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% 15.07.2011

Present: Mr. Abhishek Maratha, Sr. Standing Counsel for the Revenue.

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ITA 305/2011

(common orders)

In all these appeals which pertain to the same assessee, the issue pertains to the levy of penalty under Section 271 (C) of the Income Tax Act (hereinafter referred to as 'the Act') for different assessment years. The factual background is that the assessee is a company incorporated in Japan and is engaged in the operation of aircrafts in international traffic. Some expatriate employees of this company had served in India from 1st April, 2001. A survey was conducted by the income tax authorities on the premises of the assessee on 24th February, 2005 wherein it was noticed that the assessee had failed to deduct tax on the part of amount paid by the assessee to the said expatriate employees. We may note here itself that on the salaries paid to these expatriates in India as well as in Japan, tax at source was duly deducted by the assessee and deposited with the income tax authorities. However, the assessee had not deducted the tax at source. One component part that is the

amount paid to these expatriates in Japan towards social security, insurance pension etc. It was also found that though tax at source was not deducted on the aforesaid component in India, but tax was duly deducted in Japan and paid to the income tax authorities in Japan. According to the income tax department, the aforesaid component also form part of salaries within the meaning of Indian Income-Tax Act and, therefore, the assessee was required to deduct tax at source thereupon as well. It is further a matter of record that after this objection was raised, the assessee, deposited the tax on that amount as well. However, failure on the part of assessee in not deducting the tax at source at the time of disbursement of salary led to initiation of penalty proceeding under Section 271 (c) of the Act and ultimately the Assessing Officer passed orders under the aforesaid provisions levying different amounts as penalties for the assessment year 1999-2000 to 2005-06. These penalties were deleted by the CIT (A) and the order of the CIT (A) has been confirmed by the ITAT.

A perusal of the order of the Tribunal would demonstrate that the concept of application of entire income charged under the head "salary" was a nascent issue at the relevant time. Law on this aspect was in fluid situation and there was no clear cut authority/ pronouncements on this aspect. This is observed by the Apex Court itself in CIT Vs. Eli Lilly & Co. (India) (P) Ltd. 312 ITR 225. In that

case also, on identical circumstances, in this very ground, the Supreme Court upheld the deletion of penalty imposed under Section 271 (c) of Act. The relevant observations of the Supreme Court discussing this aspect is as follows:-

> "(iv) On the Scope of Section 271C read with Section 273B:
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> Section 271C inter alia states that if any person fails to deduct the whole or any part of the tax as required by the provisions of Chapter XVII-B 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. In these cases we are concerned with Section 271C(1)(a). Thus Section 271C(1)(a) makes it clear that the penalty leviable shall be equal to the amount of tax which such person failed to deduct. We cannot hold this provision to be mandatory or compensatory or automatic because under Section 273B Parliament has enacted that penalty shall not be imposed in cases falling thereunder. Section 271C falls in the category of such cases. Section 273B states that notwithstanding anything contained in Section 271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the

liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason. In each of the 104 cases before us, we find that non-deduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under Section 192 was a nascent issue. It has not be considered by this Court before. Further, in most of these cases, the tax- deductor-assessee has not claimed deduction under Section 40(a)(iii) in computation of its business income. This is one more reason for not imposing penalty under Section 271C because by not claiming deduction under Section 40(a)(iii), in some cases, higher corporate tax has been paid to the extent of Rs. 906.52 lacs (see Civil Appeal No. 1778/06 entitled CIT v. The Bank of Tokyo-Mitsubishi Ltd.). In some of the cases, it is undisputed that each of the expatriate employees have paid directly the taxes due on the foreign salary by way of advance tax/self-assessment tax. The tax-

deductor-assessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under Section 271C as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source."

The Tribunal has followed the aforesaid judgment and rightly so has observed that above facts of the present case are identical to the facts in the aforesaid judgment.

In these circumstances, we are of the opinion that no substantial question of law arises in these appeals and the same are dismissed accordingly.

A.K. SIKRI, J.

M.L.MEHTA, J.

July 15, 2011
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