IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

ITA No.40 of 2016 a/w
ITA's No. 41,42 & 43 of 2016

Date of decision: 31.5.2017

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1. ITA No.40 of 2016

Commissioner of Income Tax ...Appellant.

Versus

H.P. State Electricity Board ...Respondent

2. ITA No.41 of 2016

Commissioner of Income Tax ...Appellant.

Versus

H.P. State Electricity Board ...Respondent

3. ITA No.42 of 2016

Commissioner of Income Tax ...Appellant.

Versus

H.P. State Electricity Board ...Respondent

4. ITA No.43 of 2016

Commissioner of Income Tax ...Appellant.

Versus

H.P. State Electricity Board ...Respondent

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Acting Chief Justice
The Hon'ble Mr. Justice Sandeep Sharma, Judge

Whether approved for reporting? Yes.

For the petitioner(s): Mr. Vinay Kuthiala, Senior Advocate, with Ms. Vandana Kuthiala, Advocate.

For the respondent(s): Mr. Rakesh Sharma, Advocate.

Sandeep Sharma, Judge

Since in all the aforesaid ITAs, similar questions of law and fact are involved, as such, they are being taken up together and disposed of by a common judgment.

2. By way of instant appeal(s) filed under Section 260-A of the Income Tax Act, 1961, challenge has been laid to the order(s) dated 10.12.2015, passed by Income Tax Appellant Tribunal, Division Bench, Chandigarh in ITA No.38/Chd.2015 A.Y.2007-8, ITA No.39/Chd.2015 A.Y. 2008-09, ITA No.40 /Chd.2015 A.Y. 2009-10 and ITA No.41/Chd.2015 A.Y. 2010-11, whereby appeal(s) having been preferred by the assessee have been dismissed.

3. Briefly stated facts as emerge from the record are that the assessee is a company i.e. State Electricity Board incorporated under the Electricity Act, 1948, engaged in Generation, Transmission & Distribution of Power in the State

of Himachal Pradesh, made certain payments on account of wheeling charges/SLDC/Transmission charges to the payee company i.e. PGCIL. On 11.02.2009 TDS inspection/survey under Section 133-A of the Income Tax Act, 1961 came to be conducted at the business premises of the above mentioned company M/s Himachal Pradesh State Electricity Board, Shimla (for short "HPSEB"), where it was noticed that the assessee deductor has made payments of transmission charges to PGCIL without deduction of tax at source. Above named assessee deductor submitted before the Income Tax Authority that PGCIL has filed its return of income and has paid the entire amount of income tax payable by them and as such, there was reasonable cause for the deductor assessee not to deduct TDS at source. However, assessing Officer relying upon the judgment of the Hon'ble Supreme Court of India reported in 293 ITR 226(SC) in case titled *Hindustan Coca Cola Beverages Private Limited* and Circular No.275/201/95-IT(B) dated January 29,1997 issued by the Central Board of Direct Tax Act, wherein it has been notified that "No demand visualized under Section 201(1) of the Income Tax Act, should be enforced after the tax deductor has satisfied the office in Charge of TDS that taxes due have been paid by the deductee assessee, however, same will not

alter the liability to charge interest under Section 201(1A) of the Act, till the date of order passed under Section 201 of the Income Tax Act, 1961. On 31.03.2010 case was referred for initiation of penalty proceedings under Section 271-C of the Income Tax Act, 1961 for not deducting tax at source under the provisions of Income Tax Act, 1961.

4. Aforesaid order passed under Section 201(1A) was laid challenge before Commissioner Income Tax (Appeals), but fact remains that Commissioner Income Tax (Appeals) came to the conclusion that the deductor/assessee was not prevented by any sufficient and reasonable cause for non-complying with the provisions of Section 194-C of the Income Tax Act, 1961 and thus made itself liable for penalty under Section 271C of the Income Tax Act, 1961 and accordingly deductor assessee was held in default and penalty amounting to ₹1,36,00,187/-, ₹2,48,13,453/-, ₹2,76,67,625/- and ₹5,71,017/- for the financial years 2006-07, 2007-08, 2008-09 and 2009-10 respectively came to be imposed against the assessee.

5. Being aggrieved and dissatisfied with the aforesaid order having been passed by learned Commissioner Income Tax(Appeals), assessee preferred an appeal before the Income Tax Appellate Tribunal(Chandigarh) **(for short"**

ITAT), who vide order dated 28.2.2012 upheld the order of assessing Officer made under Section 201(1A) with the direction to re-compute the amount of interest under Section 201(IA) till the date of payment of taxes by the payee in accordance with the contents laid down in circular No.275/201/95-IT(B), dated 29.1.1997, wherein it was clarified that payments of due taxes by the payee, will not alter the liability for payment of interest under Section 201(1A) or the liability for penalty under Section 271C of the income Tax Act.

6. Pursuant to aforesaid order, show cause notice under Section 271-C read with Section 274 of the Income Tax Act, came to be issued against the assessee on 16.5.2012. However, assessee at assessment stage pleaded that since the deductee i.e. PGCIL has already paid the tax, he cannot be held as assessee in default under Section 201 & 201(1A) and as such, no penalty is imposable on assessee. The assessing Officer imposed a penalty of ₹1,36,00,187/-, ₹2,48,13,453/-, ₹2,76,67,625/- & ₹ 5,71,017/- for the financial year 2006-07, 2007-08, 2008-09 and 2009-10 respectively after arriving at a conclusion that there was no reasonable cause for the deductor assessee not to deduct the tax.

7. Aggrieved with the aforesaid order passed by assessing Officer, appeal came to be preferred before the Commissioner Income Tax(Appeals), wherein Commissioner Income Tax (Appeals) held that mere non violation of Section 201 does not exonerate the assessee as deductor to deduct tax within the specific provisions of Sections 192, 194, 194A etc. The Commissioner Income Tax(A) further held that failure to deduct tax invokes two types of sections, one section like 201, where assessee deductor is treated as assessee in default on behalf of tax liability of deductee and second penal provisions such as section 271-C, wherein failure to deduct tax is liable for penalty independently. Thus, interlinking of two sections 201 and 271-C is violation of the separate provisions of the Act. Plea having been made by the assessee that it was under honest belief that since transmission charge are regulated by CERC and it was not to deduct TDS on transmission charges was not accepted by the Commissioner Income Tax (A) as reasonable cause for failure to deduct tax and as such, appeal of the assessee was dismissed by Commissioner Income Tax (A) upholding the levy of penalty under Section 271 of the Income Tax Act.

8. Aforesaid order passed by Commissioner Income Tax (Appeals) came to be adjudicated by the Income Tax

Appellate Tribunal (Chandigarh) in the appeal having been preferred by the assessee. Learned Income Tax Appellate Tribunal (Chandigarh) taking note of the order passed by the ITAT Hyderabad in the case of *ACIT Vs. M/s Good Health Plan Limited* in MA No.155/Hyd/2013, held that since the assessee has not been treated as an assessee in default in terms of section 201 of the Act and as such, it is neither liable to deduct nor pay any tax as per Chapter XVIIB of the Act. Learned tribunal further concluded that there was a reasonable cause for not deducting the TDS on payment made by the assessee and as such, penalty imposed by assessing Officer was ordered to be deleted. In the aforesaid background, Income Tax Department preferred instant appeal (s) laying therein challenge to the order dated 10.12.2015, passed by the Income Tax Appellate Tribunal, Chandigarh on the ground that provisions contained under Sections 201 and 271-C of the Income Tax Act, 1961 are independent of each other and they operate in two different fields and apart from this it is matter of fact that assessee failed to deduct tax at source and as such, penalty under Section 271-C of the Income Tax Act, 1961 was rightly imposed by the Additional Commissioner, Income Tax, Shimla.

9. While laying challenge to the aforesaid order(s) dated 10.12.2015, passed by the Income Tax Appellate Tribunal, Chandigarh, appellant-department stated that following substantial questions of law arise for the determination of this Court:-

i). **Whether in the facts and circumstances of this case the Ld. ITAT was right in law in deleting the penalties imposed U/s 271C for non deduction of tax at source u/s 194C even though the assessee has committed default to deduct the tax at source.**

ii). **Whether the Ld. ITAT disregarded/ misinterpreted the provisions of Section 271C and 201 of the Income Tax Act.**

10. Mr. Vinay Kuthiala, learned Senior Advocate, duly assisted by Ms. Vandana Kuthiala, Advocate, while referring to the impugned order(s), contended that learned income Tax Tribunal has grossly erred in deleting the penalty under Section 271C of Income Tax Act, 1961 by accepting the plea of the assessee because assessee failed to fulfill its statutory duty to deduct and deposit the tax at source and pay to the Central Government, as required under provisions of Chapter XVII-B. He further contended that provisions as contained under Section 201 & section 271-C of the Income Tax, 1961 are independent and as such, findings returned by the Appellate Tribunal that assessee has not been treated as an

assessee in default as per Section 201 of the Act and as such, it is not liable to deduct nor pay any tax as per Chapter XVII B deserves to be quashed and set-aside being erroneous and contrary to the aforesaid provisions of law. Learned counsel further contended that the assessee did not have a reasonable cause for not deducting tax at source and learned tribunal without going into the factual aspect of the matter could not have adjudicated on the sufficiency of the reasonable cause and as such, impugned order(s) deserve to be quashed and set-aside.

11. Learned counsel further contended that learned tribunal has failed to appreciate the legal position that section 271C is independent of the condition whether the assessee was held to be in default or not because interpretation given by the learned Tribunal is upheld in that eventuality section 201 of the Income Tax Act will have a restricted meaning, which could never be the intention of the legislature.

12. Mr. R.K.Sharma, learned counsel representing the respondent(s), while referring to the impugned order(s) passed by the learned tribunal contended that there is no illegality and infirmity in the same and as such, same deserves to be upheld. Learned counsel further contended

that since PGCIL was found to have paid taxes on its income received from assessee, assessee was not treated as an assessee in default under Section 201 of the Act by the ITO (TDS) vide his order dated 30.03.2010, which was further upheld by the learned tribunal in its order dated 28.2.2012 and as such, no penalty, if any, could be levied against the assessee under Section 271C of the Income Tax Act. While referring to first proviso to Section 201 of the Act, learned counsel stated that returns have been filed by the recipient of income and it has computed tax liability and has paid the tax and that person referred to under Section 201 of the Act shall not be treated as assessee in default, meaning thereby that the prayer would not be liable for payment of tax or deduction of tax. While supporting the impugned order passed by the learned Tribunal, learned counsel representing the respondent contended that admittedly in the instant case assessee has not been treated as an “assessee in default” in terms of Section 201 of the Act and as such, learned tribunal rightly arrived at a conclusion that it is neither liable to deduct nor pay any tax as per Chapter XVII B. With the aforesaid submissions, learned counsel representing the respondent prayed for dismissal of the present appeal(s).

13. We have heard learned counsel for the parties and have carefully gone through the record.

14. Before ascertaining the correctness of aforesaid submissions having been made by the learned counsel representing the parties viz-a-viz impugned order(s) passed by the learned tribunal, it would be profitable to take note of Section 271C of the Income Tax Act, 1961::-

> 271 C.(1) if any person fails to-
>
> (a) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or
>
> (b) pay the whole or any part of the tax as required by or under-
>
> (i) sub-section(2) of section 115-O; or
>
> (ii) the second proviso to section 194B
>
> then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.
>
> (2) Any penalty imposable under sub-section (1) shall be imposed by the joint Commissioner.

15. Undisputedly, aforesaid provisions of law provides that penalty under Section 271C is leviable for failure to deduct as tax, as required by provisions of Chapter XVII-B of the Income Tax Act, 1961. Vide aforesaid provisions of law

penalty has been also quantified as being equal to the amount of tax which such person fails to deduct or pay in terms of the aforesaid provisions. Chapter XVII B specifically deals with the provisions relating to tax deduction at source and specifically provide that in case of default in deduction of tax at source or payment of the same, the person responsible shall be treated as an assessee in default. At this stage, it would be apt to take note of Section 201 of the Income Tax Act:-

> Consequences of failure to deduct or pay
>
> Section 201:-
>
> (1) Where any person, including the principal Officer of a company,-
>
> (a) Who is required to deduct any sum in accordance with the provisions of this Act; or
>
> (b) Referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax.
>
> [Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the

cum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident:-

i) has furnished his return of income under section 139;

ii) has taken into account such sum for computing income in such return of income; and

iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed;]

Provided [further] that no penalty shall be charged under Section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax]

(1A). 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 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,

(i) at once per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at once and one half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid'

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub section (3) of section 200;]

[Provided that in case any person, including the principal officer of a company fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident but is not deemed to be an assessee in default under the first proviso to sub-section(1), the interest under clause(*ii*) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident].

(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).

(3) No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of seven years from the end of the financial year in which payment is made or credit is given].

(4) The provisions of sub-clause(ii) of sub section(3) of section 153 and of Explanation 1 to section 153 shall, so far as may, apply to the time limit prescribed in sub-section (3).]

[Explanation:- For the purpose of this section, the expression “accountant” shall have the meaning assigned to it in the Explanation to sub-Section(2) of section 288.}

16. The first proviso to aforesaid section clearly provides that if returns have been filed by the recipient of income and he has computed tax liability and he has paid the tax, the person referred to under section 201 of the Act shall not be treated as assessee in default. It clearly emerge on the record from reading of aforesaid provisions of law that in case recipient of income computed tax liability and paid tax on the same, person would not be liable for payment of tax or deduction of tax.

17. In the instant case, assessee deductor specifically submitted before the authorities that PGCIL i.e. recipient of income has filed its return of income and has paid the entire amount of income tax payable by them and as such, there was no occasion to it to deduct tax at source. In the present case, it clearly emerge from the order passed by the income tax authorities that assessee was not treated as an assessee in default in terms of section 201 of the Act, and a such he could not be held liable to deduct or pay any tax in terms of provisions contained in Chapter XVII B. Since, assessee was not treated an assessee in default in terms of Section 201 of the Act, learned tribunal below rightly held that there is no question of levy of penalty under Section 271-C. It also

emerge from the record that impugned sums stood reimbursed to the PGCIL i.e. recipient of the company and in these circumstances, learned tribunal rightly held that deducing TDS further by assessee would tantamount to double taxation. Section 273-B clearly provides that no penalty would be levied in case reasonable cause for the default committed is proved on record. Section 271-C provides that if any person fails to deduct the whole or any part of the tax, as required by the provisions of Chapter XVII-B, person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. But, aforesaid provision cannot be read in isolation because, as has been observed above, section 273-B specifically provides that no penalty shall be leviable in cases where reasonable cause for default committed is proved on record, meaning thereby penalty under Section 271-C can only be levied in case assessee fails to place on record reasonable cause for default in deducting tax under Section 201 of the Income Tax Act.

18. In the instant case, as is clearly borne out from the record that assessee has not been treated as an assessee in default in terms of Section 201 of the Act, and as such, it is neither liable to deduct nor pay any tax as per Chapter XVII B

and as such, learned tribunal rightly held that there is no question of levying penalty under Section 271-C of the Act. Leaving everything aside, reasonable cause has been shown by the assessee for not deducing TDS on the payment.

19. Reliance is placed upon the judgment of Hon'ble Apex Court in *CIT Vs. Eli Lilly & Co. Pvt. Ltd.* 312 ITR 225(SC); wherein it has been held that since 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, penalty under Section 271-C was not leviable as reasonable cause was shown for not deducting tax at source. It would be profitable to reproduce relevant para of the judgment herein:

> "Section 271C, inter alia, states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B then such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct. In these cases we are concerned with Section 271C(1)(a). Thus, section 271C(1)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such personal failed to deduct. We cannot held this provisions to the mandatory or compensatory or automatic because under section 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Section 271C falls in the category of such cases. Section 273B states that notwithstanding anything contained in section 271C, no penalty shall be imposed on the 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 persons who do not have good and sufficient reason or 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 persons to prove such good and sufficient reason. 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 eligible 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 ₹906.52 lakhs(See Civil Appeal No.1778 of 2006 titled CIT v. Bank of Tokyo-Mitsubishi Ltd). In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. 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.

20. It is ample clear from the aforesaid law laid down by the Hon'ble Apex Court that provisions contained in Section 271-C are not mandatory or compensatory or automatic because under Section 273-B parliament has enacted that penalty shall not be imposed in cases falling thereunder. The Hon'ble Apex Court has categorically held in the aforesaid judgment that Section 271-C falls in the category of such cases. Section 273-B states that notwithstanding anything contained in Section 271-C, 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. 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. In the instant case, assessee has/had good sufficient reason for not deducting tax at source and as such, penalty proceedings initiated by income tax department were rightly quashed by the learned appellate Tribunal.

21. After having carefully gone through the aforesaid relevant provisions of law as well as impugned order(s) passed by the learned Tribunal, this Court sees no illegality in the order(s) of learned tribunal that no penalty can be imposed under Section 271-C to the assessee for non deduction of tax at source because admittedly petitioner has rendered plausible/ genuine explanation for not deducing tax at source. Similarly, this Court sees no force in the arguments/ submissions made on behalf of the learned counsel representing appellant-department that learned appellate Tribunal misinterpreted the provision of Section 271-C and 201 of the Income Tax Act, because once assessee was not treated as an assessee in default in terms of Section

201 of the Act, he was not liable to deduct or pay any tax in terms of the provisions contained in Chapter XVII-B. On the top above everything, as has been discussed above, no penalty can be levied under Section 271(C), if the reasonable cause is shown by the assessee for not deducting TDS.

22. Substantial questions of law are answered accordingly.

23. Consequently, in view of the detailed discussion made hereinabove, the impugned order(s) is well reasoned and legal one, needs no interference. Accordingly, the impugned order(s) passed by the learned tribunal are upheld and the present appeal(s) stands dismissed. Pending application(s), if any, shall also stand(s) disposed of.

(Sanjay Karol)
Acting Chief Justice

31st May, 2017
(shankar)

(Sandeep Sharma)
Judge