(2001) 04 DEL CK 0134

Delhi High Court

Case No: Civil Writ Petition No. 7066 of 2000

Woodward Governor India P. Ltd.		APPELLANT
	Vs	
Commissioner of Income Tax and Others		RESPONDENT

Date of Decision: April 19, 2001

Acts Referred:

- Income Tax Act, 1961 - Section 271C, 273B

Citation: (2002) 253 ITR 745 : (2001) 118 TAXMAN 433

Hon'ble Judges: Dr. Arijit Pasayat, C.J; D.K. Jain, J

Bench: Division Bench

Advocate: M.S. Syali and Satyen Sethi, for the Appellant; R.D. Jolly and Premlata Bansal, for the Respondent

Final Decision: Allowed

Judgement

Arijit Pasayat, C.J.

This is an application under Articles 226 and 227 of the Constitution of India, 1950 (in short "the Constitution"), questioning the correctness of an order passed u/s 264 of the Income Tax Act, 1961 (in short "the Act"), by the Commissioner of Income Tax, Delhi-VI (in short "the Commissioner"). By the said impugned order dated November 3, 2000, penalty imposed u/s 271C of the Act by the Additional Commissioner of Income Tax, TDS Range : 28 (hereinafter described as "the Assessing Officer") was upheld.

A brief reference to the factual aspect would be necessary before we deal with the petitioner''s main stand that no penalty was imposable. The petitioner filed its salary tax deducted at source (in short "IDS") return in Form No. 24. On verification of the same, the Assessing Officer found that IDS in respect of one expatriate employee was not deducted properly. Orders u/s 201/201(1A) of the Act were passed working

out short deduction of tax at Rs. 27,68,844. Proceedings u/s 271C for short deduction were initiated and penalty amounting to Rs. 27,68,844 was imposed. The same was assailed before the Commissioner u/s 264 of the Act. The petitioner''s stand was that the deeming provision contained in Section 9(1)(ii) of the Act cannot be extended to have any nexus with an obligation for deduction of tax at source as contained in Section 192 of the Act. It was further pleaded that payment of remuneration was made by a non-resident company and Therefore proceedings u/s 271C of the Act were not available to be taken. In any event, it was pleaded that it was prevented by reasonable cause for non-deduction of tax at source. The Commissioner by the impugned order held that the petitioner had failed in its liability to deduct tax at source u/s 192 on salaries paid to its expatriate employee for services rendered in India.

Learned counsel for the petitioner submitted that the analysis of the legal position as done by the Commissioner is not proper. In any event, in view of the specific language of Section 273B, the Commissioner was obliged to consider the petitioner''s pica about existence of reasonable cause. That having not been done the order passed by the Commissioner cannot be maintained. Learned counsel for the Revenue, on the other hand, submitted that the levy of penalty u/s 271C becomes warranted if the existing conditions are not satisfied and what Section 273B postulates is grant of an opportunity, which undoubtedly has been granted to the petitioner to have its say in the matter. The question of existence of reasonable cause or otherwise is linked with the main question, as to whether there was a liability to deduct tax at source.

We feel that the stand of the petitioner is on terra firma. So far as the consideration of the question of existence of reasonable cause is concerned, the two pivotal provisions, i.e., Section 271C and Section 273B, read as follows :

"271C. Penalty for failure to deduct tax at source.--If any person fails to deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B, he shall be liable to pay, by way of penalty, a sum equal to the amount of the tax which he failed to deduct as aforesaid.

273B. Penalty not to be imposed in certain cases.-- Notwithstanding anything contained in the provisions of Clause (b) of Sub-section (1) of Section 271, Section 271A, Section 271B, Section 271C, Section 271D, Section 271E, Clause (c) or Clause (d) of Sub-section (1) or Sub-section (2) of Section 272A, Sub-section (1) of Section 272AA or Sub-section (1) of Section 272BB or Clause (b) of subsection (1) or Clause (b) or Clause (c) of Sub-section (2) of Section 273, no penalty shall be imposable on the person or the assessed, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure."

Section 273B starts with a non obstinate clause and provides that notwithstanding anything contained in several provisions enumerated therein including Section

271C, no penalty shall be imposable on the person or the assessed, as the case may be, for any failure referred to in the said provisions, if he proves that there was reasonable cause for the said failure. A clause beginning with "notwithstanding anything" is sometimes appended to a section in the beginning with a view to give the enacting part of the section in case of conflict an overriding effect over the provision of Act mentioned in the non obstinate clause (see M/s. Orient Paper and Industries Ltd. and another Vs. State of Orissa and others, A non obstinate clause may be used as a legislative device, to modify the ambit of the provision of law mentioned in the non obstinate clause, or to override it in specified circumstances, (see T.R. Thandur Vs. Union of India (UOI) and Others, . The true effect of the non obstinate clause is that in spite of the provision or Act mentioned in the non obstinate clause, the enactment following it will have its full operation or that the provisions embraced in the non obstinate clause will not be an impediment for the operation of the enactment (see Smt. Parayankandiyal Eravath Kanapravan Kalliani Amma and others Vs. K. Devi and others, Therefore, in order to bring in application of Section 271C in the backdrop of Section 273B, absence of reasonable cause, existence of which has to be established by the assessed, is the sine qua non.

Levy of penalty u/s 271C is not automatic. Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision the same was without a reasonable cause. The initial burden is on the assessed to show that there existed reasonable cause which was the reason for the failure referred to in the concerned provision. Thereafter the officer dealing with the matter has to consider whether the Explanation offered by the assessed or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause. "Reasonable cause" as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. It can be described as probable cause. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the prescribed consequences follow.

The above being the position, the Commissioner''s non-consideration of the plea raised by the assessed about the existence of reasonable cause vitiated the order. On that score, we find the order passed by the Commissioner to be non-maintainable. The residual question is whether the Commissioner''s conclusion regarding liability u/s 192 of the Act to deduct tax at source is in order. We feel that the matter may be examined afresh by the Commissioner while dealing with the question of existence of reasonable cause or otherwise. To that extent it shall not be construed as if we have expressed any opinion on the merits of the case. The impugned order of the Commissioner dated November 3, 2000, is set aside. The writ petition is allowed to the extent indicated. No costs.