IN THE INCOME TAX APPELLATE TRIBUNAL
HYDERABAD BENCHES **"B"** BENCH: HYDERABAD

BEFORE SHRI D. MANMOHAN, VICE PRESIDENT AND
SHRI RIFAUR RAHMAN, ACCOUNTANT MEMBER

ITA. Nos. 28 to 34/Hyd/2018
Assessment Year: 2009-10 to 2015-16
&
S.A. Nos. 13 to 19/Hyd/2018
(Arising out of ITA. Nos. 28 to 34/Hyd/2018)
Assessment Year: 2009-10 to 2015-16

M/s. Siby Mining and Infrastructure Private Limited, Hyderabad. PAN: AAECS 9130 L	vs.	Joint Commissioner of Income Tax (TDS), Range-2, Hyderabad.
(Appellant)		(Respondent)

For Assessee:	Shri C. Suresh
For Revenue :	Smt. N. Swapna, DR

Date of Hearing :	01.05.2018
Date of Pronouncement :	11.05.2018

ORDER

PER D. MANMOHAN, VP:

These appals by the assessee are directed against the orders passed by CIT (A)-8, Hyderabad and they pertain to assessment years 2009-10 to 2015-16.

2. The issue involved in all these appeals being common, we proceed to dispose of these appeals by a combined order, for the sake of convenience.

3. Penalty levied by the A.O. u/s 271C of the Income Tax Act, 1961 having been confirmed by the Ld. CIT(A), assessee is in appeal before the Tribunal.

4. Assessee is engaged in excavation works. Assessee received loan from NBFCs which fixes EMI at the beginning itself, comprising of principal and interest element, for which NBFCs collect post-dated cheques which can be encashed directly from its bank account at scheduled dates. During the year under consideration, the interest payable to NBFCs was accordingly paid, but without deducting tax at source.

5. According to the Learned Counsel for the assessee, the assessee has been engaged in this business for past eight years but the loan was taken from the following NBFCs only during the previous year relevant to the A.Y. 2009-10.

Sl No.	Name of the NBFC	Interest paid (Rs.)	TDS default (Rs.)
1.	SREI Finance Ltd	15,11,719/-	1,51,172/-
2.	TML Finance Services Ltd	115,40,120/-	1,54,012/-
3.	Tata Capital Limited	7,23,581/-	72,358/-
4.	GE Capital Finance Services Ltd	98,115/-	9,812/-
5.	Reliance Capital Ltd	3,67,407/-	36,741/-
6.	Kotak Mahindra Prime Ltd	6,156/-	Below Limit
	Total	42,47,098/-	4,24,095/-

6. Though the assessee has been deducting tax at source on all other expenditure, with regard to the interest paid to the NBFCs the assessee failed to deduct tax.

7. During the course of survey operations and also based on the information with regard to the expenditure claimed under various heads for the Financial Years relevant to the Assessment Years under consideration, A.O. noticed that tax was not deducted at source, as provided u/s 194A of the Act, in respect of the payments made to the above mentioned NBFCs. This section provides for deduction of tax by the assessee who is responsible for paying, by way of interest, to any person. The A.O. accordingly treated the assessee as a defaulter u/s

201(1) and 201(1A) of the Act vide order dated 31.10.2016, the ITO (TDS) called upon the assessee to show cause as to why the assessee-company should not be treated as defaulter u/s 201(1) and 201(1A) of the Act. In response thereto, the assessee submitted that as per the terms and conditions of the loan, EMIs have to be paid to the above mentioned NBFCs, as fixed by them and the same is collected through post-dated cheques by virtue of which EMI amounts are recovered from the bank directly. The EMI constitutes principal and interest components. Since the amount is collected directly from the account, the assessee claimed that there was no control on it to deduct tax from the interest portion.

8. The TDS officer observed that the assessee knows the exact amount payable to the NBFCs and therefore it ought to have deducted tax at source.

9. The assessee pleaded that though tax was not deducted by the assessee-company, the payees in their return of income, admitted the same as their incomes and paid taxes thereon. However, those details were not furnished before the TDS Officer. Under these circumstances, the TDS Officer has treated the assessee as a defaulter u/s 201(1) and 201(1A) of the Act and simultaneously initiated proceedings u/s 271C to levy penalty for failure to deduct tax at source.

10. The assessee moved a rectification petition u/s 154 of the IT Act wherein he has furnished all relevant details as per Form 26A to prove that the payees have filed their income tax returns and they have included the amount of interest in their returns of income. Therefore, the assessee should not be treated as a defaulter u/s 201(1) and 201(1A) of the Act.

11. Since the A.O. has separately initiated proceedings u/s 271C of the Act, the assessee contended therein that only on account of

payment of post-dated cheques, the assessee had no control over the interest payment and further the assessee was under the impression that there was no need to make TDS in such cases. In otherwords, it was stated that there was a reasonable cause, as provided u/s 273B and therefore exempt from levy of penalty.

12. A.O. observed that at the time of calculating quantum of EMI, the assessee is required to reduce the applicable TDS and issue cheques for the balance amount. The TDS component reduced from the EMI was required to be remitted to the Government account as per the prescribed time limits. Therefore, the contention of the assessee that it had no control over the payment of interest is not acceptable.

13. Though the assessee has furnished copies of Form 26A from the its payees, to show that the interest receipts were admitted by the payees in their returns of income, the A.O. observed that proceedings u/s 201 are different from the proceedings u/s 271C of the Act. Section 201 of the Act merely states that the assessee need not be treated as defaulter once the recipient files its return of income and paid taxes whereas section 271C of the Act is a penal provision introduced to deter the assessees from non-deduction of tax at source. JCIT (TDS) also referred Circular issued by the CBDT as well as the decision of the Hon'ble Supreme Court in the case of M/s. Hindustan Coco Cola Beverages (293 ITR 226) to highlight that the Hon'ble Apex Court categorically stated that in the event of furnishing of returns of income by the payees, no demand u/s 201(1) should be enforced but interest till the date of payment of taxes by the assessee or the liability of penalty u/s 271C of the Act should be considered separately. The penalty was levied u/s 271C, for all the years under consideration, for failure to deduct tax at source u/s 194A of the act.

14. Aggrieved, assessee contended before the Ld. CIT(A) that the assessee was under bonafide belief that payment of interest to NBFCs is covered under the list of exceptions provided for u/s 194A(3) of the IT Act, 1961 which speaks of interest payable to banking companies. It was also contended that the tax was deducted in respect of all other payments except for payments made to NBFCs, since the assessee-company received professional advice stating that EMIs having been paid in one lump-sum amount, comprising both principal and interest, the requirement of TDS does not arise. It was thus contended that the assessee was prevented by sufficient and reasonable cause in discharging its liabilities. Learned Counsel for the assessee relied upon the following decisions in support of its contention that the assessee has a reasonable cause for failure to deduct tax at source.

(i) Sukhdev Singh vs. JCIT, ITAT Chandigarh Bench in ITA No. 116/CHD/2014, dt 29.9.2014;
(ii) Muthoot Bankers vs. JCIT (2011) 12 ITR (TRIB) 40 (Cochin);
(iii) CIT vs. Bank of Nova Scotia (2016) 380 ITR 550 (SC) and
(iv) Hon'ble Delhi High Court in the case of Woodward Governor (India) Ltd vs. CIT.

15. Ld. CIT(A) observed that u/s 194A exemption from TDS is limited only to interest payments to Banks and not to NBFCs. There cannot be any scope for confusion in this regard as Banks are different from NBFCs. He further observed that though the assessee submitted that it had acted on professional advice, no such evidence was produced and therefore, the claim of the assessee should only be taken as self-serving statement. The case law relied upon by the assessee were also distinguished on facts. Ld. CIT(A) observed that the decision of the ITAT Chandigarh Bench (supra) was based on the fact that the claim of bonafide belief was consistently made before the Assessing Officer as well as the Ld. CIT(A) whereas in the instant case, the claim was made for the first time before the Ld. CIT(A). In the case of Muthoot Bankers

(supra) the question of sufficient cause was a matter of factual finding by the Tribunal whereas, in the present case, the facts were different. The decision of the Hon'ble Delhi High Court in the case of Woodward Governor (India) Ltd was held to be not applicable. The judgment of the Hon'ble Supreme Court in the case of Bank of Nova Scotia (supra) refers to dismissal of SLP and hence it was observed that the said decision was not an authoritative pronouncement on the subject. He finally concluded that the appellant failed to discharge the burden of proof that there were good and sufficient reasons for failure to deduct tax and thus the penalty levied by the JCIT was upheld. Further, aggrieved, assessee-company is in appeal before the Tribunal.

16. Learned Counsel for the Assessee submitted that the assessee-company was diligently deducting tax at source from all the expenditure right from the inception of the company. There was no lapse on the part of the assessee on any occasion except in the case of payment made to NBFCs and that too because of the peculiar circumstances of the case coupled with the professional advice and the wrong impression that it could not have deducted tax at source in view of the fact that the post-dated cheques were already collected by the NBFCs. It was contended that it is not a case of giving different reason before the Ld. CIT(A); plea before the Ld. CIT(A) was merely supportive of the reasons given before the A.O.

17. In support of the contention that non-deduction was on account of wrong advice of CA, assessee filed an affidavit of the CA. In the affidavit (page 85 of the paper book) Shri V. Ramachanra Rao, CA, deposed that he has been in practice for the last 22 years and he is a Statutory Auditor of M/s. Siby Mining and Infrastructure Private Limited for the years under consideration and also acted as a Tax Auditor of the assessee-company. Loans taken from NBFCs were being repaid in monthly EMIs comprising of principal and interest in one

lump-sum. NBFCs are subject to the monitoring and control of the Reserve Bank of India as an Institution involved in public lending and all these NBFCs are listed companies which are income tax assessees and filed returns of income. Under these circumstances, he advised the assessee-company that it is not liable to deduct tax at source in respect of interest paid to NBFCs. It was also stated that even in the tax audit reports given by him, he has certified that assessee-company has complied with all its TDS obligations which implies that he was also under bonafide belief that tax need not be deducted at source on such payments, in the peculiar circumstances of the case.

18. Learned Counsel for the Assessee strongly relied upon the affidavit filed by the CA and submitted that it was not the case of giving a fresh reason before the appellate authorities but it was a case of elaboration of reasons by supporting evidences in the form of affidavit. Since the CA was also the Tax Auditor of the assessee-company, it was only an oral communication at the relevant point of time. Therefore, one has to go by surrounding circumstances by analysing the plea of the assessee rather than insisting upon written evidence. He also submitted that penalty u/s 271C is neither mandatory nor must but is subject to the exceptions provided u/s 273B of the Act i.e., in the event of proving a bonafide reason. The expression "reasonable cause" is required to be interpreted liberally in a fair and reasonable manner, so as to advance the cause of justice, since harsh and legalistic approach should be mitigated by a soft approach in applying penal provisions, as held by the Hyderabad Special Bench in the case of ACIT vs. Gayatri Traders (58 ITR 121). He also referred to the decision of the ITAT Chandigarh Bench in the case of Sukhdev Sing vs. JCIT (TDS) (pages 37 to 40 of paper book-2) to contend that under identical circumstances – with regard to non-deduction of tax on the interest to NBFCs – the claim of bonafide belief was accepted by the ITAT. He also took support of the

decision of the Hon'ble Supreme Court in the case of CIT vs. Bank of Nova Scotia (page 80 of the paper book-2) wherein it upheld the view of the Hon'ble Delhi High Court that it is necessary to establish that there was contumacious conduct on the part of the assessee in order to levy penalty u/s 271C of the Act. Learned Counsel for the Assessee placed copy of the order of the ITAT Mumbai Bench in the case of Smt. Aishwarya Rai Bachchan vs. Addl. CIT (158 ITD 987) to submit that in the aforesaid case the plea, that the non-deduction of tax was based upon the advice of the Chartered Accountant, was accepted as sufficient / reasonable cause for failure to deduct tax at source. Assessee also relied upon the decision of the Hon'ble Karnataka High Court in the case of Rajajinagar Cooperative Bank Ltd (page 47 of the paper book-2) wherein the Court observed that construing a provision in a different manner should not merely lead to penalty if the assessee has immediately accepted the mistake upon pointing out and thereupon paying tax and interest. Learned Counsel for the Assessee submitted that even in the instant case, the assessee promptly paid the interest levied u/s 201(1A) and proved that the payees have filed their return of income and hence assessee cannot be treated as a defaulter u/s 201(1) of the Act. Thus, the assessee-company has acted under bonafide belief that it need not deduct tax at source. Though the assessee-company was consistent in its stand, it had to file an affidavit only to support its contention. Thus it is not a fit case for levy of penalty.

19. On the other hand, Learned Departmental Representative relied upon the decision of the Hon'ble Kerala High Court in the case of CIT vs. Muthoot Bankers (398 ITR 276) to submit that penalty is leviable u/s 271C of the Act unless the assessee proves that it was prevented from deducting tax at source on account of reasonable cause. In the instant case, the assessee could not prove the circumstances and in fact made its claim all along that non-deduction was on account of payment

through post-dated cheques; however it was later contended that it was based on the advice of CA. This plea was raised for the first time before the Ld. CIT(A). Learned DR also placed before us a copy of the note dated 12.03.2018 of the JCIT (TDS), Hyderabad, addressed to the office of the Departmental Representatives, wherein it was stated that initial plea of the assessee with regard to the non-deduction of tax differed from plea taken at a later stage. During the proceedings u/s 271C of the Act it was contended that the payment was collected by the NBFCs directly from its bank account at scheduled dates and hence there is no control over such payments which led to non-deduction of tax at source and thus assessee was under bonafide impression that there was no need to deduct tax and it realised it's mistake only after a survey was conducted u/s 133A of the Act. Thus it never took a plea that it was incorrectly advised by the Chartered Accountant.

20. However, before the Ld. CIT(A) it was contended that assessee was under the bonafide belief that non-deduction of tax in respect of interest paid to NBFCs is on the ground that it is exempt from deduction u/s 194A(3) of the Act whereas banks cannot be compared with NBFCs and there is no room for such mistaken impression. It was also contended that the assessee has not submitted any evidence either before the A.O. or before the Ld. CIT(A) to contend that it acted on professional advice. It was also stated that the affidavit of a Chartered Accountant, without any correspondence during the relevant Financial Years to show that it has sought the opinion / professional advice, should not be taken into consideration.

21. We have carefully considered the rival submissions and perused the record. Learned Counsel for the Assessee submits that non-deduction of tax at source was on account of multiple factors which are linked to one and another. It is not in dispute that the assessee had to pay post-dated cheques immediately at the time of taking loans. It

claims that it was under bonafide impression that the post-dated cheques having been encashed directly from the NBFCs which includes principal component as well as interest component, it could not have deducted tax at source. It was also supported by the advice of the Chartered Accountant, who was not only a Statutory Auditor but also a Tax Auditor of the assessee-company. The consistent plea of the assessee was that there was no such negligence on the part of the assessee right from the inception of the business except in the case of payments made to the NBFCs. The Tax Auditor had certified in his tax audit report that wherever the tax ought to have been deducted at source, the assessee complied with the Statutory obligation which implies that the Chartered Accountant was also under the bonafide belief that in the peculiar circumstances of the case, there was no need to deduct tax at source. This was also supported by an affidavit duly signed by the Chartered Accountant. It is not the case of the assessee that even after pointing it out to the assessee, about the failure to deduct tax at source, the assessee refused to accept the stand taken by the Assessing Officer. In fact, the assessee dutifully proved that the recipients have filed returns of income therefore assessee cannot be treated as a defaulter within the meaning of section 201(1) of the Act. The Learned Counsel for the Assessee also submitted that the assessee has not disputed the payment of interest u/s 201(1A) of the Act. Leviabiltiy of penalty has to be analysed in this backdrop. As rightly observed by ITAT Special Bench Hyderabad (supra) the expression "reasonable cause" has to be considered liberally to advance the cause of justice rather than considering the explanation of the assessee by adopting a harsh and legalistic approach. Even if it is assumed that the assessee has given varied explanation before the Ld. CIT(A) for the first time, it cannot be said to be different from the explanation originally tendered. No doubt the assessee was under impression that it could

not have deducted tax at source since post-dated cheques were given to NBFCs. Added to the opinion, the Chartered Accountant has also not qualified in his audit report that the assessee ought to have deducted tax at source. In otherwords, the view taken by the assessee was supported by the honest belief of the Chartered Accountant. In the case of Smt. Aishwarya Rai Bachchan (supra), the ITAT Mumbai Bench observed that non-deduction of tax at source, based upon an advice of a Chartered Account, should be treated as a 'reasonable cause'. Similarly, in the case of Sukhdev Singh (supra) ITAT Chandigarh Bench observed that the bonafide belief of the assessee that there is no need to deduct tax at source on the interest payable to NBFCs constitutes a 'reasonable cause'. Hon'ble Karnataka High Court (supra) has also expressed a similar view. Under these circumstances we are of the opinion that the assessee's failure to deduct tax at source is supported by a bonafide reason and therefore we set aside the orders passed by the A.O. as well as the Ld. CIT(A) and delete the penalty levied u/s 271C of the Act.

22. In the result, appeals filed by the assessee are allowed.

S.A. Nos. 13 to 19/Hyd/2018
(Arising out of ITA. Nos. 28 to 34/Hyd/2018)

23. By these applications, the assessee requested for stay of collection of outstanding demand till the disposal of the appeals (ITA. Nos. 29 to 34/Hyd/2018). By this order, the said appeals having been disposed of, the Stay Applications do not stand. Accordingly, the same are treated as infructuous and dismissed.

Order pronounced in the open court on 11th May, 2018.

Sd/- Sd/-

(S. RIFAUR RAHMAN) **(D.MANMOHAN)**
ACCOUNTANT MEMBER **VICE PRESIDENT**
Hyderabad, Dated: 11th May, 2018.

OKK, Sr.PS

Copy to

1.	M/s. Siby Mining and Infrastructure Private Limited, C/o. Sekhgar And Suresh Chartered Accountants, 133/4, Rashtrapati Road, Secunderabad.
2.	JCIT (TDS), Range-2, IT Towers, Masab Tank, Hyderabad.
3.	CIT (A)-8, Hyderabad.
4.	Pr. CIT-8, Hyderabad.
5.	DR, ITAT, Hyderabad.
6.	Guard File