* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITAs No.475/2010, 476/2010, 860/2010**

% **Reserved On: 23.03.2011**
Date of Decision: 11.05.2011

The Commissioner of Income Tax – TDS .... **APPELLANT**

Through: Ms.Rashmi Chopra, Sr. Standing Counsel

Versus

ITC Ltd. .... **RESPONDENT**

Through: Mr.Ajay Vohra with Ms.Kavita Jha and Mr.Somhanth Shukla, Advcoates

AND

\+ **ITA No.445/2011**

% **Reserved On: 23.03.2011**
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The Commissioner of Income Tax – TDS .... **APPELLANT**

Through: Ms.Prem Lata Bansal, Sr. Advocate with Mr.Deepak Anand, Jr. Standing Counsel.

Versus

C J International Hotels Ltd. .... **RESPONDENT**

Through: Mr.M.S. Syali, Sr. Advocate with Ms.Madhavi Swaroop and Ms.Husnal Syali, Advocates

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L. MEHTA

1.	Whether reporters of Local papers 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 the Digest?	Yes

M.L. MEHTA, J.

*

For orders, see ITA No.475/2010.

M.L.MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

May 11, 2011
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1. Whether reporters of Local papers be allowed to see the judgment?
2. To be referred to the reporter or not?
3. Whether the judgment should be reported in the Digest? Yes

M.L. MEHTA, J.
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1. These four appeals are being disposed of by this common order as the questions of law arising in these appeals are common. ITAs No.475/2010, 476/2010 and 860/2010 relate to assessee/ITC Ltd. (hereinafter referred to as the "assessee/ITC") for the assessment years 2005-06, 2004-05 and 2003-04 respectively. ITA No.445/2011 relates to assessee, C.J. International Hotels Ltd. (hereinafter referred to as the "assessee/CJ") for the assessment year 2004-04.

2. The assessees are engaged in the business of owning, operating and managing hotels. Surveys were conducted under Section 133A of the Income Tax Act, 1961 (hereinafter referred to as "the Act") at the business premises of the assessees during which it was found that the assessees had been paying tips to its employees but not deducting taxes thereon. The Assessing

Officers treated the amounts of tips under the head "Salary" in the hands of respective staff and held that the assessees were liable to deduct taxes at source from such payments under Section 192 of the Act. The assessees were treated by the Assessing Officers as "assessees-in-default" under Section 201(1) of the Act. The Assessing Officers worked out different amount of taxes to be paid by these assessees under Section 201(1) and also interest under Section 201(1A) of the Act for the aforementioned assessments years.

3. Aggrieved from the orders of the Assessing Officers, the assessees filed appeals before Commissioner of Income Tax (Appellate) [hereinafter referred to as "CIT(A)"]. The appeals in all the four cases were allowed by the CIT(A) by separate orders. The CIT(A) relied upon the decisions of the Tribunal in the case ***Nehru Place Hotels v. ITO***, 173 Taxman 88, ITA No.4055-4060/DL/2005 and held that the assessees could not be treated assessees-in-default under Section 201(1) of the Act for non deduction of tax on tips collected by it and distributed among their employees. Consequently, the CIT(A) in all the four appeals held that no interest was to be charged under Section 201(1A) of the Act.

4. Aggrieved from the orders of the CIT(A), the Revenue filed appeals before the Income Tax Appellate Tribunal (hereinafter referred to as "the Tribunal"). All the appeals came to be dismissed by the Tribunal relying upon its own order for the assessment year 1986-87 (in the case of assessee/ITC) and also on the case of Nehru Place Hotels Limited. V. ITO (*supra*)]. A common order was passed by the Tribunal in the cases relating to ITAs No.475/2010 and 476/2010 of the assessee/ITC. The case relating to the assessee/ITC (ITA No.860/2010) for the assessment year 2003-2004 came to be disposed by the Tribunal vide separate order dated 30th October, 2009. The case relating to the assessee/CJ for the assessment year 2005-2006 came to be disposed by the Tribunal vide its order dated 17th December, 2009. In all the cases, the Tribunal held that the payments of tips paid by the assessees to its employees are not liable for TDS under Section 192 of the Act and thus, the assessees could not be treated assessees-in-default under Section 201 and consequently not liable for any interest under Section 201(1A) of the Act. It is against these orders of the Tribunal that the present appeals have been preferred by the Revenue.

5. The appeals have been admitted on the common questions of law as under:-

"(a) Whether on the facts and in the circumstances of the case, the Ld. ITAT erred in law and on merits holding that the assessee was not an 'assessee in default' for short/non deduction of tax at source on account of banquet and restaurant tips collected and paid by it to its employees?

(b) Whether on the facts and in the circumstances of the case, the Ld. ITAT erred in law and on merits in holding that the payment of banquet and restaurant tips to the employees of the assessee in its capacity as employer were not profits in lieu of salary within the meaning of Section 17 (3) (ii) of the Income Tax Act, 1961?"

6. We have heard the learned counsel for the parties and perused the record. The common question that arises for consideration is, as to whether tips paid by the customers for availing services in the restaurants of the assessees constitute salary within the meaning of Section 15 and Section 17 of the Act and whether the assessees are liable to deduct taxes at source on these payments under Section 192 of the Act.

7. There is no dispute with regard to the proposition that the obligation to deduct taxes at source under Section 192 of the Act in respect of a payment arises when an employee is responsible to make a payment, which is chargeable to tax under the head "Salary" in the hands of the recipient. It is for the purpose of

deduction of tax at source from salary that Section 192 of the Act defines 'salary' as under :-

> (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 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."

8. A plain reading of this Section would explain that the employer is required to deduct tax at source out of the income of the employees chargeable under the head 'salary' at the time of payment on the basis of estimated income of the recipient.

9. Learned counsel for the Revenue submits that the assessees are in default on account of their failure to deduct tax at source under Section 192 of the Act on the tips which constitute income of the employees chargeable under the head 'salary' under Sections 15 and 17 of the Act. On the other hand, learned senior counsel, Mr.Syali, and Mr.Vohra, for the assessees, contend otherwise. They submit that since the tips are not 'salaries' or 'in lieu thereof' paid by the assesses to the employees, the same were not income and thus not taxable under the head 'salary'

under Section 15 and consequently, no tax was required to be deducted under Section 192 of the Act.

10. The counsel for the Revenue as well as assessees on their part explain the mechanism and nature of payment of tips by the customers and their payment/distribution by the assessees. Learned counsels for the assessees submit that the tips are paid by the customers out of their own volition and discretion. They are in the nature of gratuitous payment made by the customers directly to the waiters/staff, as reward in appreciation of services rendered to them. Neither the payment of the tips by the customers nor the quantum of tips is mandatory. The tips are received by the employees from the customers. The assessees act as mere trustees/custodian in collecting the tips charged to the customers credit cards and then pass over the same to the employees/waiters for whom these are meant. Merely because the assessees in the aforesaid circumstances, collect the amount of tips, in the first instance, and pass on to the employees, it cannot be construed as the amount of tips flowing under the contract of employment and becoming part of the salary paid by the assessees to the employees. The assessees only act as a conduit for passing the tips onto the employees. No part of tips is retained by the assessees. Learned counsels for the

assessees submit that the assessees act in fiduciary capacity in the matter of collection and distribution of the tips. They are neither contractually nor compulsorily bound to pay any tips to the staff. The tips amount collected from the customers and distributed among the staff cannot, by any stretch of imagination, be said to be salary due/payable or paid by the assessees. They submit that the tips received by the employees are not remuneration or reward/return for services rendered by the employees to the assessees (employer). But, the same represent reward given by the customers at their discretion pleased with the services rendered. The earning of the tips was entirely at the pleasure of the customers. They further submit that the tips vary from customer to customer and from bill to bill. Further, the employees cannot claim any vested right thereto, since the employer neither pays nor is bound to pay any amount to the employees as tips. The tips are not any dues from the employers payable to the employees nor are they allowed to be paid to them by the employer. The mere fact that an employee would not have earned the tips if he had not been deputed at the outlet, cannot lead to the inference that the payment of tips was flowing from the contract of employment. The fact that the employment was the cause without which the earnings of the tips would not have happened (*causa sine qua non*) does not *ipso*

facto lead to inference that the same was in the nature of salary, since the contract of employment was not the immediate *causa causana* of such earnings. Learned counsels submit that the essential pre-condition of Section 15 are not met, since the amount of tips is neither due from any employer nor it would constitute as a salary paid or allowed to be paid by or on behalf of the employer. Learned counsel refers to the case of ***Emil Webber*** : 200 ITR 483 @ 487 (SC). Learned senior counsel, Mr.Syali, also submits that the payments should flow from the employer to the employee or else it is income from other source and not as part of salary. To bolster the above submissions, learned counsels of the assessees, Mr.Vohra and Mr.Sayali, rely upon the cases of ***The Ram Bagh Palace Hotel, Jaipur v. The Rajathan Hotel Workers' Union, Jaipur,*** AIR 1976 SC 2303; ***Quality Inn Southern Star v. The Regional Director, Employees' State Insurance Corporation***, Civil Appeal No.1250/2001 decided by the Supreme Court on 3rd December, 2007 and ***Nehru Place Hotels v. ITO***, 173 Taxman 88.

11. Learned counsel for the Revenue, Ms.Rashmi Chopra, on the other hand submits that the outlet/restaurant, tips are routed through the bills as service charges and being a part of bills are mandatorily to be paid on clearance of the bill. Amounts of

service charges added to the bill vary as per policy of the employer as to the amount of benefit to be given to its employees. Addition of service charges in the bills cannot be termed as gratuitous or even voluntary and discretionary, but are compulsory. She submits that the assessees have been persistently following a well-laid procedure to charge a fix amount of say, 10% or so as service charges from its customers at the time service is rendered by the staff at the banquets and they are further regularly collecting the other outlet tips. About 50% of the amounts so earned from banquets towards the service charges are retained by the assessees before distribution of the balance to the staff. The tips collected from the other outlets are also being disbursed to the employees on monthly or fortnightly basis. She submits that it is immaterial how the same is collected and how the amount is paid to it employees. But as and when it is disbursed by the assessees, the employees earned the same only on account of rendering services to the employer. Thus, there was an employer and employee relationship that existed at all times. The business activities of the assessees are pursued from its employees, whose duties are to serve their customers or the tips are being paid to the employees in lieu of rendering prompt services for their employers. Learned counsel, Ms.Rashmi Chopra, further submits that the assessees are now

deducting TDS from the tips/service charges from the bills of banquets, but are not doing so in respect of tips collected from other outlets. She submits that the assessees cannot adopt double tax policies in distribution of tip amounts. The tip amounts may be charged in any shape or by any name, may be called as "service charges" or "tips", the meaning and purpose remains the same. The day the total bill towards food and beverages along with tip is paid by the customer to the assessee, the right to claim the tips in addition to salary accrues to the employee from the employer assessee. Similar to the salary, the tip receipts of the hotel employees are also sourced from the hotel bills paid by the customers. Therefore, as regard the source of tips and monthly salary of hotel employees, there is no fundamental difference. The proceeds collected from its customers come under the books of accounts of the assessees.

12. In support of her submissions, learned counsel, Mr.Chopra, relies upon the case of ***Karamchari Union v. Union of India and others***, 243 ITRS 143.

13. In view of the above submissions of learned counsel for the parties, we need to see as to whether the tips paid to the employees by the assessees would constitute salary within the

meaning of Sections 15 and 17 of the Act, as alleged by the Revenue or it would not be so as submitted by the assessees. As per the Webster Comprehensive Dictionary, 'tip' means small gift of money for service given, to a servant, waiter, porter or alike. There is no dispute that it is not a payment made by the employer as a reward or remuneration for services rendered by the employee. As per the Oxford English Dictionary, 'tip' means a small present of money given especially for a service rendered or accepted. Under Section 2(24) 'income' has been defined to include several items which have been enumerated thereunder and we are concerned here with item No.1 which is profits and gains. In the words of Halsbury, the word 'profit' has to be understood in its natural and proper sense, i.e., in a sense in which no commercial man would misunderstand. (see ***Gresham Life Assurance Society v. Styles*** (1892) 3 TC 185. The concept of 'salary' goes back to the days of Roman Empire. The soldiers were given 'Sal (Salt)' as a regard for their services. With the passage of time, the mode has changed from salt to money. However, 'salary', in its conceptual and legal sense, remains a reward for the services rendered. The word 'salary' is derived from the word 'salarium'. In a nutshell, it means compensation for 'rendition of some sort of service'. The salary

is paid usually as a reward for the performance of one's duties. It is paid at the stated intervals.

14. To make the assessees responsible to deduct tax at source, it would be essential to see, as to whether tips form part of the salary within the meanings scribed to it under the Act. For the purpose of income to be chargeable under the head 'salary', Section 15 defines salary as under:

> "**15. Salaries.** – The following income shall be chargeable to income-tax under the head "Salaries" –
>
> (a) any salary due from an employer or a former employer to an assessee in the previous year, whether paid or not;
>
> (b) any salary paid or allowed to him in the previous year by or on behalf of an employer or a former employer though not due or before it became due to him;
>
> (c) any arrears of salary paid or allowed to him in the previous year by or on behalf of an employer on a former employer, if not charged to income-tax for any earlier previous year."

15. Section 17 extends the scope of meaning of Section 15, which reads as under:

> "**17. "Salary", "Perquisite" and "profits in lieu of salary" defined** - For the purposes of sections 15 and 16 and of this section, -
>
> (1) "salary" includes –

(i) Wages,

(ii) Any annuity or pension;

(iii) Any gratuity;

(iv) Any fees, commissions, perquisites or profits in lieu of or in addition to any salary or wages;

(v) Any advance of salary;

(2) ....

(3) "profits in lieu of salary" includes –

(i) The amount of any compensation due to or received by an assessee from his employer or former employer at or in connection with the termination of his employment or the modification of the terms and conditions relating thereto;

(ii) Any payment [other than any payment referred to in clause (10) [, clause (10A)] [, clause(10B)], clause (11), [clause (12) [, clause 13] or clause (13A)] of section 10), due to or received by an assessee from an employer or a former employer or from a provident or other fund, [***] to the extent to which it does not consist of contributions by the assessee or [interest on such contributions or any sum received under a Keyman insurance policy including the sum allocated by way of bonus on such policy:"

16. Under the provisions of Sections 15 and 17 as reproduced above, we may see that the salary is not merely defined to mean the compensation of services rendered, but, by providing an inclusive definition under Section 17, the scope of provision of Section 15 gets widened. Though we are not concerned, we note

that even the pension and gratuity, which ordinarily do not come within the definition of "salary", are included within the term 'salary' by virtue of Section 17(1). Thus, the legislation under Section 15 does not confine salary within the narrow limit of compensation for services rendered during the subsistence of a relationship of employer and employee but even includes the benefits which may become available at the end of that relationship. The word 'includes' is generally used as word of extension, but the meaning of a word or phrase is extended when it is said to include things that would not properly fall within its ordinary connotation. Thus, where 'includes' has an extending force, it adds towards the phrase a meaning which does not naturally belong to it. Scope of inclusive definition cannot be restricted to those words only which occur in such definition, but inclusive definition will extend to so many other things, which are not talked of in the section – {***All India Defence accounts Association v. Union of India***, [1989] 175 ITR 494 (Allahabad)}. In sub-clause (iv) of Section 17(1), it has been provided that even fees, commissions, perquisites or profits which are paid to a person 'in lieu of or in addition to any salary or wages' shall be included in income, taxable under Section 15 of the Act. As per ***CIT v. Gopal Krishna Suri,*** [2000] 113 Taxman 707 (Bombay), the word 'salary' under Section 17(1) is

very wide and an inclusive definition. Further as per ***CIT v. Ram Rattan Lal Verma***, [2005] 145 Taxman 256 (Allahabad), the expression 'salary' for the purpose of computing income for charging purpose will mean only as defined under Section 17.

17. In fact, Section 17 defines "salary", "perquisites" and "profits in lieu of salary" only for the purposes of Section 15 and Section 16. Under sub-Section (1), "Salary" includes not only wages, pension, gratuity, etc., but under the sub-clause (iv), it includes any fees, commissions, perquisites, or profits 'in lieu of' or 'in addition to salary or wages'. The income of tips in all cases may not strictly fall within the "profits in lieu of salary", but in any case, it would be 'profit in addition to salary or wages' at the hands of the recipients. It is in this way that the meaning of "salary" under Section 15 as also under Section 16 is expanded by the inclusion of anything which is received by an employee in addition to salary or wages. The word "profits" here is used only to convey any "advantage" or "gain" by receipt of any payment by the employee. Applying this general meaning of the word "profits" and considering meaning given to it under Section 17(1)(iv) and Section 17(3)(ii) it can be said that "advantage" in terms of payment received by the employee from the employer in relation to or in addition to salary or wages would be covered

by the inclusive definition of the word "salary". Because of the inclusive meaning given to this, phrase "profits in lieu of salary" would include any payment due to or received by an employee from an employer, even though it has no connection with the profits of the employer. Likewise, the inclusive meaning given to the phrase "profits in addition to salary or wages" would include any payment due to or received by an employee from an employer even though it has no connection with the profits of the employer. Under Section 15 clause (b), any salary paid or allowed to an employee by or on behalf of his employer was to constitute income chargeable to tax under the head "salary". In the expanded definition of "salary", as noted above, by virtue of Section 17, any amount paid by an employer to his employee by virtue of his employment or "allowed to him" by or on behalf of the employer would constitute income under Section 15 of the Act. That being the plain interpretation of Section 15 and Section 17, the receipt of tips by an employee from his employer would fall within clause (b) of Section 15.

18. The submissions that since the tips were received by the employee from the customers and not the employer, such receipts would not constitute income under clause (b), would be in fact not the correct interpretation of clause (b) of Section 15.

If it was so intended by the Legislature that the tips so received by an employee were not to constitute income under Section 15, there was no need of Section 17 in the Act. Section 17 prescribes various kinds of gains received in addition to salary as being income for the purposes of Section 15. The employer, by virtue of employment, allows the employee to receive tips from the customers and in case the employer himself collects, that is also disbursed by the employer to the employees. As per ***CIT v. L.W. Russel***, 53 ITR 91, in order that any payment can be construed as a nature of "salary", the same must have reference to the employment, where under the employee acquires vested right, enforceable in law to receive the amount. In this case, it was also held that the expression "paid" includes every receipt by the employee from the employer whether it was due to him or not and the expression "allowed" is of wider connotation and any credit made in the employee's account is covered thereby and it should imply that the right is conferred on the employee in respect of the same. Once the tips are paid by the customers either in cash directly to the employees or by way of charge to the credit cards in the bills, the employees can be said to have gained additional income. When the tips are received by the employees directly in cash, the employer hardly has any role and it may not be even knowing the amounts of tips collected by the

employees. That would outrightly be out of the purview of responsibility of the employer under Section 192 of the Act. But, however, when the tips are charged to the bill either by way of fixed percentage of amount, say 10% or so on the total bill, or where no percentage was specified and amount is indicated by the customer on the bill as a tip, the same goes into the receipt of the employer and is subsequently disbursed to the employees depending upon the nature of understanding and agreement between the employers and the employees. Different settings have different operating mechanisms with regard to collection and disbursement of the tips. Some of the outlets have in-built system of charging some percentage in the bills itself that may be either in the shape of "service charges" or "tips" or may be by any other name. Others leave it to the customers to indicate some amount either on percentage basis or in lumpsum as tips. In either case, these payments go to the receipts of the employer and are distributed either on weekly, quarterly or monthly basis. Such receipts at the hands of employees are nothing but their income for the purpose of Section 15. The system has been continuing and a large amount of income at the hands of the recipients generated through this channel of tips is escaping assessment. What is worse is that it is happening with the full knowledge of the employers, who are admittedly collecting and

distributing this part of the income to the employees without evening knowing as to whether the same was being accounted for by them for the purposes of taxation or not. As soon as such amounts are received by the employer, an obligation arises on him to disburse the same to the rightful persons, namely, the employees. Simultaneously, a right accrues to the employees to claim the same from the employer. By virtue of his relationship of an employer and employee, a vested right accrues to the employee to claim the same.

19. From the above interpretation of the provisions of Section 2(24), Section 15 and Section 17, we may see that the tips would constitute income within the meaning of Section 2(24) and thus taxabie under Section 15.

20. In case of ***Karamchari Union v. Union of India and others***, 243 ITRS 143, the Supreme Court has held as under:

> "Applying the aforesaid general meaning of the word 'Profits' and considering the dictionary meaning given to under Section 17(1)(iv) and (3)(ii), it can be said that 'advantage' in terms of payment of money received by the employee from the employer in relation to or in addition to any salary or wages would be covered by the inclusive definition of the word 'salary'. Because of the inclusive meaning given to the phrase "profits in lieu of salary" would include 'any payment' due to or received by an assessee from an employer, even though it has no connection with the profit of the employer."

21. Applying the above ratio of the Apex Court, the advantage to the hotel employees in the form of monies received as banquet tips or other outlet tips would be covered by the inclusive definition of 'salary' and there cannot be two opinions in view of the said judgment of the Supreme Court.

22. In the case of Ram Bagh Palace Hotel, Jaipur *(supra)*, which was relied upon by the learned counsels for assessees, in support of their submission that the amounts of tips do not constitute salary of the employees paid by the employer under the contract of the employment, the context was entirely different. The Hon'ble Supreme Court described the nature of tips at the hands of the employees as payments not paid by the management out of its pocket but a transfer of what was collected from the customers in the following manner:

> "2. We regret to be unable to agree with the counsel on this point. It is well-known that in important hotels in the country, the appellant is now a five star hotel-the customers are of the affluent variety and pay tips either to the waiters directly or in the shape of service charges or otherwise to the management along with the bill for the items consumed. In short, the true character of tips cannot be treated as any payment made by the management out of its pocket but a transfer of what is collected to the staff as it is intended by the payer to be so distributed. It may also happen that more money comes in by the way of tips into the pockets of the management than distributed by it. We cannot therefore consider the receipt of tips by the staff as

anything like a payment made by the management to its employees warranting consideration by the tribunal to depress the award of dearness allowance."

23. The case of Quality Inn Southern Star (*supra*) relied upon by the learned counsels for assesses is also distinguishable. It was in the context of wages under Section 2(22) of the Employees' State Insurance Act, 1948 that it was held by the Apex court that amount of service charges collected from the customers and disbursed among the employees does not amount to wages under Section 2(22) of this Act. It was held that "the amount received by the employees were not in the nature of "wages" as they were not given to the employees under the terms of contract of employment, either express or implied. The appointment letters expressly state that employees are not entitled to any other remuneration. Thus, the distribution of service charges is expressly excluded from the wages."

24. From the above discussion, we may conclude that the receipt of the tips constitute income at the hands of the recipients and is chargeable to the income tax under the head "salary" under Section 15 of the Act. That being so, it was obligatory upon the assessees to deduct taxes at source from such payments under Section 192 of the Act.

25. Mr.Syali, learned senior counsel for the assessee/CJ, and also Mr.Vohra, the learned counsel for the assessee/ITC, submit that the obligation cast on the assessees under Section 192 is to make an honest and bonafide estimate of income of the employees chargeable to the tax under the head "salaries", but this obligation does not extend beyond to precisely compute such income at the hands of the employees. They submit that if in assessment of the employee it was found that there was a short deduction of tax by the employer out of the income of the employee chargeable under the head "salary" on account of bonafide difference of opinion, regarding inter alia treatment of any amount/receipt, then the employer/assessee cannot be held liable as 'assessee-in-default' under Section 201 of the Act and subjected to the penal consequences of the alleged failure. They submit that the assessees' bonafide believed that the tips are paid by the customers and that though the employee is liable to pay tax in respect of the tips, the employer is not liable to include the same in the estimated salary for the purpose of bonafide deductions of tax at source under Section 192 of the Act. They submit that this practice was adopted since the commencement of the hotel business and the same was accepted by the Revenue by accepting the assessments in the form of annual returns in the past. They place reliance on the

cases of ***Gwalior Rayon Silk Co. Limited v. CIT,*** 140 ITR 832 (Madhya Pradesh) and ***CIT v. Nestle India Limited,*** 243 ITR 435 (Delhi).

26. In the case of Gwalior Rayon Silk Co. Limited *(supra)*, the Madhya Pradesh High Court observed as under:-

> "The provisions of s. 201 of the Act are attracted in the case of an employer only when that employer does not deduct or, after deducting, fails to pay the tax as required by the Act. We have already seen that the Act requires an employer to deduct and pay tax on the estimated income of his employee. 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. It cannot be held that he has not deducted tax on the estimated income of the employee."

27. In the case of CIT v. Nestle India Limited (*supra*), the High Court of Delhi while upholding the order of the Tribunal quashing the order under Section 201 of the Act observed as follows:-

> "The conclusion arrived at by the Tribunal is a pure finding of fact, which does not give rise to any question of law. The Tribunal has not examined, and rightly so, the question as to whether the said allowance would be exempt under Section 10(14) of the Act or not because that question has to be adjusted at the time of assessment of the employee receiving the said allowance and he cannot be bound by the stand of his employer about the taxability or otherwise of a particular

allowance. Deduction of income-tax is subject to regular assessment in the hands of the payee/recipient. "

28. Reliance is also placed on the order of the Tribunal in the case of Nehru Place Hotels Limited (*supra*) wherein the Tribunal held the assessees to be not in default on the ground of bonafide belief that no taxes were deductable at source along with the fact that the assessee (Nehru Place Hotel) had started deducting the TDS and depositing tax on this particular payments for the financial year 2004-2005. Reliance is also placed on the decision of this Court in ITAs No.778/2008 etc. dated 21.07.2008. In the order dated 21.07.2008 rendered in ITA No.778/2008 and others, the Division Bench of this Court observed as under:

"ITA Nos. 778/2008, 779/2008, 780/2008, 814/2008 and 816/2008

These appeals pertaining to assessment years 1999-2000 to 2004-05 have been preferred by the revenue against the common order of the Income Tax Appellate Tribunal dated 27.7.2007.

The issue before the Tribunal was whether the assessee could be termed as an assessee in default within the parameters of Section 201(1)/201(IA) of the Income Tax Act, 1961. The Tribunal has inter alia come to the conclusion that in any event it was quite reasonable for the assessee to form a bonafide belief that the tips which were collected by it on behalf of the employees and subsequently distributed to its employees did not form part of the salary paid by them and, therefore, no deduction on account of tax at source was required to be made by the assessee. The Tribunal came to the conclusive finding

> that the assessee had such a bonafide belief and it is on account of this that the tax was not deducted at source. Consequently, we find that no substantial question of law arises for our consideration. The appeals are dismissed."

29. We have given our thoughtful consideration to the submissions of the learned counsels for the assessees based on *bonafide* belief and non deducting tax at source from the payments made to the employees on account of tips. Learned counsel appearing for the Revenue did not controvert that this practice has been accepted by the Revenue by accepting the assessments in the form of annual returns of the assessees in the past. Since the taxes were to be deducted from the amounts, which were the dues of the employees, no dishonest intentions could be attributed to the assessees. In this regard, we find no reasons to disagree with the reasoning of Madhya Pradesh High Court and Delhi High Court in the cases of Gwalior Rayon Silk Co. Limited (*supra*) and CIT v. Nestle India Limited *(supra)* respectively.

30. Thus, while reiterating our conclusion that the receipts of the tips constitute 'income' of the recipients and is chargeable under the head 'salary' under Section 15 of the Act and that it was obligatory upon the assessees to deduct taxes at source from

such payments under Section 192 of the Act, we, in the given circumstances, are inclined to give the benefit of *bonafide* belief to the assessees for the periods upto the assessment years. In the given circumstances, we are of the view that the cause of non-deduction of taxes as submitted appears to be sufficient being adequate, reliable and sound. Based on this reasoning, we cannot make them liable for levy of penalty as envisaged under Section 201 of the Act. {See ***CIT v. Majestic Hotel Ltd***. *[2006] 155 Taxman 447 (Delhi)*. However, levy of interest under Section 201(1A) is neither treated as penalty nor has the said provision been included in Section 273B to make 'reasonableness of the cause' for the failure to deduct, a relevant consideration. Section 201(1A) makes the payment of simple interest mandatory. The payment of interest under that provision is not penal. There is, therefore, no question of waiver of such interest on the basis that the default was not intentional or on any other basis. (See ***Bennet Coleman & Co. Ltd. v. V.P. Damle, Third ITO,*** [1986] 157 ITR 812 (Bom.) and ***CIT v. Prem Nath Motors (P.) Ltd.***, [2002] 120 Taxman 584 (Delhi).

2011:DHC:14163-DB

31. In view of our discussions, we thus answer the questions accordingly as indicated above. The appeals are allowed without any order as to costs.

M.L.MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

May 11 , 2011
'Dev'