

**IN THE INCOME TAX APPELLATE TRIBUNAL
"L" Bench, Mumbai**

**Before Shri Jason P. Boaz, Accountant Member
and Shri Ram Lal Negi, Judicial Member**

ITA Nos. 4063 to 4066/Mum/2008

(Assessment Years: 200-01, 2002-03, 2003-04 & 2004-05)

M/s. KPMG Lodha Excelus, 1 st Floor Apollo Mills Compound N.M. Joshi Marg, Mahalaxmi Mumbai 400011	Vs.	Additional C.I.T. (International Taxation) Range-3, Mumbai
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PAN – AAAFK1415H

Appellant

Respondent

Appellant by:	Shri Arijit Chakrovarty & Ms. Sharddha Swarup
Respondent by:	Shri M.V. Raj Guru

Date of Hearing: 26.04.2017

Date of Pronouncement: 28.04.2017

ORDER

Per Bench

These appeals by the assessee are directed against the orders of the CIT(A)-XXXIII, Mumbai dated 31.03.2008 for assessment years 2001-02, 2002-03 to 2004-05, confirming the levy of penalty under section 271C of the Income Tax Act, 1961 (in short 'the Act').

2. The facts of the dispute, briefly, are as under: -

2.1 The assessee firm, set up in India under the Indian Partnership Act, 1932 with the permission of the Secretariat of Industrial Approvals, Ministry of Industry, Government of India and the Reserve Bank of India, is a member of the KPMG International, a Verein (i.e. an association) established under the laws of the Swiss Confederation with its Headquarters in the Netherlands. The assessee had entered into a Licence Agreement and a Membership agreement both dated 01.10.1998 with KPMG International and also entered into separate sub-licence agreements with other member entities in India of KPMG International. Pursuant to

the aforesaid licence, sub-licence and membership agreement the assessee made remittances to KPMG International in respect of contribution towards share of costs (i.e. cash calls), reimbursement of charges towards intuition of computer based banking, bank guarantees, professional indemnity insurance, etc. in respective years as these charges arose, without deduction of tax at source as the same were, in the assessee's opinion, not chargeable to tax. The Assessing Officer (AO) issued show cause notices for the assessment years under consideration (i.e. 2000-01 and 2002-03 to 2004-05) requiring the assessee to explain why the said amounts were paid/remitted to the NRI, KPMG International without deducting tax at source. After considering the assessee's explanation, the AO passed orders under section 201(1) and 201(1A) of the Act all dated 06.03.2007 for the assessment years in question, holding the assessee to be an assessee in default for not deducting tax at source while making the aforesaid payments to KPMG International which constituted Royalty. The AO also simultaneously issued notices dated 06.03.2007 calling upon the assessee as to why penalty under section 271C of the Act should not be levied in its case for the four assessment years under consideration for failure to deduct tax at source under section 195 of the Act in respect of payments to KPMG International which were in the nature of royalty. According to the submissions made before us, no appeals were preferred by the assessee in these four assessment years against the orders passed under sections 201(1) and 201(1A) of the Act dated 06.03.2007. Subsequently, the AO took up penalty proceedings under section 271C of the Act and after considering the assessee's contentions and explanations, the AO proceeded to levy penalty under section 271C of the Act vide orders dated 19.09.2007 for the four impugned assessment years.

2.2 Aggrieved by the order of assessment levying penalty under section 271C of the Act vide orders dated 19.09.2007 for assessment years 2000-01 and 2002-03 to 2004-05, the assessee preferred appeals before the CIT(A)-XXXIII, Mumbai, which were dismissed vide the impugned orders all dated 31.03.2008.

3. Aggrieved by the impugned orders of CIT(A)-XXXIII, Mumbai dated 31.03.2008 confirming the levy of penalty under section 271C of the Act for assessment years 2000-01 and 2002-03 to 2004-05, the assessee has preferred these appeals raising the following grounds which are extracted assessment year-wise hereunder: -

3.1.1 A.Y. 2000-01

“On the facts and circumstances of the case and in law

- 1) *The Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.20,13,350 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to contribution towards the Appellant’s and the Indian member entities’ share of costs (i.e. cash calls) of Rs.1,00,66,749.*
- 2) *The Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.1,03,296 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of charges towards intuition computer based banking of Rs.5,16,489.”*

3.1.2 A.Y. 2002-03

“On the facts and circumstances of the case and in law

- 1) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.27,71,274 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to contribution towards the Appellant's and the Indian member entities' share of costs (i.e. cash calls) ofRs.2,77,12,743.*
- 2) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.4,09,411 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of bank guarantee charges of Rs.40,94,115.*
- 3) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.11,87,202 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of professional indemnity insurance of Rs. 1,18,72,016.*
- 4) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.76,989 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of charges towards intuition computer based banking of Rs.7,69,886.*
- 5) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.6,94,483 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to remittances aggregating Rs.69,44,830 made pursuant to agreements entered into for provision of personnel.”*

3.1.3 A.Y. 2003-04

“On the facts and circumstances of the case and in law

- 1) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.24,25,216 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to contribution towards the Appellant's and the Indian member entities' share of costs (i.e. cash calls) of Rs.2,42,52154.*
- 2) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.2,10,547 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of bank guarantee charges of Rs.21,05,472.*
- 3) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.11,96,246 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of professional indemnity insurance of Rs. 1,19,62,461.*
- 4) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.1,53,380 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to an amount of Rs.15,33,800 which was recorded as payable in this year but was reversed in subsequent year.”*

3.1.4 A.Y. 2004-05

“On the facts and circumstances of the case and in law

- 1) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.32,08,312 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to contribution towards the Appellant's and the Indian member entities' share of costs (i.e. cash calls) of Rs.3,20,83,122.*
- 2) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.30,40,866 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of professional indemnity insurance of Rs.3,04,08,658.*
- 3) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.2,01,411 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to reimbursement of bank guarantee charges of Rs.20,14,111.*
- 4) *the Commissioner of Income tax (Appeals) erred in upholding the penalty of Rs.19,18,771 levied by the Assessing Officer u/s 271C of the Income tax Act, 1961 with respect to remittances aggregating Rs.1,91,87,705 made pursuant to agreements entered into for provision of personnel.”*

3.2.1 According to the learned A.R. of the assessee, admittedly orders under section 201(1) of the Act were passed by the AO for all four assessment years, 2000-01 and 2002-03 to 2004-05 vide separate orders,

all dated 06.03.2007, treating the assessee as an 'assessee in default' and that no appeals were preferred against these orders by the assessee. It is submitted that the proceedings for these four assessment years before the Bench were initiated pursuant to similar proceedings taken up for A.Y. 2001-02 in the case on hand on identical issues wherein vide order dated 24.03.2005 passed under section 201(1)/201(1A) of the Act for A.Y. 2001-02, the assessee was held to be an assessee in default for non deduction of tax at source under section 195 of the Act in respect of payments to KPMG International, which were treated as royalty. Penalty under section 271C of the Act was then levied. On appeal this order was upheld by the learned CIT(A) vide order dated 27.11.2006 as was the order levying penalty under section 271C of the Act. On further appeal by the assessee, the Coordinate Bench of this Tribunal vide order in ITA No. 1959/Mum/2007 dated 27.10.2010 remanded the matter to the file of the learned CIT(A) with certain directions in para 9 thereof.

3.2.2 Thereafter, the Coordinate Bench of this Tribunal in its order in ITA No. 6287/Mum/2008 also remanded the order of the CIT(A), upholding the penalty levied under section 271C of the Act, to the file of the CIT(A) to decide the same in accordance with the decision taken in the appeal against the order under section 201 of the Act. In remand proceedings, the learned CIT(A) vide order dated 11.01.2012 held that KPMG International is a mutual association and in keeping with the principle of mutuality, its receipts would not constitute income chargeable to tax and therefore the assessee was not obliged by law to deduct tax at source on payments to KPMG International. Consequent thereto, the CIT(A)-10, Mumbai vide order dated 29.02.2012 deleted the penalty imposed under section 271C of the Act on the ground that since the assessee was not liable to deduct tax at source on payments to KPMG International, the basis for levy of penalty does not survive. According to the learned A.R. of the assessee, no appeal was preferred by Revenue against the order of the CIT(A) deleting the penalty under section 271C of the Act for A.Y. 2001-02 and further Revenue's appeal in quantum proceedings was dismissed by a Coordinate Bench of this Tribunal in its order in ITA No. 2493/Mum/2013 dated 07.04.2017. It is contended that since the facts and

issues involved in A.Y. 2001-02 are the same as those for the assessment years 2000-01 and 2002-03 to 2004-05, even though the assessee has not preferred appeals in the quantum proceedings for these assessment years the findings rendered for A.Y. 2001-02 by the Coordinate Bench of ITAT in quantum proceedings in favour of the assessee (supra) coupled with the fact that the deletion of penalty under section 271C of the Act for A.Y. 2001-02 by the learned CIT(A) was accepted and not challenged by Revenue, penalty levied under section 271C of the Act for these four years is not sustainable and required to be deleted.

3.3 The learned D.R. for Revenue was unable to controvert the proposition put forward by the assessee and fairly conceded that the dispute in respect of the sustainability or otherwise of the penalty under section 271C of the Act may have to be held in favour of the assessee in view of the decision of the Coordinate Bench of this Tribunal for A.Y. 2001-02 in quantum proceedings (supra), the facts remaining the same for the four assessment years in appeal and also due to the fact that Revenue has not preferred any appeal against the order of the CIT(A) deleting the penalty levied under section 271C of the Act for A.Y. 2001-02.

3.4.1 We have heard the counsels for both the parties and perused and carefully considered the material on record; including the judicial pronouncements cited. On a perusal of the facts of the case on record in respect of the issue of sustainability of the levy of penalty under section 271C of the Act for the four assessment years 2000-01 and 2002-03 to 2004-05 before us and that of A.Y. 2001-02, we find that in all these years, vide orders dated 06.03.2008 and 24.03.2005 respectively, the AO had held the assessee to be an 'assessee in default' under section 201(1) of the Act for not deducting tax at source under section 195 of the Act on payments to KPMG International which were in the nature of 'royalty'. For assessment years 2000-01 and 2002-03 to 2004-05 admittedly the assessee did not preferred appeals against the orders of the AO passed under section 201(1)/202(1A) dated 06.03.2007 and subsequent thereto, the AO proceeded to levy penalty under section 271C of the Act in these

four years vide separate orders dated 19.09.2007, which on appeal were upheld by the CIT(A) vide separate orders dated 31.03.2008.

3.4.2 In proceedings for A.Y. 2001-02 in the case on hand, on the basis of which the findings were rendered in both quantum and appellate proceedings for assessment years 2000-01 and 2002-03 to 2004-05, the facts as emerge from the record are that an order was passed under section 201(1) of the Act dated 24.03.2005 holding the assessee to be an 'assessee in default' for failure to deduct tax at source under section 195 of the Act in respect of payments to KPMG International since they were in the nature of royalty, which was upheld by the CIT(A) vide order dated 27.11.2006. Subsequently, the AO had also levied penalty under section 271C of the Act which was upheld by the CIT(A). On further appeals by the assessee, a Coordinate Bench of this Tribunal vide order in ITA No. 1959/Mum/2007 dated 27.10.2010 remanded the matter back to the file of the CIT(A) to decide the taxability of the amounts paid by the assessee to KPMG International after considering the principle of mutuality. Subsequently, a Coordinate Bench of this Tribunal also remanded against the order of the CIT(A) confirming penalty under section 271C of the Act to the file of the CIT(A) vide order in ITA No. 6287/Mum/2008 for fresh adjudication in accordance with the decision taken by the CIT(A) against the order under section 201 of the Act. Subsequently, on remand, the learned CIT(A) vide order dated 11.01.2012 decided the matter of mutuality in favour of the assessee. Following that order, the CIT(A)-10, Mumbai vide order dated 29.02.2012 held observing that in view of the CIT(A) order dated 11.01.2012, wherein the CIT(A) had held that the assessee was not liable to deduct tax at source on payments to KPMG International, the basis for levy of penalty under section 271C of the Act in the case on hand does not exist and deleted the penalty imposed under section 271C of the Act. Admittedly no appeal has been preferred by the Revenue against the order of the CIT(A)-10, Mumbai for A.Y. 2001-02 deleting the penalty under section 271C of the Act vide order dated 29.02.2012. Revenue's appeal against the order of the CIT(A) dated 11.01.2012 in quantum proceedings for A.Y. 2001-02 has also been

dismissed by a Coordinate Bench of this Tribunal vide order in ITA No. 2493/Mum/2012 dated 07.04.20017.

3.4.3 In the factual and legal matrix of the case as narrated above and taking into account the fact that (i) on identical facts as in the four assessment years before us, the Coordinate Bench of ITAT in the assessee's own case for A.Y. 2001-02 vide order in ITA 2493/Mum/2012 dated 07.04.2017 has upheld the CIT(A)'s finding that keeping in view the principle of mutuality the assessee is not required to deduct tax at source on payments to KPMG International and (ii) Revenue has not challenged the order of the CIT(A)-10, Mumbai dated 29.02.2012 deleting the penalty levied under section 271C of the Act for A.Y. 2001-02; we are of the considered view that since the very basis for levy and upholding of penalty under section 271C of the Act by the authorities below for assessment years 2000-01 and 2002-03 to 2004-05 does not survive, the orders levying/upholding the aforesaid penalty are not sustainable. Consequently the said penalty levied under section 271C of the Act in the case on hand and upheld by the CIT(A) in the impugned order is hereby deleted. It is accordingly ordered.

4. In the result, the assessee's appeals for assessment years 2000-01 and 2002-03 to 2004-05 are allowed.

Order pronounced in the open court on 28th April, 2017.

Sd/-
(Ram Lal Negi)
Judicial Member

Sd/-
(Jason P. Boaz)
Accountant Member

Mumbai, Dated: 28th April, 2017

Copy to:

1. *The Appellant*
2. *The Respondent*
3. *The CIT(A) -XXXIII, Mumbai*
4. *The DIT (IT), Mumbai*
5. *The DR, "L" Bench, ITAT, Mumbai*

By Order

//True Copy//

Assistant Registrar
ITAT, Mumbai Benches, Mumbai

n.p.