

ito Vs. Cargo Linkers

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Court : Income Tax Appellate Tribunal ITAT Delhi

Decided On : Mar-09-2007

Judge : N Vasudevan, K Bansal

Appellant : ito

Respondent : Cargo Linkers

Judgement :

1. These are appeals by the revenue against the order dated 9-6-2006 of the Id. Commissioner of Income-tax (Appeals)-XXX, New Delhi, relating to the financial years 2000-01, 2001-02, 2002-03 and 2003-04.

2. The ground of appeal, which is common in all the four appeals, reads as follows: On the facts and circumstances of the case, Id. CIT (Appeals) has erred in A deleting the penalty levied under Section 271C amounting to Rs. 10,60,609 despite the fact that an order under Section 201(1)/201(1A) treating the assessee in default for short deduction of Rs. 10,60,609 was sustained by the Id. CIT (Appeals).

3. The respondent herein is a partnership firm carrying on the business of clearing and forwarding agents (C & F agents). It acts as an agent for booking cargo for transportation abroad for various airlines operating in India. The respondent would collect the freight charges from the person, who intends to send goods through a particular airline and pays the same to the airline or the General Sales Agents (GSA) of the airline. It charges commission from the customer. In respect of the

freight charges, which the respondent collects from the customer and which he pays over to the airline or the GSA of the airline, no tax had been deducted at source. According to the revenue the provisions of Section 194C of the Income-tax Act, 1961 (hereinafter referred to as 'the Act') were applicable whereby any person responsible for paying any sum to any contractor for carrying out any work shall at the time of payment deduct tax at a prescribed rate. There was a survey in the business premises of the respondent on 10-9-2003 in which the factum of non-deduction of tax at source by the respondent was noticed. An order under Section 201(1)/ 201(1 A) of the Act dated 19-2-2004 was passed.

The respondent was also found to have made payment to M/s. Nancy Crafts and Associates on account of agency charges. According to the revenue the above payment attracted deduction of tax at source under Section 194H of the Act. In the order passed under Section 201(l)/201(lA) of the Act the respondent was held guilty of having not deducting tax at source under Sections 194C as well as 194H of the Act. Subsequently, penalty proceedings under Section 271C of the Act were also initiated for the purpose of imposing penalty for failure to deduct tax at source. It is also worthwhile mentioning that subsequently an order under Section 154 of the Act was passed reducing g the quantum of default of tax deductible at source and interest thereon. In the penalty proceedings under Section 271C of the Act there was no representation on behalf of the; respondent and in the circumstances the assessing officer held that the respondent failed to deduct tax at source in terms of Sections 194C and 194H of the Act and was, therefore, liable for penalty under Section 271C of the Act. The assessing officer also held that there was no reasonable cause for the respondent's failure and, therefore, the penalty was to be levied.

Against this order of the Assessing F Officer, the respondent preferred appeal before the CIT (Appeals).

4. Before the CIT (Appeals) the respondent submitted that its job was basically to transport goods belonging to exporters. Transportation was done by respective airlines and the respondent's job was only to find the appropriate airline. The respondent only receives commission from the airline on the cargo it books. The

respondent pointed out that the contract of transportation was between, the exporter and the airline and that the respondent was not getting any work done for itself. The payment made by the respondent for transportation of the goods is only routed through the respondent and is in fact a payment directly by the exporter to the airline. The respondent thus submitted that it was not making any payment for carrying out any work in pursuance of a contract to the airline and, therefore, provisions of Section 194C of the Act did not apply. The respondent submitted that in any case it was under the bona fide impression that it was not liable to deduct TDS on the amount given to the GSA of airlines or the airlines as it was merely acting as an agent of the airline while collecting the freight charges from the exporters. The respondent also pointed out that no other agent in the industry was deducting TDS. The respondent also pointed out that the Air Cargo Agents' Association of India had filed a petition before the C.B.D.T. against the revenue's action in raising a demand under Section 201 of the Act. The respondent also pointed out that the agents of airlines in India had paid taxes on this amount received through the respondent and there was no loss to the revenue. The respondent also submitted that its Chartered Accountant also advised them that there was no obligation to deduct tax at source. Even the Cargo Agents' Association had got opinion of Tax Solicitors, M/s. Vaish & Associates, who had advised them that no TDS is deductible on the transactions of the kind carried out by the respondent. The respondent thus submitted that there was a reasonable cause for not deducting tax at source and, therefore, no penalty should be imposed. The CIT (Appeals) on consideration of the submissions was of the view that there was a reasonable cause for the respondent's failure and no penalty should be imposed. He also noticed that no person in the line of business was deducting tax at source and a mis-conception prevailed in their minds regarding liability to deduct tax at source. Going by the nature of transactions, the CIT (Appeals) was of the view that the belief entertained by the respondent was bona fide. The CIT (Appeals), therefore, cancelled the penalty imposed by the assessing officer. The revenue aggrieved by the order of the CIT (Appeals) has preferred the present appeals before the Tribunal.

5. We have heard the submissions of the learned counsel for the respondent as well as the learned departmental Representative. These submissions were a

reiteration of the stand taken before the revenue authorities. We have considered the rival submissions. In our view the respondent herein merely acts as an intermediary to facilitate the contract for carriage of goods. The principal contract for carriage of goods is between the exporter and the carrier airline. An implied contract to carry goods cannot be presumed between the respondent and the airlines. Section 194C of the Act contemplates an obligation only on the part of the exporter to deduct tax at source. We make these observations only in the context of belief entertained by the respondent that it was not liable to deduct tax at source on the payments that it makes to the airlines or their agents on behalf of the exporter. The nature of the transaction, which we have already explained clearly goes to show that the provisions of Section 194C of the Act were not attracted vis-a-vis the respondent herein. It is also not in dispute that no other person in the trade had been deducting tax at source. In the light of the nature of the transaction, which we have already explained the Air Cargo Agents' Association of India had given a representation dated 19-1-2004 to the Chairman of the Central Board of Direct Taxes explaining the nature of the transaction and praying that the suitable instructions be issued not to insist on deduction of tax at source. Another aspect, which we notice is that many airlines that carry the cargo are non-resident entities. The question whether these entities would be liable to pay tax in India in respect of the profits from operation of aircraft is doubtful. The Double Taxation Avoidance Agreement (DTAA) between India and several other countries provides for taxation only in the contracting State and not in India.

6.1 The plea of the respondent in the facts and circumstances of the present case that it was under the bona fide belief that there was no C obligation to deduct tax at source as contemplated under Section 194H of the Act cannot be said to be false. The Hon'ble Delhi High Court in the case of Woodward Governor India (P.) Ltd. v. CIT has explained the expression 'reasonable cause' in the following words: 'Reasonable cause' as applied to human action, is that which would constrain a person of average intelligence and ordinary prudence. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary, prudent and cautious man, placed in the position of the person concerned to come to the conclusion that the same was the right thing to do. The cause shown has to be

considered and only if it is found to be frivolous, without substance or foundation, would the prescribed consequences follow.

6.2 Keeping in mind the overall facts and circumstances of the present case, we are of the view that the penalty imposed was rightly cancelled by the CIT (Appeals). There was a reasonable cause for the respondent's failure to deduct tax at source and consequently the penalties imposed by the assessing officer were rightly cancelled by the CIT (Appeals).

All the appeals by the revenue are, therefore, dismissed.

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