आयकरअपीलीयअधिकरण, विशाखापटणमपीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्रीवी. दुर्गाराव,न्यायिकसदस्यएवं
श्रीडि.एस. सुन्दरसिंह, लेखासदस्यकेसमक्ष

BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER&
SHRI D.S. SUNDER SINGH, ACCOUNTANT MEMBER

आयकरअपीलसं**./I.T.A.No.454-456/Viz/2017**
(निर्धारणवर्ष**/Assessment Year:2008-09, 2009-10 and 2010-11)**

M/s United Breweries Ltd., (Successor to M/s United Millenium Breweries Ltd.,) Bantupalli Village Ranasthalam Mandalam Srikakulam Dt. **[PAN :AAACU6053C]**	Vs.	Jt. Commissioner of Income Tax TDS Range Visakhapatnam
(अपीलार्थी/ Appellant)		**(प्रत्यर्थी/ Respondent)**

अपीलार्थीकीओरसे/ Appellant by	:	Shri Y.A.Rao, AR
प्रत्यर्थीकीओरसे / Respondent by	:	Shri Deba Kumar Sonowal, DR
सुनवाईकीतारीख / Date of Hearing	:	27.02.2018
घोषणाकीतारीख/Date of Pronouncement	:	14.03.2018

आदेश /O R D E R

PER D.S. SUNDER SINGH, Accountant Member:

These appeals are filed by the assessee against the order of the Commissioner of Income-Tax (Appeals) [CIT(A)]-2, Visakhapatnam vide ITA No.145-147/2015-16/CIT(A)-2/JCIT(TDS)/VSP/2017-18 dated 22.05.2017 for the assessment year 2007-08 to 2009-10.

2. In this case, the assessee made short deduction of tax at source in respect of Brand fee paid to M/s United Breweries Ltd (UBL) and Millennium Breweries India Ltd (MBIL)(parent company) . The assessee is required to deduct tax at source @10% on payments made to the parent company u/s 194 J of I.T act but deducted the TDS @2% u/s194C of the I.T. Act. The assessee possessed the manufacturing facility along with license of manufacturing of beer but did not own any brand of it's own and the beer is sold on brand name, hence it had entered into agreement to manufacture the beer in the brand name of parent company under the contractual agreement with MBIL group of companies and it sold the goods to APBCL under its own name. It had also paid excise duty and sale tax. In effect, it had produced and marketed the beer on its own in the brand name of the parent company and

deducted the tax at source u/s 194C of the Act by treating the payment as contract payment. The AO took the view that the brand fee is in the nature of royalty for use of brand name and tax should be deducted u/s 194J of I.T. Act. Since the rate at which the tax is required to be deducted u/s 194C is lower than the rate prescribed u/s 194J of the Act, the AO treated the assessee as assessee in default in respect of short deduction of tax at source and raised the demand. However, the assessee claimed before the ld. CIT(A) for not treating the assessee in default u/s 201 as per the judgement of the Hon'ble Supreme Court rendered in the case of Hindustan Coco-Cola Beverages Pvt. Ltd. Vs. CIT[293 ITR 226] (SC).The Ld.CIT(A) considered the submission made by the assessee and held that the AO is justified in levying the interest u/s 201(1A) of the Act.

3. Aggrieved by the order of the Ld.CIT(A), the assessee filed appeal before the ITAT, Visakhapatnam and the ITAT Visakhapatnam upheld the order the of the Ld.CIT(A) and held that the payment was in the nature of royalty and payment of brand fee attracts the TDS at 10% u/s 194J of I.T.Act. For ready reference, we extract relevant part of Hon'ble ITAT's order vide ITA No.103,

104 & 105/Viz/2014 dated 10.08.2015 for the assessment year 2008-09 to 2010-11 which reads as under :

> *"3. We have heard rival contentions and perused the record. The assessee might haveacted as contract manufacturer, but the facts remains that, for all practical purposes, it has declared itself to be the manufacture and has also sold the products under its invoice only. The financial statements prepared by it also vindicate the same. When, for all legal requirements, the assessee has claimed itself to be the manufacturer of beer and has sold it under its own name by using the brand name of main line companies, it is incomprehensible as to how the assessee could dim for the limited purpose of sec. 194J of the Act that it was a mere contract manufacturer manufacturing beers for others. It was not shown to us that the property and risk attached with the manufactured products always remained with the Contractee. Further, we notice that the assessee has claimed to have executed contract for others, whereas, on the payment of 'brand fee', it has deducted TDS u/s 194C of the Act treating the same as contract payment, as if it has entrusted the contract to the main line companies. Hence the payment made to the brand owners under brewing agreement cannot be a contract payment failing under the scope of sec. 194C of the Act. Though the Ld A.R tried to contend that the entire payment could not be considered as payment of royalty, yet no material was placed to substantiate the said contentions. If the contention of the Ld AR that the amount transferred by way of 'brand fee" was actually a transfer of business profits is to be accepted, it has to be shown that the property and risk attached with the products remained with the contractee. In any case, it is a new argument raised for the first time before the Tribunal and hence we arenot inclined to appreciate the said contentions of Accordingly, we are of the view that there is no infirmity in the action of the tax authorities in treating the payment of 'brand fee' as payment of royalty falling within the scope of sec.194C of the Act."*

4. The Ld. Jt. CIT has imposed penalty u/s 271C of I.T. Act for short deduction of tax at source after giving opportunity to the assessee. Aggrieved by the order of the Jt.CIT, the assessee went on appeal before the CIT(A) and the Ld.CIT(A) confirmed the penalty levied u/s 271C of the Act. Aggrieved by the order of the Ld.CIT(A), the assessee is in appeal before this Tribunal. The

Ld. CIT(A) confirmed the penalty levied u/s 271C and the relevant part of the Ld.CIT(A) is extracted which reads asunder:

6.1 The facts on record show that the assessee paid brand fee to M/s MBIL & M/s UBL under the Brewing Agreement as follows for the subject years:-

Assessment year	Amount
2008-09	9,13,64,139
2009-10	4,17,26,245
2010-11	2,26,48,247

6.2 The assessee had deducted TDS at 2% u/s 194C on the said payments and it was contended that it was merely a contractual payment. In this regard, it is relevant to refer to the terms of the Brewing Agreement where the consideration for the said payment was stated as under

> *7.Consideration:*
>
> *In terms of the conditions agreed supra, Brewer agrees to pay by way of consideration towards representational rights for manufacture and supply of Beer under labels mentioned in Annexure a fee of Rs.5 per case. Such payment shall be made on a monthly basis and not later than 10th day of the following month.*
>
> *10. Representational Rights*
>
> *UBL has permitted BREWER touse the labels for Branding of the UBL beer for sale pursuant to the terms and conditions contained in this Agreement and such representational right is granted only for manufacture and supply of Beer and for no other purpose, Any steps taken by BREWER or UBL for recordal under the relevant provisions of the Trade Marks Acts shall be to the benefit of UBL alone.*
>
> *This Agreement shall be used by either party for registration of Labels under various Laws.*
>
> *10.1 UBL hereby permits BREWER to use the Trademarks in relation to only beer labels, beer packaging materials, beer crown corks. Upon the condition that the beer shall be produced according to the know-how and standards*

prescribed by UBL including for storing and packaging.

10.2 Permitting BREWER to use the Trademarks belonging to UBL will not in any way affect the rights of UBL to use the marks by itself or permitting the use of the same mark to! by other contract bottling units;

10.3. In view of the provisions of section 48(2) of the Trademarks Act 1999, permitted use of the Trademarks of UBL by BREWER is deemed to be used by UBL itself, not only for the purpose of Trademarks Act, 1999 but for any other law.

10.4. No amount shall be payable to UBL for the permitted use of the Trademark by BREWER except for the Brand Fee as mentioned in clause 7.

10.5 BREWER will at all times recognize the validity of the Trademarks and UBL's ownership thereof as well as the exclusive right of UBL to take all appropriate measures for protection of the trademarks and will not at any time put in issue the validity of the Trademarks nor shall do any act calculated to prejudice such validity. The permitted use of the trademarks shall not confer on BREWER any ownership in the Trademarks.

From the perusal of the Agreement, it is patently clear that the subject payments are made towards consideration for use of trademark etc. and are in the nature of royalty and that the provisions of sec 194J are attracted. The assessee's contention that they represent contractual payment u/s 194C was rejected by both the appellate authorities. The Hon'ble ITAT Vizag while rejecting the assessee's contention observed as under:-

We have heard rival contentions and perused the record. The assessee might have acted as contract manufacturer but the facts remain that, for all practical purposes, it has declared itself to be the manufacturer and has sold the product under its invoice only. The financial statements prepared by it also vindicate the same. When, for all legal requirements, the assessee has claimed itself to be the manufacturer of beer and has sold it under its own name by using the brand name of main line companies, it is incomprehensible as to how the assessee could claim for the limited purpose of sec, 194J of the Act that it wasmere contract manufacturer manufacturing beers for others. It was not shown to us that the property and risk attached with the manufactured products always remained with the Contractee, Further, We notice that the assessee has claimed to have executed contract for others, whereas, on the payment of 'brand fee', it has deducted TOS u/s 194C of the Act treating the same as contract payment, as if it has entrusted the contract to the main line companies. Hence the payment made to the brand owners under brewing / agreement cannot be a contract payment falling under the scope

of sec 194C of the Act Though the Ld A.R. tried to contend that the entire payment could not be considered as payment of royalty, yet no material was placed to substantiate the said contentions. If the contention of the Ld A.R. that the amount transferred by way of "brand" was actually a transfer of business profits is to be accepted, it has to be shown that the property and risk attached with the products remained with the Contractee, In any case, it is a new argument raised for the first time before the Tribunal and hence we are not inclined to appreciate the said contentions of Ld A.R. Accordingly, we are of the view that there is no infirmity in the action of the tax authorities in treating the payment of 'brand fee' as payment of royalty failing within the scope of sec 194J of the Act.

6.3 The legal position as to existence of "reasonable cause" u/s 273B was explained by the Hon'ble Delhi High Court in the case of Woodward Governor India P Ltd v CIT (253 ITR 745), as under:-

> *the officer dealing with the matter has to consider whether the explanation offered by the assessee 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, with it substance or foundation, the prescribed consequences follow.*

6.4 Thus it has to be seen whether the assessee had reasonable cause. The assessee contends that it was under the bonafide belief that the impugned payments were not made towards royalty and that the provisions of section 194C are applicable since payments were made in pursuance of 'contract', and that the misapplication of the provisions cannot be considered as malafide intention; that such bonafide belief was sought to be reiterated with reference to the statutory audit report where no mention of such default was made. Thus it was argued that the assessee had 'reasonable cause' and the various judicial pronouncements referred above were relied on. It has to be seen as to

the existence of a state of circumstances, which assuming them to be true would reasonably lead any ordinarily prudent man to come to the conclusion that it was the right thing to do. In this context, it may be relevant to refer to the terms of the Brewing Agreement under which the impugned payments were made and note that the plain terms of the Brewing Agreement clearly show that the impugned payments were made towards brand fee. The assessee is a signatory to the Agreement and it is an admitted position that the impugned amounts were calculated and paid as per the Brewing Agreement. The AR could not point to any clause in the Brewing Agreement to infer or understand that the impugned payments were not made towards brand fee, or that the conditions for royalty payment was not existing. The plea that the assessee under bonafide belief that the impugned payment was made for execution of contract work is illogical as under the terms of Brewing Agreement the payee is not made towards Brand fee. There are no conditions or existing facts or circumstances which could lead to the belief that the payment under the Brewing Agreement was not for brand fee but for executing any contract or work. The AR could not point to any conditions or circumstances in the Brewing Agreement that could lead to such belief. The argument that the assessee was under bonafide belief that the provisions of sec.194C would be applicable as the payments was made pursuance to a contract is totally illogical. It would be fallacious to deduce that all payments made under an agreement / contract would attract sec.194C, as transactions relating to royalty payment, rent payment etc would be invariably based on written agreement / contract in the case of companies. Thus, the plea that the assessee was under bonafide belief that the impugned payments were made towards execution of contract work and not towards royalty has no factual or legal merits, and

patently it is not a case of application of wrong section. In view of these, I do not find any merit in the assessee's plea of 'reasonable cause' for the impugned default.

6.5. During the appeal proceedings, the AR raised a plea that the statutory auditors did not mention in their audit report that tax deduction was not made properly and is a case of bonafide belief by the company. In support, the AR relied on the decision of the Hon'ble Supreme Court in the case of price Water Coopers (348 JTR) 306). I have examined this plea. At the outset, it is to be noted that this is a new plea not raised before the AO. The facts in the case of Price Water Coopers are that the tax audit report remarked that certain provision towards gratuity was not allowable deduction, but the assessee wrongly claimed such deduction in the return of income, and such a wrongful claim was held to be a bonafide error, based on the report filed before the Court explaining the circumstances under which the error was committed. In these factual situation, the Court came to conclude that such bonafide error would not amount to furnishing inaccurate particulars of income for the purpose of concealment penalty under sec 271(1)(c). However, factual and legal matrix in the present case are totally different. Factually, as already discussed above, the plain terms of the Brewing Agreement clearly show that the impugned payments were made towards royalty and not towards any contract work. The assessee company is a party to the agreement and has also submitted that the payments were computed and made as per the terms of Brewing Agreement. Thus, the element of bonáfide error does not exist. Besides, no information was placed on record to show that the CA had advised that the tax had to be deducted u/s.194C in regard to the impugned payments and that

the impugned payments are not in the nature of 'royalty'. In this regard It is relevant to refer to the observation of Hon'ble Delhi HC in CIT v N G Technologies Ltd (ITA No.82/2012 dt.1st December, 2014)

> *It is mandatory and compulsory for a company to get their accounts audited from a Chartered Accountant, who is required to submit an audit report to be filed with the return. We cannot, therefore, accept the contention of the assessee as universal and comprehensive that all claims howsoever untenable, once certified by a Chartered Accountant or the Directors of the company, cannot be made a subject matter of penalty proceedings. This will be stretching and making the requirement to prove bona tide conduct illusionary and ineffective and would fail to, check and stop fanciful and incredible claims. It is noticeable that most of the income tax returns are accepted without scrutiny or regular assessment and self-compliance of tax provisions is a rule required to be followed The view, which we have taken, is in consonance with the ratio expounded in Reliance Petro Products Pvt. Ltd. (supra).*

In the case of CIT v Arcatech Ltd. (ITA No.71/2013, dt.12th September, 2013), the Hon'ble Delhi HC observed:-

We cannot stretch the plea that the issue was debatable or there was wrong advice beyond the point to believe or accept contentions when the claim itself is impossible to accept and is contrary to fundamentals of tax or accountancy. Income tax returns are mostly accepted without scrutiny or regular assessment. Self and due compliance of tax provisions is required.

The above principles were followed by the Hon'ble ITAT Mumbai in the case of StateBank of Mauritius. (ITA No. 3139/208 dt 30 sep 2016) and the Hon'ble Tribunal went on to observe that fanciful claims under the garb of interpretation is not bonafide. Thus the judicial authorities have laid down the principle that prima facie inadmissible or patently wrong claims would not be bonafide; where the claim was ex-facie wrong being contrary to fundamental / basic principles of accounts and Act, such claim cannot be said to be bonafide, whether or not supported by CA Certificate; that the pretence of legal opinion of a CA is only a smoke screen and facade.

6.9In the light of above factual and legal position, I do not find merit in the assessee's claim of 'reasonable cause'. The Hon'ble Kerala High Court in the case of CIT Vs. Muthoot Bankers (Aryasala) 385 ITR 051 upheld levy of penalty u/s.271C where the assessee failed to establish 'reasonable cause'. In view Of the above, I find that the levy of impugned penalties u/s.271C for financial years 2007-08 to 2009-10 on this count are held justified and accordingly confirmed.

5. During the appeal hearing, the Ld.AR argued that the assessee was under the bonafide impression that the payment was contractual payment but not the brand fee. The Ld.AR further argued that the deductee has admitted the income in its hands, hence, there is no revenue loss in this case for imposing the penalty and further submitted that once the income is admitted in the hands of the deductee, deduction of TDS at 10% does not have any the tax effect. Ld.AR also argued that in case the payee admits the tax, the assessee cannot be treated as assessee in default consequent to the amendment made to second proviso to 40(a)(ia) of I.T.Act which is said to be retrospective by Hon'ble Delhi High Court in the case of CIT Vs. Ansal Landmark Townships Ltd, therefore taking cue from the amendment made to section 40(a)(ia) of the Act, the penalty is not exigible u/s 271C. Hence requested to cancel the penalty.

6. On the other hand, Ld. DR supported the orders of the lower authorities.

7. We have heard both the parties and perused the material on record. For failure of the assessee to deduct the tax as required as per chapter XVIIB and section 194B, the penalty u/s 271C attracts. We reproduce hereunder the relevant section of 271C which reads asunder:

[**Penalty for failure to deduct tax at source.**

[71] **271C.** [72][(1) If any person fails to—

(*a*) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or

(*b*) pay the whole or any part of the tax as required by or under—

(*i*) sub-section (2) of section 115-O; or

(*ii*) the second proviso to section 194B,

then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.]

[73][(2) Any penalty imposable under sub-section (1) shall be imposed by the [74][Joint] Commissioner.]

8. Plain reading of section 271C indicates that failure to deduct whole or part of the tax or failure to pay whole or part amount to the government account attracts the penalty under section 271C. With regard to the belief of the assessee that the payment was in the nature of contract payment the agreement clearly indicated that the payment was brand fee and the assessee had not entered in to any contract for rendering the services but

manufactured the goods on it's own in the brand name of parent company and sold the same to APBCL. For using the Brand name the assessee had made the payment of Royalty which clearly indicated by the agreement and discussed in detail by the Ld.CIT(A). Therefore this argument of the assessee is not tenable. The assessee argued that short deduction of tax at source @2% instead of 10% does not put the revenue at loss, hence requested to cancel the penalty proceedings. The issue whether the revenue has sustained the loss or not is not the look out of the assessee and it is obligation on the part of the assessee to deduct the correct amount and remit the correct account before the due date. Whether the revenue gets loss or not is not a reasonable cause for not to levy the penalty. Similarly, the assessee argued that with regard to the amendment made to section 40(a)(ia) treating the assessee as not in default for imposing the penalty u/s 271C. In this case, the issue is short deduction of tax at source by treating the brand fee payable by the assessee to the parent company as a contract payment u/s 194C of I.T. Act. Both the parent company as well as the assessee has the support of legal assistance of tax experts. Therefore plain reading of section 271C clearly shows that non deduction of tax at source or short deduction attracts the penalty u/s 271C of I.T. Act. The argument of the assessee that short deduction does not cause loss

to the revenue is not a reasonable explanation and it shows the willful default of the assessee for short deduction. Hon'ble Kerala high court in the case of CIT vs Muthoot Bankers (Aryasala) reported in 385 ITR 0051held as under:

5. Having heard the Senior Counsel for the revenue and also going through the orders passed by the statutory authorities, we find that it was the admitted case of the assessee that they did not deduct tax at source as required by them under Section 194A. When there is a failure on the part of the assessee to deduct tax at source in violation of Section 194A, the penal provisions of Section 271C are attracted. In such a case, the only way out for the assessee is to take the benefit of Section 273B by establishing that there was reasonable cause justifying their failure to comply with Section 194A.

Referring to various precedents this Court had occasion to deal with a similar case in the judgment in ITA 139/2013 where it was held that the burden under Section 273B is entirely on with the assessee and that a case which is beyond the control of the assessee and which prevents a reasonable man of ordinary prudence acting under normal circumstances, without negligence or inaction or want of bona fides, alone make out a reasonable cause. In this case, Annexure A order of the Joint Commissioner shows that the assessee failed to produce any evidence to substantiate its claims. However, the Commissioner (Appeals) decided the issue by putting the burden on the revenue, which is evident from the extracted portion of the Annexure B order passed by the Commissioner. The order of the Tribunal shows that the Tribunal has given totally different reasons which are mere surmises and assumptions made by it and are not founded on any materials that were made available by the assessee. All this therefore show that the assessee had not established a reasonable cause, as contemplated in Section 273B to resist an order of penalty under Section 271C. Therefore, we find that the Commissioner (Appeals) and the Tribunal acted illegally in cancelling the penalty levied on the assessee. Therefore, answering the question of law in favour of the revenue, this appeal is disposed of.

9. In the instant case the assessee could not establish with the tangible evidence to show that there was reasonable cause for short deduction of tax. Therefore we are of the considered view that the assessee has failed to explain the reasons for short deduction of tax at source, hence, we up hold the order of the Ld. CIT(A) and dismiss the appeals of the assessee.

10. In the result, appeals of the assessee are dismissed.

The above order was pronounced in the open court on 14th Mar 2018.

Sd/-	Sd/-
(वी.दुर्गाराव)	**(डि.एस. सुन्दरसिंह)**
(V. DURGA RAO)	**(D.S. SUNDER SINGH)**
न्यायिकसदस्य/JUDICIAL MEMBER	**लेखासदस्य/ACCOUNTANT MEMBER**

विशाखापटणम /Visakhapatnam
दिनांक /Dated : 14.03.2018
L.Rama, SPS

<u>आदेशकीप्रतिलिपिअग्रेषित/Copy of the order forwarded to:-</u>

1. अपीलार्थी / The Appellant-
2. प्रत्यार्थी / The Respondent–
3. The Pr. Commissioner of Income Tax, Guntur
4. The Commissioner of Income Tax(Appeals)-1, Guntur
5. विभागीयप्रतिनिधि, आयकरअपीलीयअधिकरण, विशाखापटणम /DR, ITAT, Visakhapatnam
6. गार्डफ़ाईल / Guard file

आदेशानुसार / BY ORDER

// True Copy //

Sr. Private Secretary
ITAT, VISAKHAPATNAM