Brahma City Private Limited vs Joint Commissioner Of Income Tax, Range ... on 3 May, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Purushaindra Kumar Kaurav

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
+ W.P.(C) 573/2024, CM APPL. 2545/2024-Stay
BRAHMA CITY PRIVATE LIMITED ..... Petition
Through: Mr. Salil Kapoor, Ms. Ananya Kapoor, Mr. Lalchandani, Mr. S Yadav, Advs.

versus

JOINT COMMISSIONER OF INCOME TAX, RANGE 73 ..... Respo
Through: Mr. Puneet Rai, SSC with Mr Ashvini Kumar, Mr. Rishab Nangia, Advs.
CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV
ORDER

% 03.05.2024

1. The writ petitioner had impugned a notice seeking to initiate proceedings for penalty under the Income Tax Act, 1961 ["Act"] on the ground of a purported failure to deduct tax. The writ petition had initially been entertained since the principal question of whether External Development Charges would be covered under Section 194C was pending consideration before this Court.

2. That question has since been duly examined and a final decision has been rendered on 13 February 2024. We note that in Puri Construction Pvt. Ltd. vs. ACIT & Ors. [2024 SCC OnLine Del 939], while dealing with the aspect of penalty, we had observed as follows:-

> "84. However, while this may have conceivably been a valid ground to interdict some of the impugned show-cause notices, we This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/05/2024 at 21:55:20 find no justification to invoke our prerogative writ

powers on this score since the petitioners have, in the course of these proceedings, been afforded more than an ample and adequate opportunity to establish why section 194C would not be attracted and have been heard at great length on the questions which were raised. The applicability of section 194C also appears to have been expressly raised in the counter affidavits which were filed and thus placing the petitioners on adequate notice. In any case and in view of the above, we are of the firm opinion that the principles of prejudice would not stand attracted. It would thus be inappropriate at this late stage of the day to interfere with the show-cause notices on this ground.

85. That only leaves us to deal with the issue of the petitioners having been treated as an assessee-in-default in terms of section 201 and called upon to pay penalties by virtue of sections 221 and 271C of the Act. Pursuant to the interim orders that were made on these writ petitions, while the respondents were permitted to continue further in terms of the show-cause notices impugned herein, orders if passed against the petitioner were not to be given effect to. We have not been apprised of the status of those proceedings nor have the respondents apprised of any final orders that may have been framed in respect of each of the writ petitioners. We have also not been apprised of whether the external development charges payments have been taxed in the hands of the Haryana Shehri Vikas Pradhikaran or whether the same was offered to tax.

86. We are also cognizant of the legal position of penalty be it either under section 221 or 271C not being an inevitable corollary in case of default. This position is made explicit by the second proviso to section 221 as well as section 273B. The imposition of penalty where a question with respect to taxability had remained unclear or where an assessee had good and sufficient cause to not deposit the tax were lucidly explained by the Supreme Court in CIT v. Eli Lilly and Co. (India) (P.) Ltd. [(2009) 312 ITR 225 (SC); (2009) 15 SCC 1; 2009 SCC OnLine SC 628.] in the following terms (page 251 of 312 ITR):

"91. A bare reading of section 201(1) shows that interest under section 201(1A) 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(1A), 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(1A) itself. Sub-section (1A) specifies „on the amount of such tax which is mentioned in sub-section (1) wherein, it is the amount of tax in respect of which the assessee has

been declared in default.

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 abovestated period only. It may be clarified that the date of payment by the employee concerned can be treated as the date of actual payment....

94. Section 273B states that notwithstanding anything contained in section 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who does not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason.

95. In each of the 104 cases before us, we find that non- deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head „Salaries being exigible to deduction of tax at source under section 192 was a nascent issue. It has not been considered by this court before. Further, in most of these cases, the tax deductor-assessee has not claimed deduction under section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under section 271C because by not claiming deduction under section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs 906.52 lakhs (see Civil Appeal No. 1778 of 2006 entitled CIT v. Bank of Tokyo-Mitsubishi Ltd.)."

87. The aforesaid view has been reiterated in a more recent judgment of the Supreme Court in Singapore Airlines Ltd. v. CIT where the following principles were laid down (page 233 of 449 ITR):

"This court in Hindustan Coca Cola Beverage Pvt. Ltd. v. CIT was confronted with a similar situation where the recipient of income on which the assessee had failed to deduct tax at source under section 194C of the Income-tax This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/05/2024 at 21:55:21 Act, had already paid Income-tax on that amount. The court held (page 229 of 293 ITR):

„6. The Tribunal upon rehearing the appeal held that though the appellant-assessee was rightly held to be an "assessee-in-default",there could be no recovery of the tax

alleged to be in default once again from the appellant considering that Pradeep Oil Corporation had already paid taxes on the amount received from the appellant. It is required to note that the Department conceded before the Tribunal that the recovery could not once again be made from the tax deductor where the payee included the income on which tax was alleged to have been short deducted in its taxable income and paid taxes thereon. There is no dispute whatsoever that Pradeep Oil Corporation had already paid the taxes due on its income received from the appellant and had received refund from the tax Department. The Tribunal came to the right conclusion that the tax once again could not be recovered from the appellant (dedutor-assessee) since the tax has already been paid by the recipient of income....

9. Be that as it may, Circular No. 275/201/95IT(B), dated January 29, 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 tax deduction at source, that taxes due have been paid by the deductee-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 deductee-assessee or the liability for penalty under section 271C of the Income-tax Act. A similar principle was also advanced in the context of section 192 of the Income-tax Act in CIT v. Eli Lilly and Co. (India) P. Ltd. (page 253 of 312 ITR, SCC page 30, paras 98 to 100):

„98.... In our view, therefore, the tax deductor assessee (respondent(s)) were duty bound to deduct tax at source under section 192(1) from the home salary/special allowance(s) paid abroad by the foreign company, particularly when no work stood performed for the foreign company and the total remuneration stood paid only on account of services rendered in India during the period in question.

99. As stated above, in this matter, we have before us 104 civil appeals. We are directing the Assessing Officer to examine This is a digitally signed order.

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100. Similarly, in each of the 104 appeals, the Assessing Officer shall examine and find out whether interest has been paid/recovered for the period between the date on which tax was deductible till the date on which the tax was actually paid. If, in any case, interest accrues for the aforestated period and if it is not paid then the adjudicating authority shall take steps to recover interest for the

aforestated period under section 201(1A). It appears to us that if the recipient of income on which tax at source has not been deducted, even though it was liable to such deduction under the Income-tax Act, has already included that amount in its income and paid taxes on the same, the assessee can no longer be proceeded against for recovery of the short fall in tax deducted at source. However, it would be open to the Revenue to seek payment of interest under section 201(1A) for the period between the date of default in deduction of tax at source and the date on which the recipient actually paid Income-tax on the amount for which there had been a shortfall in such deduction.

As noted earlier, learned counsel for the parties were ad idem on the fact that the travel agents had already paid taxes on the amounts earned by them. The Revenue had contended that the default in payment of tax deducted at source could not be excused purely on this ground. However, the decisions in Hindustan Coca Cola Beverage Pvt.

Ltd. v. CIT and CIT v. Eli Lilly and Co. (India) P. Ltd. clearly bar their ability to pursue the assessee-airlines for recovery of the shortfall in tax deducted at source and restricts them to imposing interest for the default....

The ambit of „reasonable cause under section 273B requires our scrutiny before we reach the conclusion that the Assessing Officer is required to also calculate potential penalties to be levied against the assessees. This court in CIT v. Eli Lilly and Co. (India) P. Ltd. had elaborated, in the passage extracted below, on the context in which section 273B may be utilized (page 252 of 312 ITR):

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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 07/05/2024 at 21:55:21 „94.... Section 273B states that notwithstanding anything contained in section 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason.
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> 95. In each of the 104 cases before us, we find that non-

deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head „Salaries being exigible to deduction of tax at source under section 192 was a nascent issue... The tax-deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/head office and, consequently, we are of the view that in none of the 104 cases penalty was leviable under section

271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source. We find some parallels between the facts of the present case and the situation in CIT v. Eli Lilly and Co. (India) P. Ltd. The liability of an airline to deduct tax at source on supplementary commission had admittedly not been adjudicated upon by this court when the controversy first arose in the assessment year 2001-2002. While learned counsel for the Revenue, Mr. Kumar, has notified us that various airlines were deducting tax at source under section 194H at that time, this does not necessarily mean that the position of law was settled. Rather, it appears to us that while one set of air carriers acted under the assumption that the Supplementary Commission would come within the ambit of the provisions of the Income-tax Act, another set held the opposite view. The assessees before us belong to the latter category. Furthermore, as we have highlighted earlier, there were contradictory pronouncements by different High Courts in the ensuing years which clearly highlights the genuine and bona fide legal conundrum that was raised by the prospect of section 194H being applied to the supplementary commission.

Hence, there is nothing on record to show that the assessees have not fulfilled the criteria under section 273B of This is a digitally signed order.

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3. In view of the aforesaid, we dispose of the instant writ petition with liberty to the respondent to finalize the show cause notice proceedings bearing in mind the legal position as explained hereinabove.

4. All rights and contentions of respective parties are kept open.

YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

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