ito Vs. Lic of India

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SooperKanoon Citation : sooperkanoon.com/885193

Court : Kolkata

Decided On : Jul-31-2000

Reported in : [2001]79ITD278(Cal)

Appeal No. : IT Appeal Nos. 2086 & 2087 (Cal) of 1993 31 July 2000 A.Y. 1988-89 to 1989-90

Appellant : ito

Respondent : Lic of India

Advocate for Pet/Ap. : D.K. Ghosh, *for the Revenue* C.N. Mitra and R.P. Mishra, *for the Assessee*

Judgement :
ORDER

Garg, V.P.

These two appeals are by the revenue against the order of the Commissioner (Appeals) for the assessment years 1988-89 and 1989-90 against the deletion of interest of Rs. 2,001 and Rs. 2,466 respectively levied by the assessing officer under section 201(1A) of the Act. Both the appeals are late by 12 days and after going through the petition for condonation and the material on record, we are of the opinion that the revenue was prevented by sufficient and reasonable cause in delayed filing of the appeals. We, accordingly, condone the delay and proceed to decide the appeals on merits.

2. In both the appeals, the tax effect is less than Rs. 25,000 and, therefore, the revenue should have refrained to file the second appeal in view of the Central Board of Direct Taxes circular dated 28-10-1992 vide No. F. 279/116 of 1992-Income Tax and consequently the time of the Tribunal, of its own (Revenues) officers as well as the assessee would have been saved and utilised on some substantive matters. It would be apt to quote other observation of Delhi High Court in the case of CIT v. ITAT : [1998]232ITR207(Delhi) as below :

'The Central Board of Direct Taxes instructions are binding on the department. If the case at hand is covered by a policy laid down by the Central Board of Direct Taxes in that case no fault can be found with the order of the Tribunal refusing to state the case and there is no reason why the High Court should interfere with such discretion of the Tribunal as has been exercised consistently with the uniform policy laid down by the Central Board of Direct Taxes which binds all the subordinate authorities of the Income Tax Department. The High Court would not ordinarily encourage breach of policy decisions and the departmental instructions which have a public purpose behind them. Valuable time of High Courts and highly placed Tribunals is not to be wasted on petty matters.'

3. Be that as it may, on merits also we do not find any reason to take a different view than that of the Deputy Commissioner (Appeals). His order is just and proper and no interference therein is called for. Suffice it would be if we quote the following paragraph from his order :

'4. I have considered the submissions made by the A/R of the appellant company. The issue of treating C.C.A. as a part of taxable income was controversial and complex. This controversy was put to rest when the Honble Calcutta High Court passed the judgment stating that C.A.A. does not form a part of taxable income and should not be taken into account while deducting tax at source from salary income. This was the position on the issue of C.C.A. until the matter was finally settled vide Direct Taxes Amendment Laws, 1989 effective retrospectively since assessment year 1962-63 wherein the decision of the Calcutta High Court was reversed. However, the decision of the Calcutta High Court has laid the appellant to believe that it is not a part of salary income and as such it was not required to

deduct tax on this component of salary income. The liability of an employee to deduct income-tax on the amount of salary payable to his employees arises by virtue of section 192(1) of the Income Tax Act which reads as under : 'Any person responsible for paying any income chargeable under the head salaries shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the rates in force for the financial year in which the payment is made. On the estimated income of the assessee under this head for that financial year'. A perusal of the aforesaid section makes it clear that liability of the employer is to deduct tax on the estimated income of the employees. The provision of section 201 of the Income Tax Act are attracted in the case of an employer when the employer does not deduct or after deducting, fails to pay the tax as required by the Act. In this case the appellant company has right fully deducted tax on estimated income of its employees which excludes the C.C.A. by virtue of the direction given by the Honble Calcutta High Court. So it cannot be said that the appellant did not estimate the income of his employees correctly. The estimate by the employer was fair and honest. Further the provision of section 201 are not attracted in this case because there was no fault on the part of the appellant in not deducting tax on C.C.A. because it was prohibited to do so by the jurisdictional High Court. In this context Madhya Pradesh High Court in the case of Gwalior Rayon Silks Co. Ltd. v. CITI : [1983]140ITR832(MP) considered levy of interest under section 201(1A) and held that a duty is cast on an employer to form an opinion about the tax liability of his employee in respect of the salary income. While forming this opinion, the employer is undoubtedly expected to act honestly and fairly. But if it is found that, the estimate made by the employer is incorrect this fact alone, without anything more, would not inevitably lead to the inference that the employer has not acted honestly and fairly. Unless that inference can be reasonably raised against an employer, no fault can be found with him. In this case the order of the Income Tax Officer has not brought out any findings to show that failure to deduct tax at source was not on the basis of honest and fair opinion. As a matter of fact the circumstances that lead to non-deduction only show that the appellant company has acted in a very fair & honest manner. In this case appellant company has correctly deducted tax at source required under section 192(1) of the Income Tax Act and correctly estimated the income of its employees.

The failure to deduct the C.C.A. cannot be held as an act of deliberate incorrect estimate of income made by the appellant company. Because the Calcutta High Court held that C.C.A. is not a part of taxable income and restrained the appellant company to deduct tax on C.C.A. However after the retrospective amendment, appellant company has not disputed the demand raised on account of short deduction of tax. But it is agitated over the levy of interest under section 201(1A) while it agreed that there is justification in recovering the amount which should have been deducted at source in the first place even retrospectively, there can be no justification to charge interest on such failure to deduct tax at the relevant time as there is nothing to show that the appellant had acted in a dishonest manner. Further had the position of law on the point been very clear and unambiguous such an occasion of short collection of tax at source would not have arisen. In such a situation levy of interest under section 201(1A) was obviously out of question. Therefore, in the present circumstances where the appellants failure to deduct tax at source during the years under appeal was based on bona fides and had arisen by virtue of direction of the jurisdictional High Court which was binding on the appellant, there is no default on the part of the appellant company in terms of section 201 of the Income Tax Act. Therefore, while I approve the action of the Income Tax Officer in recovering addl. Tax on CCA, the levy of interest under section 201(1A) is not justified. The levy of interest of Rs. 2001 & Rs. 2466 for the Financial Years 1987-88 and 1988-89 respectively are deleted.'

4. When the assessee deducted the tax or was required to deduct the tax at source, the City Compensatory Allowance was not taxable as held by the jurisdictional High Court in the case of All India Insurance Employees Association v. Union of India : [1989]176ITR225(Cal) , referred to by the Commissioner (Appeals) in his order. How can therefore it be said that the assessee was in default in not deducting the tax at source on such income? When the law was amended with retrospective effect from 1-4-1962 by Direct Tax Laws (Amendment) Act, 1989, the assessee had already paid the salary and, therefore, there was no possibility of deducting the tax at source, even if it wanted because there was nothing from which the tax could have been deducted. To deduct anything, there must be something from which the deduction could be made. To put it in the words of Justice Ruma Pal, the Judge of the Calcutta High Court (as

she then was) in the case of Modern Fibotex India Ltd. v. Dy. CIT : [1995]212ITR496(Cal)

'An assessee cannot be imputed with clairvoyance.'

It was a case of making prima facie adjustment under section 143(1)(a) and Their Lordships held that when the return was filed, cash compensatory support was held to be exempt. At the time of filing the return, the assessee could not possibly have known that the decision on the basis of which cash compensatory support has been claimed as not amounting to assessees income ceased to be operative by reason of the retrospective legislation. In the present case also, when the assessee was required to deduct the tax at source, it could not possibly have conceived the idea of retrospective legislation and, therefore, to hold the assessee to be in default would amount to doing injustice and making it a defaulter for no fault of it.

5. The aforesaid Calcutta High Court decision in the case of Modern Fibotex India Ltd. was approved by Their Lordships of the Supreme Court in the case of CIT v. Hindustan Electro Graphites Ltd. : [2000]243ITR48(SC) by quoting the following the observations of the Constitutional Bench of the Supreme Court in the case of Pannalal Binjraj v. Union of India : [1957]31ITR565(SC) :

'A humane and considerate administration of the relevant provisions of the Income Tax Act would go a long way in allaying the apprehensions of the assessees and if that is done in the true spirit, no assessee will be in a position to charge the revenue with administering the provisions of the Act with an evil eye and unequal hand.'

6. We may also quote the following observations from the decision of the Hyderabad Bench of the Tribunal in the case of Assistant Commissioner v. Jindal Irrigation Systems Ltd. (1996) 56 ITD 164 :

'6. When the law creates a duty or charge and the party is disabled to perform it, without there being any default on his part, and there is no remedy for him, the law will in general excuse him. When the obligation is one implied by law, impossibility

of performance is a good excuse, say, impotentia excusat legem.

7. Even under the Control Act, dealing with private rights and obligations of a party to the agreement, the contract is deemed to be void on account of impossibility of performance (section 56). The law regards the order and course of nature and will not force a man to demand that which he cannot recover. The law will not itself attempt to do an act which would be vain-lex nil frustra facit-nor enforce one which would be frivolous-lex neminem cogit ad vana seu inutilia-the law will not force any one to do a thing vain and fruitless.'

This was a case where the assessee had not yet started earning income and, therefore, the Tribunal held, how can the law expect him to estimate the advance tax liability and pay tax and consequently levy of interest for failure to do so ?

7. We may also refer to the provisions of section 191 which casts a liability directly on the assessee if the tax has not been deducted at source in accordance with the provisions of Chapter-XVII dealing with 'collection and recovery-deduction at source'. When a direct liability is cast on the assessee, how can there be a liability for the same amount on the person paying the salary to the assessee? Liability to deduct tax from salary under section 192 is at the time of payment of salary and if the payer does not deduct, it then immediately shifts to the assessee under section 191 and the tax is to be paid by him directly.

8. Charge of interest under section 201(1A) can be either penal in nature or compensatory one. In both the situations, the assessee cannot be charged with levy of interest in this case-if it were the former, on the analogy of Calcutta High Court decision in the case of Modern Fibotex India Ltd. (supra) and the Supreme Court decision in the case of Hindustan Electro Graphites Ltd. (supra), because it could not have anticipated the retrospective amendment; and if it were the latter, i.e. compensatory one, the liability having been shifted directly on the recipient assessee under section 191, the assessee would be deemed to be exonerated from such liability on the payers failure to deduct tax at the time of payment. Thus, in either of the situation, the employer assessee in this case can be charged with interest under section 201(1A) of the Act.

9. Let us examine it from a different angle. In this case the liability to deduct tax is under section 192. The requirement to deduct tax is of the amount of tax payable on the estimated income of the assessee under the head salary. At the time when the payment of salary was made, the jurisdictional High Court decision was in force and, therefore, the assessee as an employer could not have been charged with a wrong estimate if it had exclued the City Compensatory Allowance from the income of the employees in accordance with the decision of the Calcutta High Court. It could have included Compensatory City Allowance in the estimate of its employees salary. Consequently, it could not possibly be charged with interest liability under section 201(1A) for the alleged non-deduction of tax at source in such a situation more so in view of Madhya Pradesh High Court decision in the case of Gwalior Rayon Silk Co. Ltd. v. CIT : [1983]140ITR832(MP) referred to the order of Deputy Commissioner (Appeals). For the reasons stated above, we uphold the order of the Deputy Commissioner (Appeals) even on merits.

10. In the result, the appeal is dismissed.