statute itself. This is quite unlike a regular assessment under which tax becomes payable only upon service of a notice of demand u/s 156. The reason is that no liability arises in such a case until service of a notice of demand, because the liability to pay tax, until determined by means of a proper assessment, remains merely ambulatory, and becomes fixed only upon the completion of the assessment and demand (see M.M. Parikh, Income Tax Officer, Special

Investigation Circle-B, Ahmedabad Vs. Navanagar Transport and Industries Ltd. and Another,). On the other hand, Sections 195, 200 and 201 deal with a liability which is at no time ambulatory, but which is attracted immediately upon the happening of an event, namely, payment and failure to deduct u/s 195 or failure to credit the sum deducted as required by Section 200. As soon as such failure occurs, the liability arises once and for all, and there is no further requirement of computation or assessment. Once the liability is incurred, no further demand is necessary to recover the tax and the interest due thereon, unless the Revenue were to initiate proceedings for imposition of penalty in terms of the proviso to Section 201(1) read with Section 221. In the present case, no penalty is sought to be imposed.

9. We shall now consider the question of limitation. Section 231 reads :

"231. Period for commencing recovery proceedings.--Save in accordance with the provisions of Section 173 or Sub-section (7) of Section 220, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which the demand is made, or, in the case of a person who is deemed to be an assessee in default under any provision of this Act, after the expiration of one year from the last day of the financial year in which the assessee is deemed to be in default....."

10. The main body of the section has two limbs. The first limb refers to taxes directly payable by the person who has earned the income and whose liability to pay the same arises only upon demand. The period of limitation for recovery referable to such liability begins to run from the last day of the financial year in which the demand is made. The second limb refers to the statutory liability of a person de hors the notice of demand. Where a person is deemed to be an assessee in default under any provision of the Act, the liability of such a person having arisen by operation of law and not by reason of any demand, the period of limitation for recovery respecting such liability begins to run, not with reference to any notice of demand, but from the last day of the financial year in which the default has occurred by reason of the failure to deduct tax as warranted by Section 195 or to pay the tax deducted as required by Section 200.

11. In this connection, we will refer to Section 46(7) of the Indian Income Tax Act, 1922 (the "old Act"), which corresponds to Section 231 of the present Act. That section, in so far as it is material, reads :

" 46. (7) Save in accordance with the provisions of Sub-section (1) of Section 42, or of the proviso to Section 45, no proceedings for the recovery of any sum payable under this Act shall be commenced after the expiration of one year from the last day of the financial year in which any demand is made under this Act:....." (emphasis* supplied)

12. In terms of this sub-section, the period of limitation runs only with reference to the demand, that is, from the last day of the financial year in which the

demand is made. The second limb contained in Section 231 of the present Act is absent in Section 46(7) of the old Act. The decisions of courts with reference to the old Act in regard to limitation must, therefore, be understood in that light. We shall in this context refer to the objects and reasons of Section 231 of the present Act, as extracted from the Report of the Select Committee (see AIR Manual, Vol. XXII, page 203) :

" The existing wording of the clause would seem to permit an Income Tax Officer to avail himself of a longer period for initiating recovery proceedings by the simple expedient of postponing the issue of notice regarding default. The Committee, therefore, considers that the words " Income Tax Officer sends an intimation in writing to such person to the effect that he is deemed to be an assessee in default" should be replaced by the words " the assessee is deemed to be in default". "

13. The report is a true indication of the legislative intent and lends considerable support to what we have stated above in regard to the period of limitation.

14. In the instant case, the period of limitation of one year began to run from the last day of the financial year (relevant to the assessment year 1973-74) in which the default occurred. The order made by the Income Tax Officer on February 25, 1977, was, therefore, long after the expiry of the period of limitation. We are fortified in this conclusion by the view expressed on the point by the Calcutta High Court in Commissioner of Income Tax Vs. Dunlop Rubber Co. (India) Ltd., and by the Delhi High Court in Bal Kishan Dass and Sons Vs. The Commissioner of Income Tax and Others, , and we respectfully agree with that view. With respect, we disagree with the contrary view expressed by the Madras High Court in Mettur Chemicals and Industrial Corporation Limited Vs. Inspecting Asst. Commissioner of I.T., Assessment Range-I, Salem,

15. In the circumstances, we answer the question in favour of the assessee and against the Revenue.

16. We direct the parties to bear their respective costs in this tax referred case.

17. A copy of this judgment under the seal of the High Court and the signature of the Registrar shall be forwarded to the Income Tax Appellate Tribunal, Cochin Bench.