

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: 'G': NEW DELHI**

**BEFORE SH. I.C. SUDHIR, JUDICIAL MEMBER
AND
SH. O.P. KANT, ACCOUNTANT MEMBER**

ITA No. 5597/Del/2013
Assessment Year: 2007-08

Asstt. Commissioner of Income Tax, TDS, Noida	Vs.	ST Microelectronics Pvt. Ltd., Plot No. 11, Knowledge Park-111, Greater Noida
GIR/PAN : AAACS3406M		
(Appellant)		(Respondent)

Appellant by	Smt. Rishpal Bedi, Sr.DR
Respondent by	Sh. K.V.S.R. Krishna, CA

Date of hearing	19.04.2016
Date of pronouncement	10.06.2016

ORDER

PER O.P. KANT, A.M.:

This appeal of the Revenue is directed against order dated 19/07/2013 of the Commissioner of Income-tax(Appeals), Noida for assessment year 2007-08 raising following grounds:

“That CIT(A) has erred in law and on facts in directing to delete the order u/s 201(1)/201(1A) of the I.T. Act passed by the Assessing Officer ignoring the fact that assessee must follow the mercantile system of accounting for these payments and erred in further allowing the assessee to follow the cash system of accounting for these payments solely on the grund of SAP environment being followed by the assessee.”

2. The facts in brief are that during tax deducted at source (TDS) verification by the TDS Assessing Officer, it was observed that tax was not deducted on certain expenses debited in profit and loss. The Assessing Officer called for the tax audit report in form No. 3 CD and observed that the auditor had also pointed

out that the TDS in respect of those accruals was not deducted/deposited as at March 2007. The assessee pleaded that said amounts have been considered for disallowance under section 40a(i) of the Income-tax Act, 1961 (for short the Act) and taxed accordingly. However, according to the AO it was mandatory for the assessee to deduct tax at source on such accruals. The Assessing Officer declared the assessee in default for a sum of Rs. 23,03,672/- under section 201(1) of the Act for short deduction of TDS and interest of Rs. 11,05,762/- under section 201(1A) of the Act. Aggrieved, the assessee filed appeal before the learned Commissioner of Income-tax (Appeals) and contended that the provisions for expenses were made without specifying or identifying the actual payee and the tax was deducted and deposited on the same expenses upon actual receipt of bills/invoices. The learned Commissioner of Income-tax (Appeals) considered the submission of the assessee and deleted the orders passed by the AO under section 201(1) and 201 (1A) of the Act in respect of the provision of expenses. Aggrieved, the Revenue is in appeal before the Tribunal.

3. In the sole ground of appeal, the Revenue has challenged the deletion of order under section 201(1) and 201(1A) of the Act.

4. Before us, the learned Sr. Departmental Representative (DR) relying on the order of the Assessing Officer submitted that assessee cannot be allowed to follow hybrid system of accounting as according to section 145(1) of the Act the assessee has to either follow mercantile or cash accounting system. She further submitted that the deficiency of non-deduction of TDS was also pointed out by the tax auditor in his report and was admitted by the assessee as the disallowance of expenses under section 40a(i) of the Act was made by the assessee itself, therefore, the assessee was liable for deduction of TDS and, thus, the penalty levied under section 201(1) and corresponding interest under section 201(1A) was rightly levied by the Assessing Officer.

5. On the other hand, the learned Authorized Representative of the assessee relying on the order of the learned Commissioner of Income-tax(Appeals),

submitted that there was no change in the method of accounting regularly followed by the assessee. The assessee had debited expenses on accrual and tax was deducted on actual booking of the expenses. The learned AR referred to the submission made before the Commissioner of Income Tax(Appeal) in respect of the accounting of expenses, which are reproduced by the learned Commissioner of Income-tax (Appeals) on page 8 of the impugned order. The learned Authorised Representative also referred to pages 61 to 62 of the assessee's paper book, according to which in assessment year 2010-11 the Assessing Officer has accepted the contention of the assessee in order under section 201(1) and 201(1A) dated 07/02/ 2013. The learned AR further relied on the decision of the Mumbai bench of the Tribunal in the case of Pfizer Ltd versus ITO (TDs) (2013) 55 SOT 277 (ITAT, Mum).

6. We have heard the rival submission and perused the material on record. The learned Commissioner of Income-tax(Appeals) has made a detailed discussion on the issue in dispute in the impugned order and after providing opportunity to the Assessing Officer as well as to the assessee, has given his findings following the decision of the Tribunal in the case of Pfizer Centre Ltd. Vs. Income Tax Officer (TDS) (supra). The relevant findings of the learned Commissioner of Income Tax(A) on the issue in dispute are reproduced as under:

“Ground Nos: 1 to 3: It has been submitted by the appellant that it is operating in an automated ERP environment i.e. SAP and that it is following mercantile / accrual system of accounting consistently wherein as per generally accepted accounting practice the accrual in respect of expenses are recognized every month on best estimate/time scale basis i.e. credit is made to a provision /accrual account which can be called a common basket and not to the account of specific party/payees. It was also pleaded that above provisioning did not result in any constructive credit to a specific payee and that prime purpose of managing books of accounts in above manner is for the purpose of management reporting on monthly results for monitoring purpose. It was also stated that the payee would raise invoice after rendering of services and it was only after due approval of services having been rendered satisfactorily, that the credit was given to

the payee account and that at this stage liability towards payees is recognized by the appellant and TDS is deducted and deposited in Government account. This system is consistently followed by the appellant in support of which it has filed subsequent date of deposit of TDS against various expenses incurred.

Further, the appellant company vide its letter dated 10/5/2012 has placed reliance on following:

- 1. CBDT circular No. 03/2010 dated 2nd March, 2010*
- 2. Decision of Bombay ITAT in the case of IDBI Vs. ITO (Mum) reported in (2007) 107 ITD 45(Mum).*

The appellant has submitted copy of CBDT's Circular No. 3/2010 dated 2/3/2010 as referred above which is in respect of TDS u/s. 194A on interest payable by banks. The relevant portion of the said circular is reproduced as under:

"As per provisions of section 194A of the Income Tax Act 1961, income tax has to be deducted at source at the time of credit of interest income to the account of the payee or at the time of payment thereof in cash or by issue of the cheque or draft or by any other mode, at the rates in force such interest amount exceeds specified limit. Further, Explanation to section 194A states that "for the purpose of this section, where any income by way of interest as aforesaid is credited to any account, whether called 'Interest payable account' or 'Suspense Account or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly".

2. Representations have been received from Indian Banks Association (IBA) seeking clarification regarding deduction of tax at source from payment of interest on time deposits by banks using Core- Branch Banking solutions (CBS) software. In case of banks using CBS software, interest payable on time deposits is calculated generally on daily basis or monthly basis and is swept & parked accordingly in the provisioning account for the purposes of macro-monitoring only. However, constructive credit is given to the depositors / payee's account either at the end of the financial year or at periodic intervals as per practice of the banks or as per the depositor's /payee's requirement or on maturity or on encashment of time deposits; whichever is earlier.

4. In view of the above position, it is clarified that since no constructive credit to the depositor's /payee's account takes place while calculating interest on time deposits on daily or monthly basis in the CBS software used by banks, tax need not be deducted at source on such provisioning of interest by banks for the purposes of macro monitoring only. In such cases, tax shall be deducted at source on accrual of interest at the end of financial year or at periodic intervals as per practice of the bank or as per the depositor's / payee's requirement or on maturity or on encashment of time deposits; whichever event takes place earlier; whenever the

aggregate of amounts of interest income credited or paid or likely to be credited or paid during the financial year by the banks exceeds the limits specified in Section 194A.

Placing reliance on above circular the appellant has argued that in the case in hand there is no constructive credit to the accounts of the payee while maintaining month wise accounts in the SAP Software which meant for management reporting of monthly results and monitoring. Accordingly, the appellant has pleaded that the above Circular, though meant for banks, the principles laid down in above Circular can be applied to the facts of the appellant's case as the appellant is also making provisional entries because of SAP System for preparing monthly Profit and Loss Accounts and Balance Sheet for internal control and monitoring of operations. Further, the appellant has also filed copy of computation of income for the year under consideration in which entire sum of Rs. 2,50,95,948/- has voluntarily been added back by the company u/s. 40(a)(ia) to arrive at taxable income in its income tax return for Assessment Year 2007-08 . In view of above facts the appellant has vehemently contended that there is no constructive credit to the account of payee and also the fact that expenses have been added voluntarily u/s. 40(a)(ia) the appellant cannot be treated as "assessee in default" so as to attract the provisions of Section 201(1) of the I.T. Act. In this regard the appellant has placed its reliance on very recent decision of Hon'ble ITAT "C" Bench, Mumbai in ITA No.1667/Mum/2010 dated 31/10/2012 in the case of M/s. Pfyzer Ltd. Vs. Income Tax Officer(TDS), Mumbai where in facts are exactly same as that of the assessee. The relevant portion of ITAT order is reproduced as under:-

"5. The learned Counsel reiterated the submission made before A.O. and CIT(A) to submit that assessee is in the practice of making provision for expenses at the end of the year as it has multifarious locations and innumerable transactions and since all the bills would not be received, without making specific entries into account of the parties, makes provisions for expenses. Next year the entire provision of expenses was written back and the actual amounts paid to the respective parties were credited to their respective accounts and TDS as per the provisions are being made. In this context the method of accounting followed by assessee, entries made in the books of account and the reliance on the Board's Circular No. 288 of 1980 were relied upon. It was the contention that it is not a constructive payment made to any payee as per the provisions of the Act and when assessee is making payment, it was following the TDS provisions. It was further submitted that when payee is not known or determined, TDS cannot be made and relied on the order of the ITAT in the case of Industrial Development Bank of India Vs. Income Tax Officer, 107 ITR 45(Mum).

6. It was further submitted that assessee has added back the entire amount of provision made and filed copies of the computation statements as well as the orders passed by A.O affirming the disallowance so made in the computation made under

section 40(a)(ia). The learned Counsel also laced on record the statement indicating the amount of provision made under various heads and the actual amount paid in thd later year including the tax deducted at source and reconciling the amounts on this issue.

11. In view of above decision of coordinate bench, since the payee is not identifiable in this case also at the time making provision, no TDS need to be made on the above amount. Further, the entire provision has been written back in the ext year and the actual amounts paid/credited were subjected to TDS as per the detailed statements filed before the authorities on which there is no dispute. Therefore, assessee is following the provisions of TDS as and when the amounts are paid/credited to respective parties.

12. As already explained and evidenced from the computation of income as well as orders of A.O. in the assessment proceedings, the entire provision has been disallowed under section 40(a) (ia) and section 40(a)(i). Once the amount has been disallowed under the provisions of section 40(a)(i) on the reason that tax has not been deducted, it is surprising that A.O. holds that the said amounts are subject to TDS provisions again so as to demand the tax under the provisions of section 201 and also levy interest under section 201(1 A). We are unable to understand the logic of AO in considering the same as covered by the provisions of section 194C to 194J. Assessee as stated has already disallowed the entire amount in the computation of income as no TDS has been made. Once an amount was disallowed under section 40(a)(i)/(ia) on the basis of the audit report of the Chartered Accountant, the same amount cannot be subject to the provision of TDS under section 201(1) on the reason that assessee should have deducted the tax. If the order of AO were to be accepted then disallowance under section 40(a)(i) and 40(a)(ia) cannot be made and provisions to that extent may become otiose. In view of the actual disallowance under section 40(a)(i) by assessee having been accepted by A.O we are of the opinion that the same amount can not be considered as amount covered by the provisions of section 194C to 194J so as to raise TDS demand again under section 201 and levy of interest under section 201(1A). Therefore, assessee's ground on this issue are to be allowed as the entire amount has been disallowed under the provisions of section 40(a)(i)/(ia) in computation of income on the reason that TDS was not made. For this reason alone assessee's grounds can to be allowed. Considering the facts and reasons stated above assessee's grounds are allowed.

13. Assessee has raised one more contention that interest under section 201(1 A) should be levied till the date of payment and not till the date of order. Anyhow this issue became academic in nature, as we have already held that demand under section 201 cannot be raised once the entire amount has been disallowed in the computation of income under section 40(a)(i) and 40(a)(ia). In view of this even though the contention is correct being a legal issue, there is no need for adjudicating the matter as the grounds raised have been held in favour of assessee. AO is directed to delete the said demand so raised. Appeal is accordingly allowed".

Further the appellant has also drawn my attention to the order of A.O. dated 7/2/2013 in assessee's own case for Assessment Year 2010-11

wherein A.O. has accepted the TDS return of the appellant. On similar issues and similar facts the A.O. has accepted the contention of the assessee and has not considered the assessee as assessee in default u/s 201(1).

I agree that the provisions of TDS are applicable only when the individual payee is identified. According to provisions of Section 190 of the Income Tax Act the scheme of deduction of tax at source is one of the methods of recovery of tax due from a person. The tax liability obviously lies in the hands of person who is earning the income. The provisions of Sections 191, 199, 202 and 203 clearly shows that deduction of at source is on behalf of the person who is the beneficiary of the payment or credit with corresponding liability to pay tax on such income. Therefore, the whole scheme of deduction of tax at source under Income Tax Act works on the assumption that the person whose liability is to pay the income, knows the identity of the beneficiary or the recipient of the income.

In the present appeal before me the A.O. has not controverted in his Remand Report the contention of the appellant that the provisions for expenses are made in a SAP environment where in the expenses are booked in order to facilitate management reporting and at this point there is no constructive recognition of liability to the payee. The year end accounting entries regarding provisioning of expenses are reversed on the very first day of the following Financial Year. The liability is ultimately recognized upon receipt of invoices from the payee and TDS is deducted and deposited in Government account within time. This is the procedure which the assessee has been following consistently.

I have considered facts of the case in hand and has gone through the judgment of Mumbai Tribunal in the case of M/s. Pfizer Centre Vs. ITO(TDS), Mumbai and also the CBDT's Circular No.03/2010 dated 2/3/2010 as cited and relied upon by the appellant and find that the facts of the present appeal is squarely covered by the above judgment of Mumbai Tribunal. So far as CBDT's Circular No. 03/2010 dated 2/3/2010 is concerned the same is applicable to banks only. However, the principle behind the said Circular tends to cover the issue involved in the present appeal. Moreover, the A.O. herself in subsequent assessment year i.e. A.Y. 2010-11 has accepted the consistent practice followed by the appellant. Taking all the above into consideration I hold that the appellant cannot be considered as assessee in default in terms of Section 201(1) as there is no identifiable payee. I therefore do not find any default in compliance of TDS related provisions by the appellant more so when the appellant has deducted and deposited TDS on the same expenses upon actual receipt of

bills/invoices from the payees. Hence, ground Nos. 1,2 and 3 of the appellant are allowed. Consequently, order passed by A.O. u/s. 201(1)/2Q1(1 A) is directed to be deleted.”

7. We find that in the case of the assessee expenses were debited on the accrual basis on monthly estimate in a common basket and not to the account of specific party/payees. It was pleaded that the provisioning of expenses did not result in any constructive credit to a specific Payee and the purpose was to manage reporting on monthly results for monitoring and tax was deducted on receipt of bills/invoices from the parties after rendering of services and only after due approval of services, the credit was given to the payee account and TDS was accordingly deducted and deposited in the government account. The system was regularly followed by the assessee and the Department has also accepted this practice in assessment year 2010-11. The contention of the Revenue that assessee followed cash system of accounting in respect of the expenses in reference is not correct as the expenses have been accounted for as and when ascertained and TDS was also deducted at that point of time. Moreover, we find that the Department itself in the assessment year 2010-11 has accepted the accounting followed in respect of the expenses and no penal action under section 201(1) and interest under 201(1A) of the Act was considered. The learned Commissioner of Income Tax(Appeal) has followed the finding of the Tribunal in the case of Pfizer Ltd Vs. ITO(TDS) (supra) wherein the Tribunal has held that since the payee was not identifiable in the case at the time of making the provision, no TDS was required to be made and further the entire provision had been written back the next year and the actual amounts paid/credited were subjected to TDS as per the detailed statement filed before the authorities, on which there was no dispute. The relevant para of the decision is reproduced as under :

“11. In view of the above decision of coordinate bench, since the payee is not identifiable in this case also at the time of making provision, no TDS need to be made on the above amount. Further, the entire provision has

been written back in the next year and the actual amounts paid/credited were subjected to TDS as per the detailed statements filed before the authorities on which there is no dispute. Therefore, assessee is following the provisions of TDS as and when the amounts are paid/credited to respective parties.”

8. In the case in hand also the payees are not identifiable at the time of making provision of the expenses and thus respectfully following the finding of the said decision we hold that tax was not deductible on the provisions of the expenses made without identifying the payee, and thus we don't find any infirmity in the order of the learned Commissioner of Income-tax(Appeals) on the issue in dispute. Accordingly, the ground of the appeal is dismissed.

9. In the result, the appeal of the Revenue is dismissed.

The decision is pronounced in the open court on 10th June, 2016.

Sd/-

(I.C. SUDHIR)

JUDICIAL MEMBER

Dated: 10th June, 2016.

Laptop/-

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Sd/-

(O.P. KANT)

ACCOUNTANT MEMBER

Asst. Registrar, ITAT, New Delhi