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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Jan-06-2006

Judge : P Parashar, N Saini

Appellant : B.T. Technet Ltd.

Respondent : Joint Cit

Judgement :

1. This is an appeal filed by the assessce against the order of the Commissioner (Appeals) dated 21-10-2004 on the sole ground that the Id.

Commissioner (Appeals) was wrong in confirming the penalty of Rs. 3,06,000 under Section 271C of the Income Tax Act, 1961.

2. The brief facts of the case are that the assessee-company is engaged in the business of development of software. It entered into an agreement on 1-4-2001 with M/s. FIITJEE Limited for introducing parties interested for becoming franchisees of M/s. FIITJEE Limited. Since this was not the main business of the assessee, it entered into another agreement with M/s. Vineet Estates Private Limited and appointed the said company as its sub-agent for rendering professional services for introducing parties interested in becoming franchisees of M/s. FIITJEE Limited. The assessee made payment of Rs. 30 lakhs as commission to M/s. Vineet Estates Private Limited which was credited in its account on 21-4-2001 for professional services rendered by them. No tax was deducted at source from the said payment of Rs. 30 lakhs. The assessing officer

in a proceeding initiated under Section 20 1 (1) of the Act determined liability of the assessee towards TDS of Rs. 3,06,000 and interest under Section 20 1 (1A) of Rs. 57,375 and raised a demand of Rs. 3,63,375 vide order dated 29-11-2002. The assessee made payment of the said demand of Rs. 3,63,375 on 30-11-2002. Thereafter the Joint Commissioner (Income-tax) Range-49, New Delhi initiated penalty proceedings under Section 271C by issuing show-cause notice on 13-8-2003. After considering the reply dated 7-1-2004 of the assess ee-company the Id. Jt. CIT, Range-49 levied penalty of Rs. 3,06,000 vide order passed on 27-2-2004.

3. The assessee filed an appeal before the Id. Commissioner (Appeals) wherein it was submitted that the assessee-company has credited commission of Rs. 30 lakhs in its books of account in the name of M/s.

Vineet Estates Private Limited on 21-4-2001 for professional services rendered by them for introducing the parties interested in becoming franchisees of M/s. FIITJEE Limited. The assessee-company has not deducted tax at source at the time of crediting the commission of Rs. 30 lakhs as the provisions of Section 194H was not applicable at the relevant point of time as the same came into force on 1-6-2001. It was submitted that the assessing officer was of the view that since payments were credited after 1-6-2001 the assesseecompany was supposed to deduct tax at source under Section 194H.4. The Id. Commissioner (Appeals) after taking into consideration the submission made by the ass essee- company observed that the Id. it. CIT has passed impugned order after being satisfied that it was a case of manipulation of books of account with a motive to avoid applicability of provisions of Section 194H in consonance with the findings of the Income Tax Officer. He noted that in terms of the engagement letter for professional services dated 1-4-2001 stipulating the payment terms, commission would become payable as soon as the deal was finalized in principal. It was seen that no deal had been finalized before 1-6-2001.

In such 'circumstances, the Id. it. CIT has concluded that it was a case of manipulation to books of account with the motive to avoid applicability of provisions of Section 194H which was inserted with effect from 1-6-2001.

5. He further noted that entries made on 15-5-2001 in the books of M/s.

FIITJEE Limited can come to the rescue of the assessee unless they are backed by payments. The assessee did not back his arguments with the help of any independent evidences like bank payments. Prima facie the entries made are all collusive because by making an ante-dated entry all concerned have saved themselves from complying with the provisions of Section 194H. He f urther observed that applicability of various judgments of various Courts presupposes existence of facts as these are portrayed and about which there is no dispute. Manipulation suggests absence of reasonable cause and confirms mens rea on the part of the colluders, especially the assessee. Hence, he confirmed the order of the Id. it. CIT levying the penalty.

6. The Id. AR for the assessee argued and submitted that the Id, Commissioner (Appeals) has upheld the finding of the Id. it. CIT about manipulation of books of account by the assessee in order to avoid applicability of the provisions of Section 194H. He argued and submitted that the said allegation of manipulation of books of account made by the Id. it. CIT was without any material. He submitted that the assessee made the payment of Rs. 3,63,375 including interest of Rs. 57,375 under Section 201(l) and 201(1A), therefore, it cannot be said that the assessee was trying to avoid its liability under the provisions of Section 194H by manipulating its books of account.

7. He further submitted that it will be seen from the penalty order passed by the Id. it. CIT that the penalty was levied on the assessee on the ground that the assessee had not contested the order of the assessing officer before the appellate authorities and has made the payment of TDS of Rs. 3,06,000 and interest of Rs. 57,375 levied under Section 201(l) and 201(IA) by the assessing officer. He submitted that there may be many reasons for the assessee for not filing an appeal against the order of the assessing officer and paying the ' tax levied in the assessment made. He submitted that penalty proceedings are quasi-criminal proceedings and assessing officer has to bring materials on record to show that the default committed by the assessee was intentional. Since the assessing officer has not made enquiries to that effect and has brought no material on record to show that the default made in not deducting the TDS from payments of commission to M/s.

Vineet Estates Private Limited intentional and to defraud the revenue the penalty as levied cannot be sustained in law and, therefore, requires to be deleted.

8. The Id. DR on the other hand supported the order of the assessing officer and the Commissioner (Appeals) and submitted that since the payments were made after 1-6-2001 by the assessee on account of commission although the same was credited to the account of M/s. Vineet Estates Private Limited on 21-4-2001 there was manipulation of the books of account with the intention to avoid compliance with the provisions of Section 194H and, hence, the penalty has been rightly levied and the order of the Commissioner (Appeals) should be upheld.9. We have heard the rival submissions and perused the orders of both the lower authorities and materials available on record. We find that the asscssee has credited the commission of Rs. 30 lakhs in its books of account in the name of M/s. Vineet Estates Private Limited on 21-4-2001. We also find that the assessee paid the TDS and interest of Rs. 3,63,375 under Section 201 (1) and 201(IA) ofthe Act levied by the assessing officer and had not challenged the said finding before the higher authorities in appeal. We further observe that the Id. Jt. CIT has imposed penalty of Rs. 3,06,000 for not deducting tax at source from the payment of commission of Rs. 30 lakhs made to M/s. Vineet Estates Private Limited for the reason that the assessee had not challenged the order of the assessing officer in appeal before the appellate authorities. In our considered opinion, there may be many reasons for the assessee not to challenge the order of the assessing officer in further appeal before the appellate authorities. This alone cannot be the ground for imposition of penalty on the assessee. The penalty proceedings are quasi-criminal proceedings and before levy of penalty the assessing officer has to bring on record some material to show that the assessee has done this intentionally. The Hon'ble Supreme Court in the case of K.C. Builders v. Assistant Commissioner has observed to quote as under: Concealment inherently carries with it the element of mens rea. The fact that some figure or some particulars have been disclosed, even if it takes out the case from non-disclosure, would not by itself take the case out of the purview of furnishing inaccurate particulars. Mere omission from the return of an item of receipt amounts neither to concealment nor to' deliberate furnishing of inaccurate particulars of income, unless and until there is some evidence to show or circumstances are found from which it can be

gathered that the omission was attributable to an intention or desire on the part of the assessee to hide or conceal the income so as to avoid imposition of tax thereon.Woodward Governor India (P.) Ltd v. CIT Section 271C is not automatic. Before levying of penalty the concerned officer is required to find out that even if there was no failure referred to in the concerned provision the same was without a reasonable cause.

11. Further the Hon'ble Chandigarh Bench of the Tribunal in the case of Punjab State Electricity Board v. Income Tax Officer (2002) 121 Taxman 367 (Mag.) held that a reasonable belief that one is not obliged to deduct tax or surcharge at source can be treated as a good and sufficient cause for not deducting tax or surcharge at source.Janta Wine Store v. Income Tax Officer (1984) 10 ITD 348 has held that merely because the assessee does not challenge an addition it cannot be inferred that the assessee was guilty of concealment of income.

13. In the instant case, we find that the provision of Section 194H was brought on Statute with effect from 1-6-2001. The assessee's contention is that since the commission income of Rs. 30 lakhs was credited in the books of account of the assessee on 21-4-2001 when the provisions of Section 194H was not on Statute the assessee did not deduct tax at source at the time of crediting of the income to the account of the assessee.

Any person, not being an individual or a Hindu undivided family, who is responsible for paying, on or after the I st day of June, 200 1, to a resident, any income by way of commission (not being insurance commission referred to in Section 194D) or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever it earlier, deduct income-tax thereon at the rate of five per cent 15. A bare reading of the said section goes to show that the assessee was required to deduct tax at source from the commission payment either at the time of credit of such income to the account of the payee or at the time of payment whichever was earlier. Since the assessce credited the commission income to the account of the payee on 21-4-2001 according to the mercantile system of account followed, which was before the introduction of Section 194H on Statute with effect from 1-6-2001, the assessee was having a bona fide belief that it was not required to deduct the tax at source from such commission payment. No material could be brought on record by the revenue to show that the assessee had manipulated its accounts by crediting the commission income on 21-4-2001 or to show that it was not legally permissible to the company to pass such entries of credits before 1-6-200 1. The above bona fide belief of the assessee shows that there was a reasonable cause for not deducting and depositing such tax earlier and hence in the circumstances in our considered opinion levy of penalty could not be sustained. Still further, the assessee's explanation is that the commission income of Rs. 41 lakhs approx. for services rendered by the assess ee-company was paid to the assessee-company by M/s. FIITJEE Limited on 15-5-2001 and services for which commission was paid to M/ section Vineet Estates Private Limited by the assessee-company was finalized to the satisfaction of the principal company, ie., M/s.

FIITJEE Limited on or before 15-5-2001 which was prior to 1-6-2001, the date of applicability of the provisions of Section 194H of the Income Tax Act, 196 1. Further, the assess ee-company was required to pay M/s.

Vinect Estates Private Limited consolidated commission of 12 per cent of the gross amount received as initial payment from the franchisees introduced through him. No material could be brought on record by the revenue to show that the payment from M/s. FIITJEE Limited was not received by the assessee on 15-5-2001. Therefore, in our considered opinion the Id. R. CIT was not justified in levying penalty of Rs. 3,06,000 on the assessee. Hence, we set aside the order of the assessing officer and the Commissioner (Appeals) and delete the levy of penalty of Rs. 3,06,000.