IN THE HIGH COURT OF DELHI

ITR Nos.169-173/82

Date of Hearing & Decision:5.9.2001

The Commissioner of Income-tax ..... Petitioner
Delhi-I, New Delhi

Through: Mr.R.C.Pandey with
with Mrs.Prem Lata
Bansal,Advocates.

VERSUS

M/s Prem Nath Motors(Private) Ltd ..... Respondent
New Delhi

Through: None.

CORAM:-

THE HON'BLE MR. JUSTICE ARIJIT PASAYAT, CHIEF JUSTICE
THE HON'BLE MR. JUSTICE D.K.JAIN

1. Whether reporters of local papers may be allowed to see the judgment? Yes

2. To be referred to the Reporter or not? Yes

Arijit Pasayat, C.J.

All the five references involve common question of law, which has been referred at the instance of Revenue, pursuant to directions given by this Court under Section 256(2) of the Income-tax Act, 1961(in short the 'Act'), by the Income-tax Appellate Tribunal, Delhi Bench 'E'(for short the 'Tribunal'), for opinion of this Court. The question reads as under:

> "Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that no interest was chargeable u/s 201(1A) in respect of the asstt. years 1967-1968 to 1971-72?"

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The dispute relates to Assessments Years 1967-68 to 1971-72.

2. During the assessment proceedings, the Assessing officer noted that the assessee had not properly deducted tax at source as required to be done under Section 192 of the Act and same had not been deposited with the Government. He noticed that two of the employees of the company, namely Surender Nath and Dévendra Nath had been paid commission and perquisites apart from salaries received by them. While submitting details of the employees in the prescribed form No.24 of the Income-tax Rules, 1962(in short 'the Rules') assessee did not furnish the quantum of commission and perquisites enjoyed by those employees in the annual return and tax had not been deducted at source as was required under Section 192 of the Act on the quantum of commission and perquisites. It was noticed that though the due dates fell in April of the relevant assessment years, the actual deposits were made sometime in June-July, 1971, March, 1972 and March, 1973. This, according to the Assessing Officer, required action under Section 201(1A) of the Act. Accordingly various amounts were levied as interest under Section 201(1A). Assessee preferred appeals before the Appellate Assistant Commissioner(in

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short 'the AAC'). Said authority held that in terms of Section 17(1)(iv) commission was part of the salary along with perquisites. Therefore, the assessee was in default for non-deduction of tax on the amount payable as perquisites. Matter was carried in appeal before the Tribunal which was of the view that there was no quantified amount on which tax could be deducted at source, and therefore, there was no possibility of making any deduction of tax. Revenue's applications for reference in terms of Section 256(1) of the Act were rejected but on being moved, this Court directed reference of the aforesaid question along with statement of case and that is how the question has been referred.

3. We have heard learned counsel for the revenue. There is no appearance on behalf of assessee in spite of notice. Learned counsel for the Revenue submitted that the true scope and ambit of Section 192(1) in the background of Section 201(1A) has not been kept in view by the Tribunal. It is submitted that the levy under Section 201(1A) is automatic, and, therefore, the question of existence of any good or sufficient reason did not arise.

4. For resolution of the issue, reference to Sections 192 (1) and 201(1A) as they existed at the relevant time would be necessary. They are as follows:

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"192(1) - 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."

201(1).....

(1A) - Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at fifteen per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid."

. It is to be noted that Sections 192(1) and and Section 201(1A) stand at different footings. One relates to non-deduction of tax while the other relates to levy of interest.

5. The levy of interest is of a compensatory measure for withholding tax which ought to have gone to the exchequer. The provision makes it clear that the levy is mandatory. It is true that the use of the expression "shall" is not always determinative of the fact whether a provision is directory or mandatory in nature. But the context in which the expression "shall" is used in Section 201(1A) makes it unambiguously clear that the levy is mandatory. The purpose of the levy is to claim compensation on the

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amount which ought to have been deducted and deposited and has not been done.

6. The use of the word "shall" raises a presumption that the particular provision is imperative. But this prima facie inference may be regarded by other considerations such as the object and scope of the enactment and consequences flowing from such construction. In Sainik Motors v. State of Rajasthan, AIR 1961 SC 1480, it was observed by the Apex Court that the word "shall" is ordinarily mandatory, but it sometimes is not so, if the context or intention otherwise demands. When a statute uses the word "shall", prima facie, it is mandatory, but the court may ascertain the real intention of the legislature by carefully attending to the real scope of statute. In considering whether a statute is imperative, a balance may be struck between the inconvenience of sometimes rigidly adhering to it and the convenience of sometimes departing from its terms. For ascertaining the real intention of the Legislature, the Court may consider, inter alia, the nature and design of the statute and the consequences which would follow from construing it one way or the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the statute provides for a contingency of the

non-compliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or furthered. If the object of enactment will be defeated by holding the same directory, it will be constructed as mandatory whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be constructed as directory. A directory provision may be distinct from a discretionary power. The former gives no discretion and is intended to be obeyed, but a failure to obey it does not render a thing duly done in disobedience of it a nullity. The latter, i.e., discretionary power, leaves the donee of the power free to use or not to use it at his discretion. Another mode of showing a clear intention that the provision enacted is mandatory is by clothing the command in a negative form. As stated by Crawford in Statutory Interpretation, page 524, prohibitive or negative words can rarely if ever be directory. And this is so even though the statute provides no penalty for disobedience (See: Lachmi Narain v. Union of India, AIR 1976 SC 714). Negative words are clearly prohibitory and are ordinarily used as a legislative

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device to make a statute imperative. Affirmative words stand on a weaker footing than negative words for reading the provision as mandatory, but affirmative words may also be so limiting as to imply a negative. "Interest" is a consideration paid either for use of money or for forbearance in demanding it after it has fallen due. It is a compensation allowed by law or fixed by parties or permitted by custom or usage for use of money belonging to another or for the delay in paying the money after it has become payable. It can be said to be the cost of using credit or funds of another. The liability for payment of interest at the rate stipulated accrues automatically on a failure to pay the amount of tax by the due date. This is so because such a provision is not a claim for any tax, but is a procedural matter providing machinery for recovery of tax which is compensatory in nature (See: Karimtharuvi Tea Estate Ltd. v. State of kerala (1966) 60 ITR 262(SC); CST v. Qureshi Crucible Centre(1993) 89 STC 467(SC) and Prahlad Rai v. STO(1992) 84 STC 375(SC). Liability to pay interest arises by operation of law, being automatic. Looking at the nature of levy, it is clear that it is compensatory in character and not in the nature of penalty. It is seen that there are several provisions where the Legislature has made a distinction between interest payable and penalty imposable. The ultimate

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liability for tax being not there does not dilute the requirements for the non-compliance of which interest is levied under section 201(1A).

7. Judged in that background, the levy of interest was justified and the Tribunal was not justified in directing its deletion. The answer to the question is in the negative, in favour of Revenue and against the assessee.

8. All the five references stand disposed of accordingly.

Chief Justice

D.K.Jain, J.

5th September, 2001
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