* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **ITA Nos.723/06, 724/06, 726/06, 727/06, 728/06, 729/06, 730/06, 731/06, 732/06, 733/06, 734/06, 735/06, 736/06 & 737/06**

Date of Decision: 02.06.2006

COMISSIONER OF INCOME-TAX DELHI ..... Appellant
!

versus

$ M/S. MAJESTIC HOTEL LTD. ...... Respondent
^
%

Advocates who appeared in these cases:

For the Appellant: Mr. R.D. Jolly & Ms.Sonia Mathur.
For the Respondent: M. Ajay Vohra & Ms.Kavita Jha.

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE SHIV NARAYAN DHINGRA

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

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2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

: **T.S. THAKUR, J.**

For original signed orders see ITA No.723/2006.

T.S. THAKUR, J

SHIV NARAYAN DHINGRA, J

June 02, 2006
ss

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All these appeals arise out of a common order passed by the Income-tax Appellate Tribunal, Delhi Bench and shall stand disposed of by this order. Before adverting to the questions that arise for consideration, it is necessary to briefly state the facts giving rise to these appeals.

2. The respondent-company is running a five star hotel in Ludhiana, Punjab. In the course of a survey of the premises of the respondent, it was found that it had failed to deduct tax at source under section 194-A of the Income-tax Act, 1961 (for short "the Act"), while paying interest on the loan borrowed by the respondent from the Tourism Finance Corporation of India Ltd. ("TFCI"). The Assessing Officer held the respondent-company to be 'an assessee in default' in terms of section 201(1) of the Act for the financial years 1994-

95 to 2001-02. An aggregate tax liability of Rs.3,41,46,984/- was, on that basis, determined against the respondent. In addition, a sum of Rs.2,13,89,341/- towards interest was held payable by it under section 201(1A) of the Act.

3. Aggrieved by the said order, the respondent appealed to the Commissioner of Income-tax and argued that payments made to TFCI towards interest were immune from any deduction at source in terms of section 194A(3)(iii)(b) of the Act. It was alternatively argued that even if the deduction at source was in law necessary, the respondent could not be treated as 'an assessee in default' as it was labouring under a bona fide belief that TFCI was covered under the provisions mentioned above and payments made to it were exempt from any deduction at source. Reliance was also placed by the assessee upon a notification issued by the Central

Government notifying TFCI for purposes of Section 194-A(3)(iii)(b) of the Act. The said notification, it was argued, was applicable retrospectively to grant immunity from deduction even in regard to payments made to the Corporation before the same was issued. The Commissioner of Income-tax repelled all these contentions. The Commissioner held that TFCI did not fall under section 194A(3)(iii)(f) of the Act nor was the notification relied upon by the respondent applicable retrospectively. The Commissioner was also of the opinion that no defence based on "reasonable cause" or "bona fide belief" justifying non-deduction of tax at source was available to the assessee in proceedings meant to determine whether the assessee was or was not in default. Repelling the contention that the order passed by the Assessing Officer was not made within a reasonable period, the Commissioner

remitted the matter back to the Assessing Officer to ascertain whether the TFCI had paid the amount of tax due on the amount received by it from the assessee and if so, to give credit of such payments to the respondent while recalculating the short deduction, if any. Dealing with the question of payment of interest on the amount of tax which should have been but was not deducted, the Commissioner observed:

> "The Appellant cannot escape the liability to pay interest u/s 201(1A) of the Act on the ground that the tax had been paid by the deductee. CBDT circular of 29.1.97 referred to earlier clarifies that liability to charge interest u/s 201(1A) of the Act till the date of payment of taxes by the deductee does not get altered even if the taxes were paid by the deductee assessee. Interest u/s 201(1A) of the Act is mandatory and there is no precondition of consideration of reasonable cause or "good and sufficient cause". In fact proviso to section 201 incorporates the principle of "good and sufficient" reasons but only for the purposes of penalty u/s 221. The language of section 201 (1A) uses the term "shall". Interest u/s 201

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(1A) of the Act is mandatory and automatic and is compensatory in nature as held by Delhi High Court in the case of Commissioner of Income Tax Vs. Prem Nath Motors (Pvt.) Ltd reported in 253 ITR 705. This proposition is also supported by Kerala High Court judgment in the case of Commissioner of Income Tax Vs K.K. Engineering Co. reported in 249 ITR 447, Bombay High Court judgment in the case of pentagon Engineering Pvt. Ltd. Vs. Commissioner of Income-tax reported in 212 ITR 92 and Guwahati High Court judgement in the case of Commissioner of Income-tax Vs. Assam Small Industries Development Corporation Limited reported in 219 ITR 324. Interest for the period commencing from the date of deductibility of tax till the payment by the deductee shall, therefore, be charged under section 201(1A) of the Act."

4. Aggrieved by the common order passed by the Commissioner for all the financial years, the parties preferred cross appeals before the Tribunal. While the respondent-assessee assailed the finding recorded by the Commissioner that the assessee was in default under section 201(1) of the

Act in relation to payments made to TFCI, the revenue was in appeal before the Tribunal on the question of deletion of the amount of tax which, according to it, should have been deducted apart from levy of interest only upto date the payee had made the payment of tax. The Tribunal has, by the common order impugned in these appeals, dismissed the appeals filed by the Revenue while allowing those filed by the assessee. The Tribunal held that payments made to TFCI were not exempt from TDS under section 194A(3)(iii)(b) of the Act. It further held that assessee was under a bona fide belief that tax was not required to be deducted from the payment of interest to TFCI.

5. On the question of limitation, the Tribunal was of the opinion that the Assessing Officer ought to have made an order within a period of four years as held by it in the case of

Raymond Woollen Mills Vs. ITO, **57 ITD 536** and that the order in the present case, was beyond the said period. The revenue has, in these appeals, assailed the correctness of the said finding. The following substantial question of law arises for our consideration:

> "Whether the Tribunal was right in law in holding that the assessee could not be treated to be in default u/s. 201 of the Income Tax Act as he was under a bonafide belief that the payments made to TFCI were exempt from deduction of tax at source under Sec.194 A(3) (iii)(b) of the said Act. If so, what is the effect of non-deduction of the tax in the facts and circumstances of the present case?"

6. We have heard learned counsel for the parties at some length and perused the record. As seen earlier, one of the points that was argued before the Commissioner and the Tribunal was whether payment to TFCI was exempt from deduction from tax at source. The Commissioner of Income-

tax as also the Tribunal have both held and, in our opinion, rightly so that such payments were not exempt from deduction at source. That finding is in favour of the revenue and in the absence of any appeal by the Assessing Officer against the same, we are not called upon to examine the correctness thereof. Learned counsel for the parties have, therefore, argued these appeals on the assumption that the payments made to TFCI were not exempt from deduction of tax at source.

7. Mr.Jolly contended that the Tribunal was in a palpable error in holding that the respondent-assessee was under a bona fide belief that payments made to TFCI were not exempt from deduction of tax at source. He urged that there was neither any basis for recording that finding nor was any such consideration germane to the question whether the

assessee was in default. We find merit in those submissions. The Assessing Officer and the Commissioner (Appeals) had both repelled the contention based on the alleged bona fide belief of the assessee that payments made to TFCI were exempt from TDS. There is indeed no material to support the plea of bonafide belief of the assessee nor has any such evidence been referred to or discussed in the order impugned in these appeals. More importantly the question whether the assessee had any bona fide belief or reasonable cause for not making the deduction at source was wholly irrelevant to the question whether it was in default within the meaning of section 201 of the Act. It was only for purposes of levy of a penalty as contemplated under section 201 read with section 221 of the Act that the sufficiency of reasons for the failure to deduct or to pay the tax assume importance. That is evident

from the proviso to section 201(1) of the Act, which reads as under:

> "**201.** (1) If any such person [referred to in section 200] and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct [the whole or any part of the tax] or after deducting fails to pay the tax as required by or under this Act, he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:
>
> **Provided** that no penalty shall be charged under section 221 from such person, principal officer or company unless the [Assessing] Officer is satisfied that such person or principal officer or company, as the case may be, has [without good and sufficient reasons] failed to deduct and pay the tax."

8. Even under section 273-B of the Act, the reasonableness of the cause for the imposition of a penalty is relevant only in relation to the provisions referred to in the said section. Levy of interest under section 201(1)(1A) of the

Act is neither treated as a penalty nor has the said provision been included in section 273-B to make "reasonableness of the cause" for the failure to deduct a relevant consideration. The Tribunal was, in that view of the matter, in error when it held that assessee had a bona fide belief that the payments made by it were exempt from deduction at source or that any such belief was in any way relevant leave alone sufficient to absolve the assessee of its obligation to pay interest at the stipulated rate.

9. It was next argued by Mr.Jolly that if payments to TFCI were not exempt as has been held by the authorities below and the alleged bona fide belief was irrelevant as we have observed above, the assessee must be deemed to be in default for purposes of section 201(1) in which event the consequences envisaged in sub-section (1A) of section 201

must flow unhindered. He contended that failure to deduct tax at source would make not only the amount of tax that ought to have been deducted recoverable from the assessee but also the interest on the said amount at the stipulated rate calculated from the date on which the said tax was deductible to the date such tax was actually paid. In as much as the Tribunal had overlooked the true legal position, it had committed an error apparent on the face of the record.

10. On behalf of the respondent, it was contented by Mr.Vohra that even in cases where the assessee was in default the revenue could not recover the amount of tax twice over by insisting that the person liable to make the deduction should not only pay interest but the principle amount of tax also. He contended that in cases where tax had been paid by the deductee, the person responsible to make the deduction at

source will not be liable to make any further payment. All that was necessary in such cases was payment of interest under section 201(1A) of the Act from the date the amount should have been deducted till the date the deductee-assessee has paid the tax. In support of the submission he relied upon the instructions issued by the Central Board of Direct Taxes dated 29.1.1997. He contended that pursuant to the order passed by the Commissioner of Income-tax, the Assessing Officer has verified whether the payee/deductee has paid taxes on the amounts received from the assessee and come to the conclusion that such payments had in fact been made by the deductee in the form of advance tax. The Assessing Officer had taking note of such payments determined a total amount of Rs.6,71,10 towards interest for the financial years in question. That payment had, according to Mr.Vohra, been

already made by the assessee leaving no other angle or issue to be examined by this Court. It was submitted by Mr.Vohra that if this Court came to the conclusion that interest was indeed payable upto date the deductee made the payments of tax, the payments already made pursuant to the order passed by the Assessing Officer, should satisfy the revenue and the appeals disposed of without going into the question whether the assessment orders made by the Assessing Officer were within or beyond the period of limitation.

11. In the light of what we have observed earlier there can be no dispute that the assessee was in default on account of its failure to make the deductions at source. That default would render it liable to pay the tax amount as also interest on the same after giving it credit for the payments if already made by the deductee. That is precisely what was directed by

the Commissioner of Income-tax. Consequently, the Assessing Officer had on the basis of information available with him examined the matter and come to the conclusion that no amount remained outstanding against the deductee for any one of the financial years. The deductee has admittedly paid the entire amount of tax for all the assessment years in advance. The Assessing Officer has determined the amount of interest payable by the assessee in terms of section 201(1)(4) from the date the tax was deducted upto the date the same was actually paid, which amount has also been deposited by the assessee.

12. There is, in our opinion, no escape from the liability arising from section 201(1A) in case where the assessee does not deduct or does not pay after deduction the amount deducted. Interest at the stipulated rate is inevitable and can

be legitimately recovered from the assessee in default. Mr.Jolly's submission, that the expression 'date on which such tax was actually paid' must relate to the date when tax is paid by the assessee, needs notice only to be rejected. If tax has been paid by the deductee as is the position in the instant case, there is no question of the assessee paying the same over again either in full or part. Tax could be recovered from the assessee only once. If that be so, interest must stop accruing, the moment, the amount of tax is paid to the revenue. It is immaterial whether the tax is paid by the deductee or the assessee who had made the deduction. What is significant is that the interest which is compensatory in character is paid to the revenue till the date the amount of tax is actually deposited. That is precisely what has been done in the instant case. The question framed earlier is answered

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accordingly.

13. In the result, we allow these appeals; set aside the order passed by the Tribunal and restore that passed by the Commissioner of Income-tax. Parties are, however, left to bear their own costs.

T.S. THAKUR, J

SHIV NARAYAN DHINGRA, J

June 02, 2006
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