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

Reserved on: 21st September, 2011

% Date of decision: 31st October, 2011

+ **ITA NO.345/2009, ITA NO.414/2009, ITA NO.458/2009, ITA NO.780/2009 & ITA NO.787/2009**

All titled as:

COMMISSIONER OF INCOME TAX .....Appellant
Through: Ms. Rashmi Chopra, Advocate.

-*versus*-

DELHI PUBLIC SCHOOL .....Respondent
Through: Mr. Ajay Vohra, Advocate with
Ms. Kavita Jha, Advocate and
Mr. Somnath Shukla, Advocate.

And

+ **ITA NO.610/2010, ITA NO.611/2010, ITA NO.612/2010, ITA NO.898/2010 & ITA NO.900/2010**

All titled as:

DELHI PUBLIC SCHOOL .....Appellant
Through: Mr. Ajay Vohra, Advocate with
Ms. Kavita Jha, Advocate and
Mr. Somnath Shukla, Advocate.

-*versus*-

COMMISSIONER OF INCOME TAX .....Respondent
Through: Mr. Abhishek Maratha, Advocate.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether reporters of local papers may be allowed to see the Judgment? No.
2. To be referred to the Reporter or not? No.
3. Whether the Judgment should be reported in the Digest? Yes.

SIDDHARTH MRIDUL, J.

1. Appeals of the Revenue are admitted on the following substantial question of law:

> "Whether on the facts and in the circumstances of the case, the learned ITAT erred in holding that Assessee was not in default under Section 201(1) and not liable for interest under Section 201(1A) of the Income Tax Act, 1961."

2. Some of the Appeals are filed by the Income Tax Department and some other Appeals by the Assessee which are in the nature of counter objections. Since the issue involved in the Appeals of the Revenue is common, these Appeals taken up first for decision.

3. An on-the-spot interactive education programme was conducted on 10th March, 2005 wherein it was revealed that the Assessee School was providing free educational facilities to the

wards of teachers/staff members. The Assessing Officer(AO), based on his understanding of Rule 3(5) of the Income Tax Rules, 1962, held that the Assessee had committed a default by lower deduction of TDS from the total salary and was thus liable to be treated in default under Section 201(1) and liable for interest under Section 201(1A) of the Income Tax Act, 1961.

4. According to the AO survey operations were carried out in the case of many other schools and in the instant case, as per the fee structure furnished during the course of survey operation, the tuition fees alone ranges from ₹1,600/- to ₹1,900/- from class Nursery to class XII, excluding all other charges/fees. Therefore, since the Assessee School did not meet its mandatory obligations the Assessee School was treated as Assessee in default as aforesaid. In this behalf, it is noted that the Assessing Officer did not apply his mind to the latter part of Rule 3(5) of the Rules, 1962 where the determination of the value of the perquisite is with reference to the "cost" of such education in a similar institution in or near the locality. In this behalf the latter part of Rule 3(5) of the Rules, which requires the AO to determine the cost of education in a similar institution in or

near the locality was completely overlooked by the AO and therefore he proceeded on an entirely incorrect proposition.

5. The Assessee School carried the matter in Appeal before the Commissioner of Income Tax (Appeals)[CIT(A)]. The CIT(A) came to the conclusion that the interpretation adopted by the AO was iniquitous. The CIT(A) held that the words used are "cost of education" and this means the amount actually paid and not the general fees charged from other students. Keeping the requirements of the Rule in view, the CIT(A) held that the perquisites are not chargeable to tax if the cost of such education or the value of such benefit per child does not exceed ₹1,000/- per month. Applying purposive construction in preference to the literal construction, the CIT(A) held that in view of the factual and legal position in the present matter, the purposive and contextual interpretation in relation to the provisions of Rule 3(5) requires to be preferred over the literal interpretation, and came to the conclusion that there was no case for treating the Assessee as an Assessee in default.

6. Before the Income Tax Appellate Tribunal (ITAT) the Assessee School had argued that it had estimated the value of

perquisite in a *bona fide* manner and, therefore, the provisions contained in Sections 201 and 201(1A) were not applicable. It was also argued that primary responsibility of payment of tax lay on various assessees as deduction of tax at source is merely interim measure for collection of tax and, therefore, the tax should be collected directly from the employees and teachers as long time has elapsed after the close of various financial years. The Assessee lastly argued that the computation made by the AO was *ad hoc* in which tax was uniformally levied in each case irrespective of the total income of the teachers and the employees and the corresponding deductions under Section 88, if any, on account of expenditure incurred on the education of the wards had also not been taken into account.

7. On the facts and circumstances of the case the ITAT observed that "*the intention and rationale of the provision is not to compute tax correctly but to facilitate recovery and collection of tax. What is required to be done under the provision is to estimate the income of the assesee under the head "salaries", compute tax on the estimated income and deduct such tax and deposit the same to the credit of the government*". The ITAT

further came to the conclusion that the tax to be deducted is merely an interim measure of an estimated amount subject to final determination of the tax in the hands of the employees on regular assessment and, therefore, by its very nature the estimated amount could not have been contemplated to be an exact amount and what is required is to deduct tax on the basis of a *bona fide* estimate. In this connection reliance was placed on the decision of the Madhya Pradesh High Court in the case of ***Gwalior Rayon Silk Co. Ltd.*** v. ***Commissioner of Income Tax***, (1983) 140 ITR 832 and in the case of ***Commissioner of Income Tax*** v. ***Nestle India Ltd.***, (2000) 243 ITR 435. On the basis of these judgments it was observed that what the Assessee was required to do was to make an honest and *bona fide* estimate of income of the employees chargeable to tax under the head "salaries", deduct tax thereon and deposit the same to the credit of the Government and since this process had been undertaken by the Assessee in a *bona fide* manner, it could not have been treated as an Assessee in default. The ITAT, therefore, held that since the Assessee had deducted a sum of ₹1,000/- per child per month on the basis of the interpretation of the provisions given in the ready reckoner, therefore, even though such an

interpretation may or may not have been correct, unless it is shown that there was something more than mere reliance on the ready reckoner, the Assessee cannot be held to be an Assessee in default in terms of the decisions in the cases cited above. Consequently the ITAT held that this case was not fit for passing orders under Section 201(1) and consequently under Section 201(1A).

8. In ***Gwalior Rayon Silk Co. Ltd.(supra)*** it was held that:-

> "The provisions of s.201 of the Act are attracted in the case of an employer only when that employer does not deduct tax at source or after deducting fails to pay the tax as required by the Act. 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."

9. In ***Commissioner of Income Tax*** v. ***ITC Ltd.***, 199 Taxman 412 (Del), in Paragraph 29 of the Report the Court held as follows:-

> "29. We have given out thoughtful consideration to the submissions of the learned counsels for the assessee based on *bona fide* 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. Ltd. (supra) and Nestle India Ltd. (supra) respectively."

10. In the present matter it is seen that TDS has been deducted on "estimated income" of the employee, and the employer was not expected to step into the shoes of the AO and determine the actual income. Furthermore, under Section 191 of the Act the liability to pay the tax was that of the recipient, and that while forming this opinion the employer was undoubtedly expected to act honestly and fairly and, therefore, 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 as held in the decision of ***Gwalior Rayon Silk Co. Ltd.(supra)***. Unless that inference can be reasonably raised

against an employer, no fault can be found against him and it cannot be held that he has not deducted tax on the estimated income of the employee. Further, it is noticed that the AO without application of mind proceeded with the determination of the value of the perquisite based on the survey operations in many other schools without reference to the "cost" of such education in a similar institution in or near the locality. Thus the very basis on which the assessment was finalized is erroneous. Factually, the CIT(A) held that on the basis of the accounts maintained by the Assessee, the cost of education was less than ₹1,000/- per month per child and, therefore, the Assessee was also entitled to the benefit of the proviso to Rule3(5) of the Rules, 1962.

11. In view of the above, we are of the opinion that the ITAT was correct in coming to the finding that these were not fit cases for passing orders under Section 201(1) and consequently levying interest under Section 201(1A) of the Act. Resultantly, the substantial question of law proposed above is answered in favour of the Assessee and against the Revenue and the Appeals filed on behalf of the Income Tax Department are dismissed

herewith. Further, we are also of the opinion, as urged on behalf of the Assessee, that the ITAT, having come to the conclusion that the Assessee was not an Assessee in default under Section 201(1) of the Act and consequently not liable to interest under Section 201(1A) of the Act, should have left the other issues unanswered for they have been rendered academic upon the ITAT finding a recording of honest and *bona fide* conduct on the part of the Assessee. The conclusions arrived at by the ITAT apart from the issues decided in the present order are accordingly reversed. Further, in view of our conclusion, the Appeals filed on behalf of the Assessee are permitted to be withdrawn as urged by Counsel for the Assessee and are disposed of accordingly. No costs.

SIDDHARTH MRIDUL, J.

ACTING CHIEF JUSTICE

OCTOBER 31, 2011
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