

**IN THE INCOME TAX APPELLATE TRIBUNAL
COCHIN BENCH, COCHIN**

**BEFORE SHRI P. K. BANSAL, VICE PRESIDENT AND
SHRI GEORGE GEORGE K., JUDICIAL MEMBER**

ITA Nos.212 to 214/COCH/2015
Assessment Years:2010-11 to 12-13

M/s Mithra Agricultural Produce Co. Ltd., Akshara Mandiram, 3 rd Floor, Marine Drive, Ernakulam, Kochi. PAN:AAECM 3228 M	Vs	Jt.C.I.T. (TDS), Kochi.
(Appellant)		(Respondent)

Appellant by	Shri T. M. Sreedharan
Respondent by	Shri A. Dhanaraj, Sr. D. R.
Date of hearing	25/09/2017
Date of pronouncement	26/09/2017

ORDER

PER P. K. BANSAL, V.P.

All these appeals filed by the assessee since involve common issue therefore, all these appeals are decided by this common order, as agreed by both the parties, on the basis of the facts relating to the assessment year 2010-11. In all these appeals, the assessee has taken the following common ground of appeal:

- "1. *The Order of the Commissioner of Income Tax(Appeals)-III, Kochi, in I.T.A. No.27/TDS/EKM/CIT(A)-III/12-13 dated 30.01.2015 dismissing the appeal against the order u/s 271C of*

the Income Tax Act, for 2010-11 assessment, is opposed to law, facts and circumstances of the case.

2. *The CIT(A) went wrong in confirming the levy of penalty and dismissing the appeal. The reasons given to do so are unjust and unwarranted.*
3. *The CIT(A) ought to have found that provisions of 271C were not attracted to the appellant's case.*
4. *It is respectfully submitted that Section 271C was wrongly invoked in the appellant's case, in so far as deduction of tax under Chapter XVII B was concerned.*
5. *It is respectfully submitted that there is no failure on the part of the appellant to deduct the tax at source under Chapter XVII B, which is an admitted fact. In such circumstances Section 271C is not attracted.*
6. *It is respectfully submitted that the notice dated 6.2.2012 issued by the adjudicating authority initiating action u/s 274 r.w.s. 271C of the IT Act is also illegal and invalid, in as much as the reasons stated for issuance of the notice is "failure to deduct tax at source" under Chapter XVII B for the financial year 2009-10. There is no such violation on the part of the appellant which has been stated before the Joint Commissioner of Income Tax (TDS), Kochi through reply dated 29.2.2012. True copy of the Notice dated 06.02.2012 issued by the Joint Commissioner of Income Tax (TDS) and the reply dated 29.02.2012 filed by the appellant are produced herewith and marked as Annexures A & B respectively.*
7. *In this connection, the adjudicating officer also failed to consider that Circular No.551 dated 23.01.1990 explaining the scope of new section 271C vide Para 16.5 clearly showed that the object of introducing the new section was to provide for levy of penalty for failure to deduct at source.*

8. *The Statutory Authority is bound to interpret the above provision strictly in accordance of law.*
9. *It is respectfully submitted that delay in remittance of the tax is compensated by the levy of interest u/s 201(1A) of the Act and as such the delay in remitting the tax was also regularized.*
10. *At any rate, the Statutory Authority should have found that the appellant was entitled to get protection of Section 271B from levy of penalty as the delay in remittance of the tax deducted was due to reasons beyond control and that there was reasonable cause for the delay."*

2. The facts of the case, in brief, are that the assessee has deducted tax at source in each of the assessment years but deposited the same late not within the time as permissible under the I.T. Act. The Assessing Officer therefore, levied the penalty under section 271C of the Act in each of the assessment years as detailed below:

Assessment year -----	Amount (Rs.) -----
2010-11	16,84,542.00
2011-12	8,98,639.00
2012-13	1,11,613.00

2. The assessee went in appeal before the CIT(A) who confirmed the order of the Assessing Officer in each of the assessment years and rejected the submissions of the assessee that there is only a delay and not a continued or absolute failure with a guilty mind or intention to evade tax. The serious financial crisis on account of huge losses was the only reason for the delay in remitting tax and as such there was no deliberate or intentional act on the part of the assessee.

3. We have heard the rival submissions, carefully considered the same along with the orders of the tax authorities below. Before us,

Learned A. R. referred to the provisions of section 271C(1) of the Act and on that basis it was contended that the penalty under section 271C can be levied only if there is a failure on the part of the assessee to deduct the whole or any part of the tax as required under the provisions of Chapter XVIIIB or pay the whole or any part of the tax as required under sub-section (2) of section 115-O; or the second proviso to section 194B. It was contended that in the case of the assessee there was no failure to deduct the tax at source under the provision of section Chapter XVIIIB. Otherwise also, on merit it was contended that there was financial crisis in the company and due to the acute financial difficulties and lack of working capital for the business, the assessee has incurred heavy loss during the impugned assessment year as detailed below:

Financial year	Loss	Accumulated loss	Secured loans
2009-10	4.96 crores	Upto 31/03/2010 17.06 crores	21.23 crores as at 31/03/2010
2010-11	4.83 crores	Upto 31/03/2011 21.82 crores	23.61 crores As at 31/03/2011
2011-12	4.21 crores	Upto 31/03/2012 25.94 crores	26.49 crores As at 31/3/2012

Therefore, the assessee was prevented by reasonable cause to deposit the tax deducted at source within the permissible time. Reliance was placed in this regard on the decision of Hon'ble Kerala High Court in the case of CIT vs. Chembara Peak Estate Ltd. 183 ITR 471 in which it was held that when default was for good and sufficient reason, no penalty is leviable. According to learned A.R., financial stringency was the reasonable cause. Reliance was also placed on the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax-XVIII Delhi vs. Bank of Nova Scotia, Civil Appeal No. 1704 of 2008 dated

07/01/2016. Learned D. R., on the other hand, relied on the decision of Hon'ble Jurisdictional High Court in the case of US Technologies International (P) Ltd. vs. CIT 195 Taxman 323 (Ker) in which in para 3 of their order the Hon'ble High Court observed "so much so, in our view failure to deduct or failure to remit recovered tax, both will attract penalty u/s. 271C of the Act," Learned D. R. also relied on the following observation of the said decision

"So far as failure on the part of the assessee to remit tax recovered at source is concerned, we do not think there can be any justifying circumstances for delay in remittance because assessee cannot divert tax recovered for the Government towards working capital or any other purpose. So much so, in our view, defence available and Section 273B does not cover failure in payment of recovered tax".

Learned D. R. has also referred to the decision of Hon'ble Delhi High Court in the case of Income Tax Officer vs. Anil Batra & Anr. CRL.L.P.241 to 243 of 2012. We have gone through all the decisions as have been relied on by both the parties. We noted that Hon'ble Supreme Court in the case of Commissioner of Income Tax-XVIII Delhi vs. Bank of Nova Scotia (supra) vide order dated 07/01/2006 dismissed the appeal of the Revenue against the order of the High Court in which Revenue, against the order of the Tribunal, took up the matter before the Supreme Court, holding that no substantial question of law arise in the matter. We noted in that decision the Tribunal vide order dated 31/03/2006 gave the following finding:

"We have carefully considered the rival submissions. In the instant case we are not dealing with collection of tax u/s 201(1) or compensatory interest u/s 201 (1A) . The case of the assessee is that these amounts have already been paid so as to end dispute with Revenue. In the present appeals we are concerned with levy of penalty u/s 271C for which it

is necessary to establish that there was contumacious conduct on the part of the assessee. We find that on similar facts Hon'ble Delhi High Court have deleted levy of penalty u/s 271C in the case of M/s. Itochu Corporation, reported in 268 ITR 172 (Del) and in the case of CIT Vs. Mitsui & Company Ltd. reported in 272 ITR 545. Respectfully following the aforesaid judgments of Hon'ble Delhi High Court and the decision of the ITAT, Delhi in the case of Television Eighteen India Ltd., we allow the assessee's appeal and cancel the penalty as levied u/s 271C."

So far the contention of the assessee that the provision of section 271C will not apply where there is failure to deposit the tax recovered at source, we noted that this issue is duly covered by the decision of Hon'ble Jurisdictional High Court against the assessee in the case of US Technologies International (P) Ltd. (supra) in which Hon'ble High Court has laid down the proposition of law that "failure to deduct the tax or failure to remit recovered tax, both will attract penalty under section 271C." Therefore, the only issue remains whether the assessee has a reasonable cause to deposit the tax within the permissible time. The provisions of section 271C are subject to the provisions of section 273B. Section 273B specifically states that no penalty shall be imposable on the person or the assessee, as the case may be, for any failure if he proves that there was reasonable cause for the said failure. In this case, we noted that the assessee has taken a plea before the CIT(A) as well as before the Assessing Officer that due to the financial difficulties faced by the assessee, the assessee could not deposit the tax within the permissible time, although subsequently he has deposited the said tax. We also noted that Hon'ble Kerala High Court has clearly held in the case of CIT vs. Chembra Peak Estates Ltd. [1990] 183 ITR 471 (Ker) that the financial difficulty is a reasonable cause for delay in payment of tax deducted at source. Similar view has been taken by Hon'ble Kerala High Court in the case of IAC vs. Issac Peter that the

financial difficulty is a reasonable cause for delay in payment of tax deducted at source. We have also gone through the decision of Hon'ble Delhi High Court in the case of ITO vs. Anil Batra & Anr. (supra) as relied by Learned D. R. We noted that in that case the question relates to the prosecution under section 276B of the Income Tax Act in respect of the liability of the director of the company whether the director is a Principal Officer or not. The lower court has acquitted the director on the plea that the directors were not issued separate show cause notice but when the matter travelled to High Court, Hon'ble High Court convicted both the directors and imposed a fine on both of them. This decision, in our opinion, does not relate to the issue before us whether the assessee was prevented with a reasonable cause or not. In view of the decision of Hon'ble Supreme Court in the case of Commissioner of Income Tax-XVIII Delhi vs. Bank of Nova Scotia (supra), we are of the view that the reasonable cause has to be looked into by the authorities below before levying the penalty under section 271C of the Act. We noted that the CIT(A) just confirmed the order of the Assessing Officer levying the penalty following the decision of Hon'ble Jurisdictional High Court in the case of US Technologies International (P) Ltd. vs. CIT (supra) and without going to the plea of the assessee whether the assessee was prevented in depositing the tax deducted at source within the time permissible due to the financial difficulties. We, therefore, in the interest of justice and fair play to both the parties, set aside the order of CIT(A) and restore this issue to the file of the Assessing Officer with the direction that the Assessing Officer shall redecide the issue whether the assessee was prevented by reasonable cause in depositing the tax deducted at source after giving proper and sufficient opportunity to the assessee afresh in accordance with law keeping in view that it is not a case that

the assessee has not made the absolute default by not remitting the recovered tax. This is a case where the assessee has duly deposited the tax deducted at source but not within the time as permissible under the Income tax Act.

4. In the result, all the appeals of the assessee are allowed for statistical purposes.

(Order pronounced in the open court on 26/09/2017)

Sd/.
(GEORGE GEORGE K.)
Judicial Member

Sd/.
(P. K. BANSAL)
Vice President

Dated:26/09/2017
***Singh**

Copy of the order forwarded to :

- 1.The Appellant
- 2.The Respondent.
- 3.Concerned CIT
- 4.The CIT(A)
5. D.R., I.T.A.T., Cochin

Asstt. Registrar