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Court : Income Tax Appellate Tribunal ITAT Mumbai

Decided On : Sep-08-2006

Reported in : (2007)106ITD558(Mum.)

Judge : S K Yadav, D Srivastava

Appellant : Crest Communication Ltd.

Respondent : Additional Director of

Judgement :

1. These appeals are preferred by the assessee against the Order of the CIT(A) on common grounds which are as under: 1. On the facts and in the circumstances of the case, the Ld. CIT(A) erred in upholding levy of penalty under Section 272A(2)(c) of the Act.

2. The learned CIT(A) has erred in not accepting the contentions of the appellant that the penalty levied by the Assessing Officer is beyond the scope of Section 272A(2)(c) of the Act read with Section 206 of the Act.

3. Without prejudice, the learned CIT(A) has erred in not accepting the appellant's contention that there was a reasonable cause for the failure alleged in terms of Section 272A(2)(c) of the Act.

Since these appeals were heard together, we prefer to adjudicate them by this consolidated order.

2. These appeals emanate from the Order passed under Section 272A(2)(c) of the Income-tax Act (Act) passed by the Additional Director of Income-tax (International Taxation). The brief facts borne out from the record are that the assessee filed its return under Section 206 of the Income-tax Act in Form No. 27 for the financial year ending on 31-3-1998 on 30th June, 2000 which was due on 14-6-1998. Thus, there was a delay of 747 days in filing of the said return. With respect to the assessment year 1998-99, the return under Section 206 was filed on 30-6-2000, whereas, it was dueon 14-6-1999 and was late by 381 days.

The Assessing Officer issued a show-cause notice in both these cases for levy of penalty under Section 272A(2)(c) of the Income-tax Act and the assessee contended that the return could not be filed in time on account of non-payment of tax due to financial constraints. The Assessing Officer observed that similar default had been committed by the assessee in earlier years as well as in subsequent years and there was inordinate delay of 747 days in assessment year 1997-98 and delay of 381 days in assessment year 1998-99 in filing of the return. He, therefore, held that it is a fit case for levy of penalty and accordingly levied the penalty at the minimum rate of Rs. 100 per day.

3. The assessee preferred an appeal before the CIT(A) and raised a preliminary objection that penalty so levied is beyond the scope of applicable provision of law and more so assessee was prevented by reasonable and sufficient cause in the compliance of the alleged applicable provisions of law. It was further contended before the CIT(A) that, Section 206 mandates the filing of the TDS return within the prescribed limit after the end of the financial year, whereas, Rule 37A of Income-tax Rules (hereinafter called as Rules) prescribed in this behalf in the context of furnishing of returns regarding TDS in the case of non-residents, requires the filing of return within 14 days of the date of deduction of tax. Therefore, the time limitation prescribed is beyond the scope of Section 206. In the premise, therefore, no Rule has been prescribed at all in terms of Section 206, or in the alternative the Rule so framed is beyond the mandate of the section. The learned Counsel for the assessee, accordingly, submitted that the penalty levied by the Assessing Officer for contravention of Section 206 is unsustainable in law on the ground that no valid Rule has been prescribed in the exercise of delegated

legislation. With regard to the reasonable and sufficient cause in delay in filing of the return, the learned Counsel for the assessee has submitted that on account of financial constraints, the tax could not be deposited in time and without depositing the tax, there was no purpose for filing of the return, as such, the return could not be filed in time. The learned CIT(A) adjudicated the issue in the light of assessee's contention and the various judicial pronouncements, but, was not convinced with it and he accordingly confirmed the penalty order of the Assessing Officer and dismissed the appeal of the assessee.

4. Now the assessee has preferred an appeal before the Tribunal and reiterated its contentions. During the course of hearing, the learned Counsel for the assessee has contended that under Section 206, the return in the prescribed form about the tax deducted at source is to be filed within the prescribed time after the end of the each financial year along with challan of tax deducted. Since the assessee was under financial constraints, it could not deposit the tax so deducted and there was no purpose of filing of the return. The return was filed as and when the tax were deposited. The learned Counsel for the assessee further contended that under Section 206 no time limit was prescribed for filing of the return. It was simply stated in this section that it should be filed after the end of the financial year. Whereas, Rules 36 to 37 deal with the time of filing of the return under Section 206 in prescribed format. But, in the assessee's case Rule 37A is applicable, according to which, return is to be filed within 14 days from the end of the quarter in Form No. 27. Rule 37A does not deal with the returns which are required to be filed under Section 206 of the Income-tax Act.

As such, for default under Rule 37A, there is no provision for levying the penalty. Hence, the penalty levied under Section 272A(2)(c) in the instant case is not sustainable in the eyes of law.

5. The learned Counsel for the assessee further contended that before introduction of Rule 37A with effect from 12-7-1988 there was only one rule i.e., Rule 37, which dealt with the time and the prescribed form for filing of the return regarding TDS deducted at source in other cases. In that rule there was no specific reference of Section 206 of the Income-tax Act. After the amendment,

Rule 37 was splitted in two rules i.e., Rule 37 and Rule 37A and in Rule 37, a specific reference of Section 206 is made, whereas, in Rule 37A, there was no reference of Section 206 of the Act. Rule 37A is made applicable to those cases in which tax is deducted at source in the case of non-residents. Since the Legislature did not make any specific reference of Section 206 of the Income-tax Act in Rule 37A, the assessee cannot be called to be in default of Section 206 for not filing of return in time prescribed in Rule 37A in the case of non-residents to attract the penalty under Section 272A(2)(c) of the Income-tax Act.

6. The learned DR on the other hand has submitted that as per provisions of Section 206, a return shall be filed within the prescribed period after the end of the financial year before the prescribed income-tax authorities and the time for filing of the return is prescribed in Rule 37 of the Income-tax Rules. But, in the case of non-residents, returns regarding TDS is to be filed within 14 days from the end of the quarter with the Assessing Officer referred to in Rule 36A. In the case of non-residents, the Legislature has made it clear that the return for TDS is required to be filed within 14 days from the end of the each quarter. The learned DR. further contended that this Rule 37A regarding submission of the return should be read along with the main provision of the Act which is Section 206 of the Income-tax Act and not independently as the Rules are always supplement to the main Act and are provided either to simplify or explain the complexity of the main provision or to provide the procedural aspect of the main provisions of the Act. As such, Rule 37A should be read along with Section 206 of the Income-tax Act and in case of default in filing of the return, assessee is liable for the penalty under Section 272A(2)(c) of the Income-tax Act.

7. Having heard the rival submissions and from careful perusal of the record, we find that undisputedly the TDS return was not filed in time.

The issue raised before us is - whether in the case of non-residents, return is required to be filed as per the provisions of Section 206 of the Income-tax Act or Rule 37A of the Income-tax Rules? If it is required to be filed under Section 206 of the Income-tax Act, what would be the period of limitation for filing the TDS return? We have carefully perused the relevant provisions of Section 206 of the Income-

tax Act and Rules 37 and 37A of the Income-tax Rules. For the sake of reference, we prefer to reproduce the relevant portion of Section 206 of the Income-tax Act and Rules 37 and 37A of the Income-tax Rules.

Section 206 : Person deducting tax to furnish prescribed return--(1) The prescribed person in the case of every office of Government, the principal officer in the case of every company, the prescribed person in the case of every local authority or other public body or association, every private employer and every other person responsible for deducting tax under the foregoing provisions of this Chapter shall, within the prescribed time after the end of each financial year, prepare and deliver or cause to be delivered to the prescribed income-tax authority or such other authority or agency as may be prescribed, such returns in such form and verified in such manner and setting forth such particulars as may be prescribed.

Rule 37 : Prescribed returns regarding tax deducted at source under Section 206--Every person, being a person responsible for deducting tax under Chapter XVII-B shall, in respect of a previous year, deliver or cause to be delivered to the (Assessing Officer) referred to in Rule 36A, the returns mentioned in column (1) of the Table below in Form No...specified in the corresponding entry in column (2) of the said Table by the end of the month falling in the financial year immediately following the previous year as specified in the corresponding entry in column (3) of the said Table:_____Sl.

Nature of returns Form No. MonthNo._____
(1) (2) (3)1.

Annual return of deduction of tax 24 June under Section 192 from "Salaries"2.

Annual return of deduction of tax 26 June under Section 193 from "Interest on 37A. Returns regarding tax deducted at source in the case of non-residents--The person making deduction of tax in accordance with Sections 193, 194, 194E, 195, 196A, 196B, 196C and 196D of the Act from any payment made to....

(i) a person, not being a company, who is a non-resident or a resident but not ordinarily resident, or (ii) a company which is neither an Indian company nor a company which has made the prescribed arrangements for the declaration and payment of dividends within India; shall send within fourteen days from the end of the quarter a statement in Form No. 27 to the Assessing Officer referred to in Rule 36A: 8. It is quite evident on bare perusal of Section 206 that it simply requires a person deducting the tax at source to furnish certain TDS returns, after the end of each financial year, in such form and verified in such manner and within such time limit as may be prescribed. However, the mode, manner, form of verification and time limit for filing the TDS returns have been prescribed under the Income-tax Rules, 1962. There are two rules, namely, Rule 37 and Rule 37A, which prescribe the modalities in this behalf. Prior to insertion of Rule 37A in the Income-tax Rules with effect from 12-4-1988, there was only one rule, namely, Rule 37 prescribing the mode, manner and time limit for filing the TDS returns. Erstwhile Rule 37 did not make any reference to Section 206. However, with the insertion of Rule 37A, Rule 37 stood split in two rules, namely Rule 37 and Rule 37A. Marginal heading to Rule 37 titled "Prescribed returns regarding tax deducted at source under Section 206" is quite specific in that it makes a pointed reference in specific terms that the annual TDS returns mentioned therein are the ones prescribed under Section 206. It is this Rule, which prescribes annual returns of TDS mentioned therein to be filed after the end of each financial year with reference to Section 206 of the Income-tax Act. Unlike Rule 37, the marginal heading of Rule 37A opens with the words "Returns regarding tax deducted at source in the case of non-residents". Unlike Rule 37, Rule 37A neither makes any reference to Section 206 nor otherwise suggests that the TDS returns mentioned therein are the ones prescribed under Section 206. Besides, Rule 37A does not require any TDS returns to be filed after the end of each financial year. In fact, Rule 37A requires quarterly returns to be filed within fourteen days from the end of the relevant quarter. Thus, the returns required to be filed under Rules 37 and 37A differ not only in terms of periodicity but also in terms of the provisions with reference to which they are required to be filed. It is, therefore, quite clear that the provisions of Section 206 have relevance to the annual TDS returns prescribed under Rule 37 and not to the Quarterly returns prescribed under Rule 37A and consequently it is

the failure on the part of the person responsible to deduct the tax at source to furnish in due time the TDS returns mentioned in Section 206 read with Rule 37 which will attract the penalty under Section 272A(2)(c).

Conversely, failure to furnish Quarterly TDS returns in terms of Rule 37A will not attract the penalty under Section 272A(2)(c) as such TDS returns are neither annual returns nor the ones specifically prescribed under Section 206.

9. The aforesaid view that we have taken is further supported by the fact wherever the Legislature intended that particular TDS returns should be treated as one prescribed under Section 206, the Legislature has specifically said so. Barring the TDS returns prescribed under Rule 37A, all other rules, namely Rules 36, 36A, 37 and 37B dealing with TDS returns have reference to Section 206 of the Act. However, omission of reference to Section 206 in Rule 37A is conspicuous and cannot be lost sight of. We cannot read reference to Section 206 in Rule 37A when such a reference is missing. We cannot supply the omission. Rather, the legislative policy is clear that it is only the returns mentioned in Rule 37, which have been prescribed in terms of Section 206. Ld.

Authorised Representative for the assessee is, therefore, right in his submission that the assessee cannot be penalized for failure to furnish a quarterly return in terms of Rule 37A as such return have not been prescribed with reference to Section 206 of the Income-tax Act.

Therefore, the person responsible for deducting the tax on source cannot be penalized under Section 272A(2)(c) for default in filing the previous return under Rule 37A as such default is not committed with reference to the TDS return required to be filed in terms of Section 206 of the Income-tax Act. If it had been the intention of the Legislature to bring the defaulter falling under Rule 37A within the purview of Section 206 it could have made similar reference to Section 206 in Rule 37A as a reference has been made to Section 206 in Rule 37.

In our view no penalty can be levied for default in filing quarterly returns under Rule 37A as such returns have not been prescribed in terms of Section 206 of the Income-tax Act.

10. During the course of hearing, our attention was also invited to the Order of the Tribunal in the case of Indian Dyestuff Industries Ltd. v.Dy. CIT IT Appeal No. 4244 (Mum.) of 1998 in which the similar view was taken by the Tribunal following the Order of the Tribunal in the case of Ginners & Pressers Ltd. v. Dy. CIT [1993] 46 ITD 185 (Bom.)(SMC).

The relevant observations made by the Tribunal is extracted hereunder: We find that while, in terms of the provisions of Section 206 of the Act, the tax deduction is only under an obligation to file the TDS returns "with prescribed time after the end of each financial year", Rule 37A requires the tax deductor to file the return, termed as 'Statement in Form No. 27', within 14 days from the date computed with reference to the date of deduction of tax at source from payments to non-residents. The time limit laid down under Rule 37A is, therefore, clearly beyond the scope of provisions of Section 206. In the case before us, it appears that the assessee made the payment to non-residents within the financial year 1992-93, and, in view of the scope of Section 206, the assessee, tax-deductor had an obligation to file the return within 'prescribed time' after the end of that financial year, but, in case assessee tax-deductor had to follow Rule 37A, the assessee had an obligation to file the return by 21st August, 1992 which is well before the end of the financial year. As to what should the Tribunal do when the provision of a rule under the Income-tax Rules, is found to be in excess of the provisions of the Income-tax Act, we find guidance from the order of the Tribunal in the case of Ginners & Pressers Ltd. v. Dy. CIT [1993] 46 ITD 185 which concludes that "the time limit prescribed by Rule 37 is in excess of the power of rule making authority and, therefore, has to be ignored.

11. Keeping in view of the totality of the facts and circumstances of the case and the relevant provisions of the Rules and Act, we are of the considered opinion that though time limit is prescribed under Rule 37A for filing of the TDS return after each quarter, but, no provision is made to penalize the assessee or the employer in case it commits default in filing the return. In the absence of a specific provision for imposing a penalty for a default, a penalty proceeding which are quasi-criminal proceedings should not be initiated to levy the penalty.

We, therefore, set aside the Order of the CIT(A) and delete the penalty.

12. The next issue raised by the assessee is with regard to the reasonable cause for non-filing of the return. In this regard, the assessee has filed the voluminous evidence to justify that he was under a financial constraint on account of which TDS was not deposited and return was not filed in time. We have also examined the prescribed form in which returns are to be filed and we find that in that form there is a specific column in which details of payment are to be mentioned and when the assessee was facing financial constraints and could not deposit the TDS, there was no purpose of filing the return. In support of this proposition, the learned Counsel for the assessee has placed reliance upon the following judgments:Third ITO v. Bombay Cable Co. (P.) Ltd. 12.1 The assessee has also filed the series of documents to establish that he was under financial constraints at the relevant point of time.

We have carefully perused the judgments referred to by the assessee and we find that it has been held by the Tribunal that if really the assessee does not have the funds to pay the taxes, there is no justification of penalizing the defaulter. Similar is the position here that assessee was under financial constraints and for these reasons, TDS were not deposited and the TDS return was also not filed. The revenue did not file any documentary evidence to rebut the evidence filed by the assessee to prove his financial stringencies. Once it is established that assessee is under financial constraints at the relevant point of time, he has a reasonable cause for non-filing of the TDS return in time. We, therefore, of the view that assessee had a reasonable cause for the delay in filing of the appeal. Accordingly, the Order of the CIT(A) is set aside and penalty is deleted.

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