THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 16.01.2009

+ ITA 138/06, 130/06, 135/06, 140/06, 143/06, 150/06 & 152/06

COMMISSIONER OF INCOME TAX (TDS) … Appellant

- versus –

M/S IKEA TRADING HONG KONG LTD ... Respondent

Advocates who appeared in this case:

For the Appellant : Ms Prem Lata Bansal with Mr Sanjeev Rajpal and Ms Anshul Sharma

For the Respondent : Mr M. S. Syali, Sr Advocate with Mr Aseem Mowar and Ms Mahua C. Kalra

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE RAJIV SHAKDHER

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

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

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

BADAR DURREZ AHMED, J

1. These seven appeals arise out of the common order passed by the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal") on 24.04.2005 in ITA Nos. 35 to 41/Del/2003 pertaining to the financial years 1987-88 to 1993-94. The substantial question of law which arises for our consideration is as follows:-

> Whether, in the facts and circumstances of the present appeals, the Income-tax Appellate Tribunal was correct in law in deleting the penalty imposed by the assessing officer

beyond the time prescribed by section 275(1)(c), the same having been passed more than six months from the end of the month in which the show cause notices were issued?

2. The assessee/respondent is a company incorporated in Japan and has a liaison office in India. A survey operation under section 133A of the Income Tax Act, 1961 (hereinafter referred to as "the said act") was carried out in the assessee's premises at 8, Balaji Estate, Guru Ravidas Marg, Kalkaji, New Delhi, on 4.12.1998. In the course of the survey, statements of various expatriates working for the assessee were recorded and they admitted that a part of their salary was being paid to them in India and some part was being received by them in their native country. Consequent upon the said survey, the assessee sent a letter dated 18.01.1999 to the income-tax officer and enclosed therewith in respect of each of the individual expatriates the following documents:-

1. Income-tax computations for the financial years 1987-88 to 1993-94

2. Salary certificates from the employer, stating the salary paid to the individual employees

3. Form-16's issued to the individual employees by the employers in India.

A summary statement of the total amount which was required to be deposited towards tax and interest thereon in respect of the financial year 1987-88 to 1993-94 was, as indicated in the letter, enclosed therewith. The total additional tax liability was indicated at

Rs 49,93,957/-. Thus the total additional liability towards tax and interest was shown as Rs 99,85,247/-. It is pertinent to note that earlier, on 08.01.1999, the assessee had, on estimate basis, deposited a total sum of Rs 1,52,00,000/- towards tax and interest. This amount was deposited through seven separate challans for each of the financial years 1988-89 to 1994-95. The estimated amount of Rs 1,52,00,000/- was far in excess of the amount payable by the assessee towards tax and interest as indicated in the letter dated 18.01.1999. Consequently, the assessee claimed a refund of Rs 52,14,753/-from the Department.

3. On 26.06.1999 the additional Commissioner of income tax issued a common show cause notice for imposition of penalty under section 271C of the said act. The relevant portion of the said show cause notice is as under:-

" Sir,

Sub: show cause notice for imposition of penalty u/s 271C of the income-tax act

Whereas it is seen that you had failed to deduct the taxes as per provisions laid down under section 192 of the income-tax act on the various amounts paid as detailed in your letter dated 18.12.99[1] and as listed below:

Fin. Year	Amount of additional tax deposited
1987-88	1, 56, 555[2]
1988-89	2, 26, 970
1989-90	3, 91, 254

1990-91	4, 51, 510
1991-92	11, 99, 364
1992-93	14, 08, 121
1993-94	11, 54, 515

> The above-mentioned amount had not been disclosed in the original return by you. In view of above, you are hereby given an opportunity to explain as to why a penalty u/s 271C of the income-tax act be not levied on you, as described therein, on your such failure to deduct the tax. You can appear personally or through your authorised representative or file written submission in this regard at 11.00 a.m. on 22.7.99. Your failure to represent the case will lead to the presumption that you have nothing to state in the matter and the case will be decided on merits."

4. Apparently, the Joint Commissioner of income-tax had in the meanwhile requested the assessee to file a statement indicating the reconciliation of additional tax and interest deposited by it and the other companies of the IKEA group on account of their expatriate employees. Consequent upon such a request, the chartered accountants of the assessee sent a letter dated 12.07.1999 to the Joint Commissioner of income-tax enclosing therewith the reconciliation statement in respect of the additional tax and interest deposited by the IKEA group on account of their expatriate employees. Insofar as the assessee was concerned, the additional tax liability was shown as Rs 49,91,289/-, which was the same as indicated in the earlier letter dated 18.01.1999 and as mentioned in the said show cause notice. The said reconciliation statement also indicated the interest liability to be

Rs 1,52,00,000/-had been deposited on 08.01.1999, the amount of refund due from the tax department was shown as Rs 52,14,753/-.

5. In response to the show cause notice, the assessee sent a written reply on 26.07.1999 to the Additional Commissioner of income-tax. In the said reply, the assessee took the position that the assessee had been under a genuine belief that as the payments were made outside India by a company incorporated outside India and located outside India, the provisions of the Income Tax Act, 1961 relating to deduction of tax at source on payment of such salaries were not applicable. However, we need not go into the question of merits inasmuch as we are only concerned with the question of limitation.

6. On 24.01.2000 the Joint Commissioner of income-tax issued a letter to the assessee granting the assessee a further opportunity of being heard in respect of the penalty sought to be imposed on the assessee. In response to the said letter dated 24.01.2000, the assessee submitted its reply by a letter dated 09.02.2000 wherein the assessee took the plea that more than six months had already elapsed since the issuance of the show cause notice and consequently no order imposing a penalty could now be passed inasmuch as the period of limitation set

However, the Joint Commissioner of income-tax went ahead and passed the order dated 16.03.2000 imposing a penalty of Rs 49,91,289/- under section 271C of the said act in respect of the financial years 1987-88 to 1993-94 being the sum equal to the total amount of short deduction of tax which the assessee had failed to deduct and pay to the credit of the central government in time as per the provisions of chapter XVII-B of the said act. The Joint Commissioner of income-tax repelled the plea of the assessee on the point of limitation by holding that the penalty proceedings were initiated in the course of verification proceedings in respect of various TDS returns filed under section 206 of the said act. The joint Commissioner observed that the verification proceedings had not yet been completed and that the orders under sections 201(1)/201(1A) had also not yet been passed. According to the Joint Commissioner, this meant that the proceedings in the course of which the penalty proceedings were initiated had not yet been completed and therefore the period of limitation which would begin on the culmination or completion of the former proceedings had not yet begin to run. After rejecting the plea of limitation raised by the assessee, the Joint Commissioner of income-tax by virtue of the penalty order dated 16.03.2000 held against the assessee on merits and imposed the said amount of penalty.

7. Being aggrieved by the penalty order dated 16.03.2000 passed by the Joint Commissioner of income-tax, the assessee preferred appeals before the Commissioner of income-tax (appeals), who, by an order dated 04.12.2002 accepted the plea of the petitioner on the point of limitation and set aside the penalty order dated 16.03.2000. Since the Commissioner of income-tax (appeals) had accepted the plea of limitation, he did not examine the question of penalty on merits inasmuch as it had become academic. The Commissioner of income-tax (appeals) followed the decision of the Tribunal in the case of *Lurgi India company Ltd* wherein the Tribunal had observed that for the purpose of section 271C, the time available for passing an order imposing penalty is six months from the end of the month in which action for imposition of penalties initiated. The Commissioner of income-tax (appeals) also referred to the decision of the Tribunal in the case of *Mitsui & Co Ltd versus CIT (1999) 65 TTJ 1* in order to emphasize the distinction between the provisions of section 271C and the provisions of section 271(1)(c) where the penalty proceedings have to be initiated during the course of assessment proceedings. He held that penalty proceedings under section 271C were independent of verification proceedings. He also took note of the fact that in several cases the department had taken the stand that proceedings under section 271C could not be linked with verification proceedings.

8. The revenue's appeals before the Tribunal were dismissed by virtue of the impugned order dated 24.04.2005. The Tribunal upheld the order passed by the Commissioner of income-tax (appeals). Aggrieved by the impugned order, the revenue has preferred the present appeals. It was contended on behalf of the revenue/appellant that both the Commissioner of income-tax (appeals) and the Tribunal had erred in law in accepting the plea of limitation raised by the assessee/respondent. The learned counsel appearing on behalf of the revenue/appellant submitted that since the penalty proceedings, which had been initiated by the issuance of the show cause notice dated 26.06.1999, had been so initiated in the course of verification proceedings, there was no question of the period of limitation having expired in view of the provisions of section 275(1)(c) of the said act. It was contended that the verification proceedings began with the survey on 04.12.1998 and ended on 12.07.1999 when the assessee sent the information regarding the additional tax liability of the assessee on account of the short deduction/ short payment of tax deducted at source. Therefore, according to the learned counsel for the revenue/appellant, the period of limitation would run out only after the end of the financial year, that is, on 31.03.2000. The learned counsel submitted that the period of six months from the end of the month in which the show cause notice dated 26.06.1999 would undoubtedly

proceedings were completed would end on 31.03.2000 and as that would expire later, the end-point of limitation would be 31.03.2000. It was submitted that the penalty order, having been passed on 16.03.2000, was clearly within time.

9. The learned counsel for the respondent/assessee supported the impugned order passed by the Tribunal and urged that the same does not call for any interference. He made two-fold submissions. In the first place, it was contended that penalty proceedings under section 271C are independent of any other proceeding and do not arise out of any other proceeding. The existence of, continuation, or culmination of any other proceeding is not a requirement for initiating penalty proceedings under section 271C of the said Act and no such pre-condition ought to be read into the statute. Secondly, it was contended, even if it be assumed that penalty proceedings were initiated in the course of verification proceedings, the said proceedings stood completed on 18.01.1999 when the assessee submitted all the details of additional tax and interest payable after having paid the same and that, too, in excess on 08.01.1999. The show cause notice dated 26.06.1999 itself only referred to the letter dated 18.01.1999 (wrongly mentioned as 18.12.1999). There is no mention of any pending proceeding. It was, therefore, submitted that the revenue's reliance on the letter of

proceeding was pending and that the same was completed only on 12.07.1999. The learned counsel for the respondent submitted that the information given in the letter of 12.07.1999 was nothing but a repetition of the information already supplied through the letter dated 18.01.1999. Moreover, the letter of 12.07.1999 was more for the purposes of the refund claim of the assessee than for the purposes of indicating the extent of the default. The deficient tax and interest stood paid in excess on 08.01.1999 itself. It was submitted that the order dated 16.03.2000 was clearly beyond time and that the Commissioner of Income Tax (appeals) as well as the Tribunal had correctly accepted the assessee's plea of time bar and had cancelled the penalty.

10. Before we proceed further, we need to notice the relevant provisions of the said Act. Sections 271C and 275(1)(c), so much as are relevant, read as under:-

"271C Penalty for failure to deduct tax at source.

(1) If any person fails to—

(*a*) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or

(*b*) pay the whole or any part of the tax as required by or under—

(i) sub-section (2) of section 115-O; or

then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.

(2) Any penalty imposable under sub-section (1) shall be imposed by the
Joint Commissioner."

"275. Bar of limitation for imposing penalties.—(1) No order imposing a penalty under this Chapter shall be passed –

(a) xxx xxx
xxx xxx ;

(b) xxx xxx
xxx xxx ;

(c) In any other case, after the expiry of the financial year in which the proceedings, in the course of which action for the imposition of penalty has been initiated, are completed, or six months from the end of the month in which action for imposition of penalty is initiated, whichever period expires later.

xxx xxx xxx xxx"

11. Recently, in **ITA 243/2008 (*Subodh Kumar Bhargava v. Commissioner of Income-tax*)** decided on 26.11.2008, we had examined the provisions of section 275. We had noted that section 275 fell within Chapter XXI which dealt with "Penalties Imposable". We had observed that sub-clauses (a) and (b) of Section 275(1), which have not been extracted above and are not attracted in the present case, related to cases where the assessment to which the proceedings for

higher authorities or were the subject matter of a revision under Section 263 of the said Act, respectively. It was noticed that sub-clause (c) of Section 275(1) covers all other cases not falling within sub-clauses (a) or (b) and, in that sense, section 275(1)(c) is a residuary provision.

12. There are two periods of limitation prescribed under sub-clause (c), the first period relates to those category of cases where action for the imposition of penalty has been initiated in the course of "some" proceedings. In such a situation, the period of limitation prescribed is upto the end and including the financial year in which such proceedings are completed.

13. The second part of Section 275(1)(c) pertains to all cases falling under clause (c). This is so because the action for imposition of penalty is contemplated in both parts. Penalty can only be imposed under Chapter XXI by following the procedure prescribed in Section 274 of the said Act which stipulates that no order imposing a penalty can be made unless the assessee has been heard or has been given a reasonable opportunity of being heard. Thus, in any eventuality, before an order imposing a penalty can be passed, the assessee has to be heard or has to be given a reasonable opportunity of being heard. This can only happen when action for imposition of penalty is initiated and the

present his point of view in opposition to such action. The only difference between the first part and the second part is that while in the first part, the action for imposition of penalty is initiated in the course of some other proceedings, under the second part, the "other" proceedings are of no relevance and the only thing to be considered is the point of time as to when the action for imposition of penalty was initiated. In this background, in ***Subodh Kumar Bhargava*** *(supra)* we had observed that:-

> "13. There may be cases which fall under Section 275(1)(c) in which action for the imposition of penalty is initiated in the course of some other proceedings. There may also be cases under Section 275(1)(c) in which the action for imposition of penalty is initiated, but not in the course of some proceedings. In the former category of cases, both the periods of limitation may be applicable, whereas in the latter category, only the second period of limitation of six months from the end of the month in which action for imposition of penalty is initiated, would apply. To illustrate this, let us take the first category of cases. This is that category where the action for imposition of penalty is initiated in the course of some other proceeding. In such a situation, it is obvious that both the periods of limitation would come into play. One would be reckoned from the date on which the other proceedings are completed upto and including the end of the financial year in which that date occurs. The other period of limitation would be that which applies irrespective of the date of completion of the "other proceedings" and which is relatable simply to the date on which action for imposition of penalty is initiated. The period of limitation in such a case would be six months from the end of the month in which the action for imposition of penalty is initiated. It is clear that where penalty proceedings are initiated in the course of some other proceedings, the legislature has provided for two

> legislature has added the expression "whichever period expires later" at the end."
>
> "……But there is a third / residuary category of cases where the initiation of action for imposition of penalty is not in the course of some proceedings. In such cases, the first part of Section 275(1)(c) would have no application and it is only the period of limitation prescribed in the second part which would apply. Since only one period of limitation would be applicable, the expression "whichever period expires later" would have to be read as that very period of limitation."

From the above observations in ***Subodh Kumar Bharagava*** *(supra),* it is clear that that every penalty order under section 275(1)(c) emanates from a notice/show cause notice. However, such notice may or may not arise in the course of some other proceeding. Where it does arise in the course of some other proceeding, two periods of limitation would be available. One starting from the completion of the other proceeding and ending with the end of the financial year. The second, starting from the end of the month in which the penalty proceeding is initiated and ending six months therefrom. In such a situation, the later of the two end-points of limitation would apply. But, where the penalty proceeding does not emanate from any other proceeding, then only the six month period from the end of the month of initiation of the penalty proceeding would be available. We have to examine as to in which category the present case falls.

14. The show cause notice dated 26.06.1999 provides us with the clues to this question. The show cause notice does not mention any pending proceeding in the course of which it was issued. In fact, the show cause notice is based entirely upon the assessee's letter dated 18.01.1999. The amounts are also identical (except for the typographical error where the amount in respect of the financial year 1987-88 has been wrongly indicated as Rs 1,56,555/- instead of the correct figure of Rs 1,59,555/-). The argument that verification was under way also does not stand to reason. The show cause notice issued on 26.06.1999 is definitive of the stand of the department that the assessee had failed to deduct the taxes as per the provisions laid down under section 192 of the income-tax act on the various amounts paid as detailed in the assessee's letter dated 18.01.1999[1] and as listed in the said notice. On their part, the department was sure of the exact amount of default. The sending of the letter dated 12.07.1999 enclosing the reconciliation statement of the entire IKEA group would not enable the revenue to submit that it was only then that they came to know of the exact extent of the default. Such a stand on the part of the revenue is belied by the issuance of the show cause notice itself prior to the receipt of the said letter of 12.07.1999. So, the penalty proceeding which was initiated by the issuance of the show cause notice on

[1] We understand that the above reference to 18.12.99 as the date of the letter was 18.01.99

26.06.1999 was not in the course of any other proceeding but, was independent of any proceeding.

15. We may also make it clear that the penalty proceeding under section 271C is independent of any other proceeding. If there is a failure to deduct or pay the tax deducted at source, penalty proceedings can be initiated. This is irrespective of any order being passed under section 201(1)/201(1A) of the said act. In fact, this is easily demonstrated by the very case at hand. No order under section 201(1)/201(1A) has been passed, yet the penalty order under section 271C has been passed all the same. Moreover, the "other" proceeding mentioned in section 271(1)(c) must be a legitimate proceeding having due recognition under the said act such as an assessment proceeding. If it were to be contended that the survey proceeding was pending, it would be contrary to the scope and ambit of the provisions of section 133A of the act. The survey operation commenced and concluded on 04.12.1998. As regards the submission that verification proceedings were pending, we note that under the said act there is no proceeding which goes by the name of verification proceedings. It is true that in the course of some proceedings such as assessment proceedings, the assessing officer may undertake verification of certain facts but, there is no provision for an independent and formalized verification

verification was underway when the show cause notice was issued, the plea of pendency of verification proceedings cannot be accepted even in law.

16. Clearly, the present case falls in the third category of cases referred to in ***Subodh Kumar Bhargava*** *(supra)* where the initiation of action for imposition of penalty is not in the course of some proceedings. Thus, the first part of Section 275(1)(c) would have no application and it is only the period of limitation prescribed in the second part which would apply. And, as held in ***Subodh Kumar Bhargava*** *(supra), s*ince only one period of limitation would be applicable, the expression "whichever period expires later" would have to be read as that very period of limitation. This being the position, the period of limitation for passing the penalty order expired on 31.12.1999 being six months from the end of the month in which the penalty proceeding was initiated by issuance of the show cause notice dated 26.06.1999. The penalty order was passed on 16.03.2000. This was clearly beyond the time prescribed under section 275(1)(c) of the said Act.

17. Consequently, we answer the question against the revenue/appellant and in favour of the assessee by holding that, in the

Appellate Tribunal was correct in law in deleting the penalty imposed by the assessing officer under section 271C of the Income Tax Act, 1961, on the ground that the penalty order dated 16.03.2000 was passed beyond the time prescribed by section 275(1)(c), the same having been passed after the lapse of six months from the end of the month in which the show cause notices were issued. The appeals are dismissed. The parties are left to bear their own costs.

BADAR DURREZ AHMED, J

RAJIV SHAKDHER, J

January 16, 2009
HJ/SR