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L.G. Electronics Inc. Vs. Additional Commissioner of

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Mar-10-2004

Reported in : (2004)84TTJ(Delhi)1029

Judge : K Prasad, Y Kapur

Appellant : L.G. Electronics Inc.

Respondent : Additional Commissioner of

Judgement :

1. These 8 appeals have been filed by the assessee which is aggrieved by the common order passed by the CIT(A) dt. 30th March, 2001; confirming the order of the AO who had imposed penalty under Section 271C of the IT Act. Except in Appeal No. 2925/Del/2001, which is for the asst. yr. 1998-99 and which has two additional grounds, there are common grounds of challenge to the order of the CIT(A) in all these appeals. The common grounds of challenge-are as detailed below: .

"1. The learned CIT(A) has erred on the facts and in the circumstances of the appellant's case and in law in confirming the levy of penalty of Rs. 59,67,098 purporting to be under Section 271C of the Income-tax Act, 1961 (hereinafter referred to as "Act" for short), far the financial years 1990-91 to 1997-98 in the present case.

2. On the facts and in the circumstances of the appellant's case and in law, the learned CIT(A) should have held that the levy of the aforesaid penalty in the present case, which was levied on 29th Oct., 1999, was beyond the limitation period of six months from 31st Aug., 1998, being the date on which notice issued by the then Deputy Commissioner of Income-tax, Range 28, New Delhi (Dy. CIT for short), for initiating the penalty proceedings under Section 271C was served on the appellant. ; 3. The view taken and the reasons relied upon by the learned CIT(A) in holding that the notice served on the appellant on 31st Aug., 1998, was only a general communication/letter from the then Dy. CIT and not a show cause notice for levy of penalty under Section 271C of the Act, and in not accepting the reported cases relied upon by the appellant, are vitiated and bad in law and are based on the CIT(A)'s failure to appreciate that the notice, inter alia, clearly required the appellant to show cause why penalty proceedings under Section 271C may not be initiated.

4. In any case and without prejudice to the other grounds, the learned CIT(A), on the facts and in the circumstances of the appellant's case, should have accepted that: (i) The appellant had voluntarily paid the tax and interest allegedly short deducted on payments made to expert employees outside India.

(ii) Ignorance of law vis-a-vis a fiscal legislation constitutes a reasonable cause, (iii) The appellant had not been held to be an assessee in default by any order passed under Section 201(1) of the Act.

5. In any case and without prejudice to the other grounds, the learned CIT(A) failed to consider and appreciate that the alleged failure, if any, in the present case was for good and sufficient, reasons and that the appellant had acted bona fide and in good faith and had co-operated with, the Department, and in this view also the penalty was not called for.

6. In any case and without prejudice to the other grounds, the view taken and the reasons relied upon by the learned CIT(A) in rejecting the contention of the appellant that no penalty is leviable in the present case, since the provisions of Section 192 of the IT Act, 1961, being only procedural and machinery provisions, are not and cannot apply to any payment which has been made outside India and

from sources outside India.

7. In any case and without prejudice to the other grounds, the learned CIT(A) has conveniently ignored the fact that after the submission of revised tax computations for expatriates stationed in India and the challans evidencing the deposit of tax and interest thereon, the Asstt. CIT, TDS Circle 23(1), New Delhi, issued a letter dt. 17th Dec., 1998, to the appellant confirming that statements of tax deduction at source filed by the appellant have been examined and tax calculation and interest thereon has been found to be correct, and, therefore, there was no case for holding the appellant as an assessee in default under Section 201(1) of the Act.

8. In any case and without prejudice to the other grounds, the amount :of penalty levied in the present case is much too high and excessive.

9. The order of the learned CIT(A) is contrary to the facts, law and the principles of natural justice.

10. The appellant craves leave to add, alter, amend and/or modify any of the grounds of appeal." 2. The additional grounds in ITA No. 2925/Del/2001 which are in addition to the aforesaid grounds are as follows: "1. The learned CIT(A) erred in law as well as on facts in setting aside issue in respect of the levy of penalty to the extent of Rs. 39,19,931 instead of himself deciding the matter, and while doing so exceeded the powers provided in Section 251(1)(b) of the Act. " 2. On the facts and in the circumstances of the case and without prejudice to the other grounds of appeal, the learned CIT(A) ought to have held that no penalty is imposable on the appellant company for alleged shortfall in deduction of tax at source to the extent of Rs. 39,19,931." 3. A perusal of the aforesaid grounds of appeal would reveal that the grievance of the assessee is that the AO has erred in not appreciating the fact that the penalty had become barred by time which action of the AO has been wrongly confirmed by the CIT(A). The other area of challenge is that there were sufficient causes disclosed by the assessee for not deducting the TDS on the payments made to its employees outside India and as there was a bona fide reason for not deducting the tax at source, the penalty had wrongly been imposed. As there are two parts of challenge to the order of the CIT(A), we proceed to filter the facts which are relevant for the purpose of adjudication of the two grounds and

we make it clear here itself that if we agree with the assessee on the limitation part that the order imposing penalty is barred by time, then, in that case, we may not enter into the other grounds.

4. The necessary facts available on record are that the appellant is a nonresident Korean company which was permitted to maintain its liaison office in India for co-ordinating its activities. This is also not in dispute that the assessee company has both Indian as well as Korean employees. For the payment of salaries made to the Indian and the Korean employees in India, the assessee company had deducted TDS. For the payments made to the expatriate Korean employees, though the payment was made abroad, no tax was deducted on those payments. The appellant, it is on the record, had not been deducting the tax at source on the payments made abroad to its expatriate Indian employees on the grounds that as the payments were made outside India, the same were not taxable.

5. A survey under Section 133 was carried out at the premises of the assessee company. During the course of survey it was found that the assessee company had not deducted tax at source for the payments made abroad. After the survey which occurred on 20th Aug., 1998, the Asstt.

CIT, Delhi Circle 23(1), vide his letter dt. 28th Aug., 1998, sought certain information pertaining to the survey. On account of the survey carried out, it appears that the assessee got aware of its liability and on and around 5th Oct., 1998, filed its statement of account voluntarily. There is no dispute on the fact that shortfall in the TDS was also deposited during this period along with the interest.

6. In between, the AO vide his undated letter, copy of which is placed at pp. 8 and 9 of the paper book issued a show cause notice under Sections 201(1), 201(1)(A) and 271C calling upon the assessee to show cause as to why penalty under Section 271C be not made for each financial year on account of short deduction of tax at source under Sections 201(1) and 201(1)(a) of the IT Act. This letter was replied to vide letter of 1st Sept., 1998, of the assessee which finds a place at p. 10 of the paper book. This is also on the record that the assessee did send the confirmation to the authorities of having deposited its TDS which was stated to be short deducted. Nothing happened thereafter till 4th April, 1999, when on 5th April,

1999, the Revenue through its communication of the said date addressed to the assessee called upon it to show cause once again as to why the penalty under Section 271(1)(c) be not imposed. This letter was replied to by the assessee stating that as there was an earlier notice to show cause, which is dt. 31st Aug., 1998, there is no reason for the Department to issue the said show cause notice. It was stated by the assessee that the said show cause notice is vitiated and bad in law. It was contended by the assessee in this background that no action having been taken against it arising from earlier show cause notice, the penalty proceedings have now become barred by time. The other plea with regard to there being a sufficient cause, as the assessee was under a bona fide impression that it is not supposed to deduct tax with respect to the payments made outside India was also raised. Some other pleas were taken pertaining to the sufficiency of cause for not depositing the tax were also raised.

7. The AO did not agree with the assessee either on its plea of the penalty being barred by time or on the reasonable and sufficient cause as projected by the assessee for not deducting the tax at source and, in this background, proceeded to impose the penalty.

8. The appeal filed by the assessee before the CIT(A) also met the same fate and that is how the matter has been brought before us.

9. At the time of hearing of the appeal, the learned counsel for the assessee contended that the penalty so imposed is barred by the provisions of Section 275 of the IT Act which mandates that the penalty should be imposed within a period of six months. Advancing his arguments further, the learned counsel for the . assessee drew our attention to pp. 8 and 9 of the paper book and contended that it is this document which is show cause notice. The Revenue, according to the assessee, having not completed the proceedings within the time prescribed by law, no penalty could be imposed on the assessee and if imposed, cannot be sustained. Advancing his arguments further the learned counsel contended that there is one show cause notice contemplated by law and if that is issued, no other notice can be issued. According to the assessee the AO had no justification to issue in this background, another show cause notice dt. 5th April, 1999. The

learned counsel for the assessee contended that once the Revenue itself has taken the document on 30th Aug., 1998, as the show cause notice, the letter of 5th April, 1999, is of no consequence. The learned counsel for the assessee in support of his contention relied upon the judgment of this Tribunal passed in the case of Lurgi India Co. Ltd. v.Jt. CIT (ITA No. 4820-4830/Del/2000) and contended that under the identical circumstances the verbatim document as is placed at pp. 8 and 9 of the paper book has been interpreted by this Tribunal to be a show cause notice, there is no reason to deviate from that finding as the language in the two documents, i.e., in the case decided by the Tribunal and this document, is common and, therefore, the penalty should be held to be barred by time.

10. To the arguments raised by the learned authorised representative on the issue of limitation, the learned Departmental Representative contended that the letter dt. 30th Aug., 1998, cannot be termed as a show cause notice because of the reason that it is a composite document. The other argument that was raised was that the Department was gathering the information through the said document and after the Department was satisfied then only it issued a show cause notice dt.

5th April, 1999. It was in this background suggested by the learned Departmental Representative that the penalty is imposed within the time prescribed by law.

11. In the rejoinder, learned counsel for the assessee reiterated the arguments already made.

12. We have heard the parties on this issue and taken ourselves through the record. After going through the record, we feel that this issue cannot be decided unless a positive finding, one way or the other, is given with respect to the documents placed at pp. 8 and 9 of the paper book which, according to the assessee, is a show cause notice while according to the Revenue communication is of general nature. In order to appreciate the controversy involved, it will be pertinent to refer to the letter dt. 30th Aug., 1998. The said letter reads as under; Sub: Income-tax Enquiry--Show-cause notice under Sections 201(1), 201(1A) & 271C of the Indian IT Act, 1961, in the cases of M/s LG Electronics Inc. Group, New Delhi, for financial years 1990-91 to 1997-98--reg.

During the course of a survey under Section 133A of the IT Act, 1961, conducted on 20th Aug., 1998, several irregularities with respect to the IT Act have come to light. It has been found that: (i) You have been paying salaries to expatriate employees based in India partly in India, partly in USA, and the balance in Republic of Korea.

(ii) That the salary, including commission and bonus was paid in USA from the account of Jung II Hong (official a/c) Account No. 121-032205 to the specific accounts of the Korean employees worked or working in India into the Bank of Tokyo-Mitsubishi Trust Company, New York branch, regularly.

(iii) That the salary component in Republic of Korea was credited to the designated accounts as advised by the employees.

(iv) That the tuition fee and other expenditures are being met by the company for the children of its Korean employees studying/studied in American Embassy International Schools at New Delhi and Bombay.

(v) Under Section 194 of the Indian IT Act, correct amount of tax was not paid by splitting agreements towards furnishings, fittings, advance rent payments, etc. in respect of various expatriate employees.

(vi) That payments were made to various advertising agents/parties on which tax was not deducted at source correctly according to Section 194C. (vii) That the tax was not deducted correctly on various allowances and perquisites allowed to the Indian employees.

2. You are requested to furnish full details of the above payments to the undersigned employee-wise for the abovementioned financial year by 1st Sept., 1998.

3. As pointed out above, you have committed default of failure to deduct tax properly in terms of provisions under Chapter XVII-B of the Indian IT Act. You are, therefore, required to show reason as to why you should not be treated as assessee in default for the amounts referred to in para 1 above in terms of Section 201(1). You are also required to show reason why interest under Section 201(1A)

should not be levied for the period of delay of payment of the taxes due to the Government. For the similar reasons mentioned above, you are required to show cause why an order under Section 271C should not be made for each of the financial year mentioned above levying penalty amounting to the income-tax short deducted under Section 201(1) and the interest leviable under Section 201(1A).

4. Your replies including the information as called for above should reach the undersigned on 1st Sept., 1998. You are also required to send the required information directly or by Fax (No. 91-011-3316714). Please take notice that if there is no full and proper compliance as required above, it would be construed that you are deliberately concealing true facts of income and taxes payable thereon. Accordingly, orders will be passed drawing adverse inferences.

13. A perusal of the said letter leaves no room to doubt that the Department had gathered certain information on the basis of which the Department had formed an opinion that the assessee had violated the provisions of Section 271C of the IT Act, but as is expected from the authority that it would comply with the rules of natural justice, they have confronted the assessee with the material collected as is found from (i) to (vii) of the aforesaid letter and called upon it to explain in this background as to why penalty be not imposed. The title of the letter, the body of the letter and the concluding portion of the letter are amply demonstrative of the fact that the Department, on the basis of the material collected was satisfied that the assessee had violated the provisions of Section 271C of the IT Act and that is why they not only issued the letter, but termed the same as a show cause notice.

14. Para 3 of the letter is quite clear and raises no manner of doubt that this communication in the background in which it was written is nothing but a show cause notice calling upon the assessee to show cause as to why the penalty be not imposed for having violated the provisions of the IT Act by not deducting TDS. Merely because the letter under reference apart from Section 271C refers to the other provisions of the Act or is a composite notice would not change the nature of the document which is, nothing but a notice to show cause.

15. Not only this, the view we have taken is supported by the judgment of this Tribunal relied upon by the assessee wherein this Tribunal in paras 21-23 of its

orders at page Nos. 172 (back side) and 173 where while interpreting an identical document it has held as under: "21. It is needless to mention that the above letter is a composite letter on account of default under various provisions of the IT Act.

This letter is not merely for collecting some information but goes beyond the limit. The subject of this letter is clearly and undoubtedly show cause notice for levy of penalty including penalty under Section 271C. We, therefore, feel that, the decision of the Madras High Court in the case of K. Samswati Ammal, wherein the Hon'ble High Court held that where an opportunity is given to show cause as part of a composite notice or in a separate notice, the effect is the same is clearly applicable.

22. Coming to the arguments of the learned Departmental Representative that the letter dt. 16th Feb., 1999, is to seek certain information and prior to collecting this information, the extent of the penalty leviable was not determined and hence this cannot be treated as a show cause notice is also not acceptable because the amount of penalty varies from stage to stage though the show cause notice is issued at the initial stage. It is made further clear that the amount of penalty depends upon the effect given to the first appellant order and even to the second appellate order.

Therefore, the Calcutta High Court decision in the case of Jyoti Prakash Mitter is very relevant and hence on this account also the argument of the learned Departmental Representative cannot be accepted. Besides this, the decisions of the Rajasthan High Court and Delhi High Court, supra, also support the case of the appellant.

The explanatory notes on the relevant provisions of the direct tax laws, cited at (1990) 183 ITR 7 (St), also has the case of this appellant.

23. After examining the totality of the facts and the circumstances of this case, we have no other conclusion but to say that the letter of dt. 16th Feb., 1999, is a show cause notice in terms of Section 271C of the IT Act." 16. In view of the discussion above, we feel that there cannot be any manner of doubt that the letter dt. 30th Aug., 1998, was not a show cause notice.

17. This brings us to the other issue that if the letter dt. 30th Aug., 1998, is a show cause notice, then whether the penalty imposed by the AO and confirmed by the CIT(A) is a must within the time prescribed or not and for that we will have no hesitation, but to refer to the provisions of Section 275 of the IT Act which are in the following terms: "(1) No order imposing a penalty under this Chapter shall be passed-- (a) in a case where the relevant assessment or other order is the subject-matter of an appeal to the CIT(A) under Section 246 or Section 246A of an appeal to the Tribunal under Section 253, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which the order of the CIT(A) or, as the case may be, the Tribunal is received by the CCIT, whichever period expires later; (b) in a case where the relevant assessments other order is the subject-matter of revision under Section 263, after the expiry of six months from the end of the month in which such order of revision is passed; (c) in any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later." .

18. A perusal of the aforesaid provisions leaves no room to doubt that the penalty under Section 271C can be imposed within the time allowed and the time allowed is six months from the end of the month in which action for imposition of penalty is initiated. Six months in this case expired in March, 1999. The penalty in this case was imposed on 29th Oct., 1999. This by no means can be said to be within the time prescribed by law and is, therefore, patently barred by time. The view we take also gets support from the order in the case Luigi India Company Ltd. referred to above, wherein in para 24 of the order which is reproduced below, this position has been identically crystallised: "from the above provisions, it is very clear that for the purposes of Section 271C, the time available for passing an order imposing penalty is 6 months from the end of the month in which action for imposition of penalty is initiated. This view also gets support from the decision of Tribunal in the case of Mitsui & Co. Ltd. v. Dy. CIT (1999) 65 TTJ (Del) 1, particularly paras 8.8 and 8.9 of this order.

Since the penalty in the instant case was levied only on 27th July, 2000, which is well beyond the prescribed time-limit under Section 275(5) of the IT Act, we have no hesitation in holding that the order passed by the AO is after the prescribed time-limit.

Accordingly, the order passed by the AO is barred by limitation and hence cancelled." 19. Consequent to the above, we find that the penalty imposed by the AO and confirmed by the CIT(A) cannot be sustained and is to be quashed on the ground that the same is barred by time.

20. In view of the fact that we have held the penalty to be barred by time, we are not venturing to enter into the area of adjudication with respect to other grounds raised in the main appeal as they are only left for academic discussion, which would be of no consequence to the present proceedings.

21. Consequent to the above, the appeals filed by the assessee succeed and are hereby allowed.

22. In view of our findings on the other grounds that the penalty imposed is barred by time, nothing remains to be adjudicated even on these additional grounds.

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