Nestle India Ltd. vs Assistant Commissioner Of Income-Tax on 28 February, 1997

Equivalent citations: [1997]61ITD444(DELHI)

ORDER

Miss Moksh Mahajan, Accountant Member

1. These 18 appeals filed by the assessee relate to assessment years 1987-88 to 1995-96. While 9 appeals relate to orders passed under section 201(1), the other 9 appeals to the orders passed under section 201(1A) of the Income-tax Act. As common issues are involved in all the appeals, these are consolidated and disposed of by a single order. The grounds of appeal raised are as under :-

Appeals under section 201(1) of the Act :

"1. The learned CIT(A) has erred on facts and in the circumstances of the case in upholding the order of Assistant Commissioner of Income-tax TDS Circle 22(1), New Delhi (ACIT) alleging short deduction of tax at source under section 201(1) of the Income-tax Act, 1961 (Act) and deeming the appellant to be an assessee in default."

"2. The learned CIT(A) has erred on the facts and in the circumstances of the case in treating the conveyance reimbursement made by the appellant to the employees as salary liable to deduction of tax at source, the same being exempt under section 10(14) read with Explanation to section 17(2) of the Act."

"3. The CIT(A) has erred incorrectly invoking the machinery provisions of sections 192 and 201(1) of the Act for collection of tax to the facts and circumstances of the case."

"4. The learned CIT(A) has erred on facts and in the circumstances of the case in treating the bona fide belief of the appellant based on interpretation of legal provisions, precedents and circulars as mala fide and incorrectly applying the provisions of sections 192 and 201(1) of the Act."

Appeals under section 201(1A) of the Act :

"1. The learned CIT(A) has erred on facts and in the circumstances of the case in upholding the order of Assistant Commissioner of Income-tax, TDS Circle 22(1), New Delhi (ACIT) charging interest under section 201(1A) of the Income-tax Act, 1961 (Act)."

2. The learned CIT(A) has erred on the facts and in the circumstances of the case in treating the conveyance reimbursement made by the appellant to the employees as salary liable to deduction of tax at source, the same being exempt under section 10(14), read with Explanation to section 17(2) of

the Act."

"3. The CIT(A) has erred incorrectly invoking the machinery provisions of sections 192 and 201(1) of the Act for collection of tax to the facts and circumstances of the case."

"4. The learned CIT(A) has erred on the facts and in the circumstances of the case in treating the bona fide belief of the appellant based on interpretation of legal provisions, precedents and circulars as mala fide and incorrectly applying the provisions of sections 192 and 201(1) of the Act."

Shri Dinesh Vyas & Ms.Preeti Goel appeared on behalf of the assessee and Mrs. Mona Singh represented the department.

2. As to the appeals filed under section 201(1) of the Act, it is submitted by the learned AR that the assessee is a company incorporated under the Companies Act, 1956. As a policy followed, the company has been reimbursing some of its employees the expenditure incurred by them on commuting between office and residence as also for attending to the other official duties. The reimbursements are made against declarations received from the employees to the effect that the amount was actually expended by them. (Copy of specimen at page 25 of the Paper Book-I in 'C'). For the sake of administrative convenience, the company fixed a ceiling on the amount of reimbursement which could be claimed by each of the employees. However, in certain exceptional cases the assessee paid the amounts in excess of ceiling on account of certain extraordinary and special reasons. The ceiling was fixed keeping in view the expenditure an employee is reasonably expected to incur and also to avoid hardship to the employee. These ceilings are in no way connected with the salary paid to the employees and are not part of the employment agreement as held by the Assessing Officer. The conveyance allowance paid for commuting between residence to office is not in the nature of salary as held in the case of Industrial Credit & Investment Corpn. of India Ltd v. Fourth ITO [1993] 47 TTJ (Bom.) 401. Taking note of the Notification No. 606(E) dated 9-6-1989 such reimbursements were considered as tax exempt under section 10(14) of the Income-tax Act. The assessee's bona fide is established from the fact that except for the conveyance allowance in regard to the other allowances paid the assessee had been deducting tax at source. In any case, the provisions of sections 192, 201 and other connected sections of the Income-tax Act, 1961 regarding the deduction of tax at source are only machinery provisions. The employer is to deduct tax for and on behalf of the employee and to pay the same to the treasury. To the extent that an employer has acted honestly and fairly in forming an opinion regarding the tax liability of his employees, the provisions of section 201 (1) of the Act are not attracted. In support reliance was placed on the decision of ITAT Bombay in the case of Great Eastern Shipping Co. Ltd v. Asstt. CIT[IT Appeal Nos. 6201 to 6203 (Bom.) of 1989]. Reliance was also placed on the decision of the Madhya Pradesh High Court in the case of Gwalior Rayon Silk Co. Ltd v. CIT [1983] 140 ITR 832/14 Taxman 99 where it was held that the provisions of section 201 of the Act are attracted in the case of an employer only when that employer does not deduct or after deducting fails to pay the tax as required by the Act. Other decisions relied upon are - CIT v. M.P. Agro Morarji Fertilizers Ltd. [1989] 176 ITR 282/[1988] 41 Taxman 115 (MP) & CIT v. Life Insurance Corpn. [1987] 166 ITR 191/[1986] 25 Taxman 6 (MP). According to the learned AR the learned CIT(A) wrongly rejected the contention of the assessee that the assessee committed no default in not deducting proper tax at source on the

allowance given for the travelling between office and residence and back by treating it as an allowable deduction. The learned DR on the other hand, submitted that it is in pursuance of a letter of the Assessing Officer that it was found out that the assessee had not deducted tax at source from the conveyance allowance given to the employees. Form No. 16 as filed before the officer did not disclose the particulars of conveyance allowance as given. Reliance placed on the form of declaration of the employees clearly showed that there is no column in regard to the distance covered and the expenses incurred in connection with the same. The form of declaration does not show that any specific particulars are to be given by the employees before reimbursement is made to them. Assessee's contention that its case is covered under section 10(14) of the Act is not acceptable. The expression used in section 10(14) of the Act is wholly, necessarily and exclusively incurred in the performance of the duties of an office or employment of profit, to the extent to which such expenses are actually incurred for that purpose. As held by their Lordships of Punjab & Haryana High Court in the case of Haryana Government College Teachers Association v. Union of India [1991] 190 ITR 15, unless exempt under Notification, no exemption could be claimed under section 10(14) of the Act. Similar decision was held in the case of Coal Mines Officers Association of India v. Union of India [1990] 181 ITR 346 (MP). The assessee must satisfy the conditions laid down under the section before claiming the exemption under the same. In support of the proposition, the decision in the case of-CWTv. State Bank of India [1995] 213 ITR 1/81 Taxman 72 (Bom.) was relied upon. Attention was invited to the decision of the ITAT Hyderabad Bench 'A' in the case of Dr. Reddy Laboratories v. ITO [19961 58 ITD 104 wherein it was held that a fixed sum of conveyance allowance paid by assessee-employer to employees for coming to office from residence and returning thereto does not qualify deduction under section 10(14) of the Act. Responding to the arguments of the learned DR it was submitted by the learned AR that Form under section 206(c) does not contain any specific column in regard to the conveyance allowance. In any case what is relevant to the assessee's case is whether the assessee's bona fide is established in not deducting tax at source in regard to the conveyance allowance or not. Relying on the various decisions specifically in the case of Indian Airlines Ltd v. Asstt. CIT [1996] 59 ITD 353 (Bom.), it was submitted that the provisions of section 201(1) of the Act could not be invoked in the case of the assessee. So would be the case for interest payable under section 201(1A) of the Act.

3. We have carefully considered the rival submissions and have also gone through the material to which our specific attention was drawn. As per information placed before us it is found that there is no provision for payment of conveyance allowance as per the copy of employment agreement (sample filed at pp. 23 and 24 of the Paper Book in the case of Mr. G. Ghosh). The employees have however been reimbursed expenses on declarations as given by them (specimen form of declaration available on p. 25 of the Paper Book). The payments made at fixed sums are stated to be on account of administrative convenience. In certain exceptional circumstances, however, some of the employees have been paid over and above the fixed sum. It is not disputed that the reimbursement of convenience allowance is in addition to the other allowances given to the employees for which there is no dispute. The statement of the learned AR that all along the years no deduction of tax has been made in regard to the conveyance allowance has also not been disputed.

4. On the admitted facts as stated above, could it be said that the assessee was under a bona fide belief that no tax is deductible at source from the conveyance allowance reimbursed to the

employees. Referring to the relevant provisions of section 192, read with section 201, of the Act, we find that the duty is cast on the employer to deduct tax at source from the salary of the employee and to pay it to the Government. In case of failure to deduct tax or pay the same to the Government the provisions of section 201 of the Act are attracted. A prescribed person deducting tax from the salary is required to furnish return as prescribed within the prescribed time after the end of each financial year to the prescribed income-tax authority (section 206 of the Income-tax Act). As per rule 37 of the Income-tax Rules, Form No. is prescribed in which the statement is to be made and the month of the year when the same is to be submitted to the concerned authority. Form No. 24 as prescribed in this respect from time to time contains a number of columns. On going through the columns it is found that there is one column relating to value of perquisites in addition to particulars of salary and other income. In the notes appended to the aforesaid Form, column 2 reads as under :-

> "Salary includes wages, annuity, pension, gratuity, fees, commission, bonus, repayment of amount deposited under the Additional Emoluments (Compulsory Deposit) Act, 1974 or profits in view of or in addition to salary or wages, including payments made at or in connection with termination of employment, advance of salary or any other sums chargeable to income-tax under the head 'Salaries'."

This column has not undergone a change with the passage of time. In an annexure to Form No. 24, the particulars have been prescribed in regard to the value of perquisites, etc. These relate to type of accommodation, furniture, rent, remuneration paid to domestic personnel, value of free passage, contribution to PF etc. Column 10 contains particulars in regard to whether any conveyance has been provided by the employer free or at a concessional rate or where the employee is allowed the use of one of more motor cars owned or hired by the employers, estimated value of perquisite. For value of these perquisites rules have also been framed. Thus there is neither a separate column in regard to reimbursement of conveyance allowance nor any mention made in this respect in the information as sought by the prescribed Authority. The definition of salary under section 17 of the Act on the other hand is an inclusive one and includes amongst other items of income perquisites - the concept of which has not been free from controversy. Whether a particular allowance is a part of salary or exempt under section 10(14) of the Act has been a subject of judicial pronouncements and clarifications issued by way of Circulars of CBDT. As to the conveyance allowance as early as 1956 vide Circular No. 23(LVIII-8) dated 9th July, 1956, the Board clarified that trip between the residence and office or regular place of work to and fro would be regarded as being of the purpose of employment. In the subsequent clarification issued in Circular No. 15 dated May 8, 1969, it was mentioned "that declaration from the employee that the conveyance is owned by him and is being used by him for the purposes of employment may be considered adequate by the disbursing officer for the purpose of calculation of tax deductible at source under section 192". Proviso to section 161(1) of the Act which was omitted with effect form 1st April, 1989 and Explanation to section 17(2) of the Act clarified that use of any vehicle provided by a company or an employer for journey from the residence to office or from office to residence would not be regarded as a benefit or amenity granted to the employee free of cost or at concessional rate. On the same analogy one can hold a view that reimbursement of conveyance expenses to cover up expenditure for the purposes of office does not form part of salary unless it is found that the salary is paid in the garb of conveyance expenses. At this juncture reference could be made to the decision of ITAT Bombay Bench 'C' in the

case of Industrial Credit & Investment Corpn. of India Ltd (supra) for assessment years 1989-90 and 1991-92 wherein it was held that the payment of conveyance allowance to meet the expenditure incurred for commuting between residence and office is not in the nature of salary. The aforesaid order was passed in an appeal filed against the order of the Income-tax Officer under section 201/192. As to the contention relating to fixed sum having been paid to all employees, it was held in the case of Industrial Credit & Investment Corpn. of India Ltd (supra) that grant of conveyance allowance to employee at a fixed rate was an age old practice and was essentially meant to meet the expenditure incurred by the employee for commuting between office and residence. As to the contention of the revenue that once a standard deduction is allowed, no further allowance is allowable under section 10(14) of the Act, we find that the issue was considered by the ITAT Hyderabad Bench 'B' (SB) in the case of P. Dayakar v. ITO [1995] 53 ITD 25 (P. 23 of the Paper Book). In the case of LIC employees it was held therein that "whatever may be the object of allowing an amount as standard deduction under section 16(i) it cannot be said that it fully covers all expenditure incurred on conveyance though it may take within its purview such expenditure also". On the other hand, the claim of the assessee in regard to exemption under section 10(14) of the Act is dependent on fulfilment of conditions, as prescribed in the section. The allowance would be exempt to the extent it is spent wholly, exclusively and necessarily in the performance of the duties of an office or employment of profit. This is, however, a matter of determination at the end of the Assessing Officer.

5. We further note that the provisions of sections 192 and 201 fall under Chapter XVII of the Income-tax Act which relate to collection and recovery of tax. Sections 192 to 199 of the Act relate to tax deduction at source. The provisions of tax deductible at source is not exclusive to salary alone but are applicable to other income, viz., interest other than interest on securities, dividends, winning from horse race and lotteries, payment to contractors, and sub-contractors, insurance agents, brokerage, etc. Comparing these provisions relating to different incomes, we find that the expression 'estimated income' is only there in section 192 of the Act and not in other sections. The tax deductible at source is one of the modes of recovery of taxes. The stage at which the tax is deducted at source is anterior to the one where it is finally determined. The latter is dependent on the determination of income at the stage when the assessment is framed. Another feature to be noted is that while it is the income of the recipient which is subjected to tax, the duty to deduct tax is cast on a person other than the recipient, i.e., payer of the salary or other amount as specified in the sections relating to tax deductible at source.

6. The assessee's conduct is to be viewed in the above background. The penalty under section 201 of the Act is leviable in a case where the assessee fails to deduct and pay the tax for good and sufficient reasons. The expression 'good and sufficient reasons' in turn would have to be read in the context of expression 'estimated income' as used in section 192 of the Act. Penalty under section 201 is leviable in case the assessee without good and sufficient reasons fails to deduct tax on the estimated income and pay the same to the Government. Thus the assessee is required to make a fair and honest estimate in regard to the salary as held by their Lordships of Madhya Pradesh High Court in the case of Gwalior Rayon Silk Co. Ltd. (supra). Fair and honest estimate would be based on the assessee's belief which is to be a bona fide one. This is to be seen in the backdrop of the various judicial decisions on the particular allowance and the clarifications on the basis of which the assessee forms

a belief that the same is either taxable or not. The 'good and sufficient reason' would further show that the belief in this respect has to be based on material on the basis of which the same is formed. This should not merely subsist in the mind of the assessee being based on conjectures and surmises. The expression good and sufficient' used together provides for a strict test in this regard. The onus is on the assessee to show that on the facts and in the circumstances of the case, the assessee could not have deducted tax from allowance as contemplated under the provisions of the Act. As stated earlier, the assessee demonstrated that his belief was based on the various decisions of the Tribunal, High Courts and the clarifications issued by CBDT from time to time. It is also a fact that it is not a case where the assessee has not deducted tax from all the allowances. It is confined to conveyance allowance alone. In this context, it may be stated that whether the particular allowance is taxable or not, would depend on the view adopted by the Assessing Officer while framing the assessment in the case of the employee at the time of deduction of tax at source. The employer is required to have a broad picture of the estimated income which is to be subjected to tax. The department could not successfully show that the assessee's conduct in not deducting tax at source was a mala fide one for which the penalty was leviable in its hand. In view of the various decisions of the Tribunal, namely, in (1) Industrial Credit & Investment Corpn. of India Ltd.'s case (supra); Great Eastern Shipping Co. Ltd's case (supra); India Airlines v. Asstt. CIT [TDS Nos. 13 to 19 (Delhi) of 1995), Mahindra & Mahindra Ltd. v. 2nd ITO [IT Appeal Nos. 9869, 9870 and 9871 (Bom.) of 1989] and Glaxo India Ltd. [IT Appeal Nos. 104 to 107 (Bom.) of 1990] and others as cited which are on the same point, we are of the view that penalty under section 201 of the Act is not leviable.

7. As regards decisions cited by the Revenue, these relate to interpretation of provisions of section 10(14) of the Act. We have already opined elsewhere in the order that this would be dependent on the assessee establishing that the conditions as laid down in section stand fulfilled. Accordingly in our considered view penalties levied under section 201(1) of the Act for all the years cannot be upheld.

8. In view of above, we would also delete the interest leviable under section 201A of the Act.

9. In the result, all the 18 appeals filed by the assessee are allowed.