THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 21.12.2011

+ ITA 74/2003

COMMISSIONER OF INCOME TAX (TDS) ... Appellant

-versus-

M/S AMERICAN EXPRESS BANK LTD ... Respondent

+ ITA 75/2003

COMMISSIONER OF INCOME TAX (TDS) ... Appellant

-versus-

M/S AMERICAN EXPRESS BANK LTD ... Respondent

+ ITA 653/2005

THE COMMISSIONER OF INCOME TAX TDS ... Appellant

-versus-

M/S AMERICAN EXPRESS BANK LTD ... Respondent

Advocates who appeared in this case:-

For the Appellants :Mr Abhishek Maratha, Sr. Standing Counsel with Ms Anshul Sharma, Advocate

For the Respondents :Ms Mahua Kalra with Mr Mayank Nagi, Mr Rahul Sateeja & Ms Husnal Syali, Advocates

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MS JUSTICE VEENA BIRBAL

BADAR DURREZ AHMED, J (ORAL)

1. These three appeals filed by the Revenue are taken up together as they involve common issues. ITA No.74/2003 and ITA No.75/2003 are in respect of American Express Bank Limited, Travel Related Services, whereas ITA No. 653/2005 is in respect of American Express Bank Limited. All the three appeals pertain to the financial year 1992-93. ITA No.74/2003 arises out of an order under Section 201 of the Income Tax Act, 1961 (hereinafter referred to as the said Act) whereby the respondent has been held to be an 'assessee in default' on account of short deduction and short payment of the taxes which ought to have been deducted at source in respect of reimbursements made to its employees on account of watchmen, gardeners, sweepers, etc., engaged by the employees of the assessee, out of their own funds. The said appeals also pertain to the reimbursement of travel expenses of the employees of the assessee company on account of their travel to and fro their residences and office. It also pertains to the reimbursement of expenses incurred by the employees for journals, newspapers and periodicals. ITA No.75/2003 arises out of an order under Section 201(1A) imposing a liability on the assessee to pay interest on the amount of short deduction/short payment of the taxes deducted/ to be deducted at

source. It also pertains to the same financial year i.e., 1992-93. ITA No.653/2005 relates to a different assessee i.e., American Express Bank Limited but is in respect of the issues which arise under Section 201 and 201 (1A) of the said Act and also pertains to the financial year 1992-93. In ITA No.653/2005, certain additional reimbursements have been made under heads such as lunch coupons, reimbursement of educational expenses etc.

2. The Income Tax Appellate Tribunal in each of these cases has held in favour of the assessee by coming to the finding that the assessee had not deducted/paid tax at source on account of the aforesaid heads of reimbursement because it was under a bona fide belief that it was not required to deduct the said amounts. We need not go into the merits of whether the said amounts were, in fact, deductible or not, because it is an admitted position that the assessee ought to have been made the said deductions. However, in view of the fact that there was some controversy with regard to some of the deductions, the Tribunal has come to a conclusion that the assessee was under a bona fide belief that the amounts were not to be deducted and, therefore, it had good cause and sufficient reason not to deduct the said amounts.

3. The substantial questions of law which arise for our consideration are:-

> "1. Whether the Income Tax Appellate Tribunal, despite having come to the conclusion that the assessee

had under a bona fide belief not deducted/not paid the tax at source in respect of the reimbursements for the heads of expenses mentioned above, was right in holding that the assessee could not be treated as an assessee in default for the purposes of Section 201 of the Income Tax Act, 1961?

2. Whether the Income Tax Appellate Tribunal was correct in law in holding that no interest under Section 201 (1A) in the facts and circumstances of the present case, was payable by the assessee?"

4. With the consent of the parties, the appeals are taken up for hearing straightaway on the basis of the appeal papers.

5. The relevant portions of Section 201, as would be applicable for the financial year 1992-93 reads as under:-

"***Section 201- Consequences of failure to deduct or pay.***

(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 occur, 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.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section 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 be liable to pay simple interest at fifteen per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.

xxxx xxxx xxxx xxxx"

6. Section 221 of the said Act which also falls in the same Chapter XVII − "Collection and Recovery" and which deals with penalty payable when tax is in default, to the extent relevant, is reproduced hereinbelow:-

"***Section 221- Penalty payable when tax in default***

(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the Assessing Officer may direct, and in case of a continuing default such further amount or the amounts as the Assessing Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears:

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard:

Provided further that where the assessee proves to the satisfaction of the Assessing Officer that the default

was for good and sufficient reasons, no penalty shall be levied under this section.

xxxx xxxx xxxx xxxx"

7. The Income Tax Appellate Tribunal in ITA No.74/2003 held as under:-

"The plethora of decisions on this point make it amply clear that the assessee company had acted honestly and fairly in short deducting the tax at source under a bona fide belief that the reimbursement of certain expenses on account of salary of gardeners/sweepers, etc., actual conveyance expenditure and the expenditure on newspapers and periodicals in the hands of the employees. Under these circumstances, the assessee, as an employer did not deduct the tax at source. The revenue has not brought any evidence on record suggesting that the assessee company had acted in a fraudulent manner. We, therefore, hold that the assessee cannot be held to be an assessee in default under section 201 of the Act for short deduction of tax on above items. Consequently, we also hold that no interest under section 201(1A) was leviable on the assessee. We, therefore, delete the levy of tax and interest under Section 201/201(1A) of the Act. We have also perused the order relied on by the learned DR in the case of sister concern of the assessee, but we find that in the case of another sister concern, namely, the American Express Bank Ltd, the Bombay Bench of the Tribunal has considered this issue. Vide its order dated 03.12.96, in ITA No.3202/Bom/90, the Tribunal has held that the estimation of the income by the assessee was bona fide and, therefore, it could not held in default, even if ultimately it is found that the employees were liable to more tax than deducted by the assessee.

Both the appeals directed by the assessee are therefore allowed."

(underlining added)

8. From the above conclusions of the Income Tax Appellate Tribunal, it is apparent that as a finding of fact, the Tribunal came to the conclusion that the assessee had acted honestly and fairly in short deducting the tax at source under a bona fide belief that the reimbursement of certain expenses on account of salary of gardeners/sweepers etc., actual conveyance expenditure and the expenditure on newspapers and periodicals were not taxable in the hands of the employees. After having returned such a finding, the Income Tax Appellate Tribunal concluded that the assessee cannot be held to be an 'assessee in default' under Section 201 of the Act for short deduction of tax on the above items. Consequently, the Tribunal held that no interest under Section 201(1A) was leviable on the assessee and, therefore, the Tribunal deleted the levy of tax and interest under Section 201/201(1A) of the said Act.

9. While we are not inclined to disturb the finding of the Income Tax Appellate Tribunal that the assessee had acted in a bona fide manner, we do not agree with the conclusion of the Income Tax Appellate Tribunal that the assessee cannot be regarded as being as an "assessee in default" in respect of the short deduction. It is important to remember that the question of "good and sufficient reasons" only arises when one considers the proviso to Section 201(1) of the said Act. That proviso has been specifically introduced to negate the possibility of imposition of penalty under Section 221 if the Assessing Officer is satisfied that the person liable had good and sufficient reasons to not deduct and pay the tax in question. Thus, the proviso is

to be applied only to the question of penalty. It would not absolve the assessee insofar as his being considered as an assessee in default for the purposes of Section 201(1) of the said Act. Therefore, this finding of the Tribunal is set aside. Consequently, question no.1 is decided in favour of the Revenue and against the assessee.

10. Insofar as the second question is concerned i.e., with regard to the interest payable under Section 201(1A) of the said Act, that is a mandatory provision, as already held by a Division Bench of this Court in the case of ***CIT v. ITC Limited***, ITA No.475/2010, dated 11.05.2011. The said Division Bench observed as under:-

> "xxxx xxxx xxxx xxxx
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> 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)."

Therefore, the second question is also answered in favour of the Revenue and against the assessee.

11. We would like to reiterate that although the questions have been decided in favour of the Revenue, it must be remembered that the finding of the Tribunal that the assessee acted in a bona fide manner, has to be kept in mind and, therefore, no penalty can be imposed on

the assessee under Section 221 because of the specific stipulation in the proviso to Section 201(1) of the said Act. We also note that the exact quantum of the default needs to be computed. It would, therefore, be necessary to remand the matter to the assessing officer for the limited purpose of computing the exact quantum of default and the interest payable under Section 201(1A) of the said Act. We make it clear that in case the employees of the assessee have paid the taxes as per their individual returns/assessments, then no amount towards tax would be payable to that extent by the assessee, however, the assessee would continue to be liable for interest under Section 201(1A) but only for the period commencing 'from the date on which such tax was deductible to the date on which the tax is actually paid' [see: CIT v Adidas India Marketing P. Ltd : (2007) 288 ITR 379 (Del) and CIT v Trans Bharat Aviation (P) Ltd : (2010) 320 ITR 671 (Del)]. The assessing officer shall give full opportunity to the assessee to produce documents in this regard.

The appeals are allowed to the extent indicated above.

BADAR DURREZ AHMED, J

VEENA BIRBAL, J

DECEMBER 21, 2011
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