IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH : BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI JASON P BOAZ, ACCOUNTANT MEMBER

Sl. No.	ITA No.	Assessment Year	Appellant	Respondent
1-2	2379 & 2380/Bang/2017	2015-16	M/s Karnataka Power Transmission Corporation Ltd. (KPTCL), Tumkur	The ITO (OSD), (TDS), LTPU, Bengaluru.
3-4	2381 & 2382/Bang/2017	2015-16	M/s KPTCL, Mysore	
5-6	2383 & 2384/Bang/2017	2015-16	M/s KPTCL, Tumkur	
7-8	2385 & 2386/Bang/2017	2015-16	M/s KPTCL, Bangalore	
9-10	2387 & 2388/Bang/2017	2015-16	M/s KPTCL, Belgaum	
11-12	2389 & 2390/Bang/2017	2015-16	M/s KPTCL, Bangalore	
13-16	2391 to 2394/Bang/2017	2015-16	M/s KPTCL, Hubli	
17-18	2395 & 2396/Bang/2017	2015-16	M/s KPTCL, Bangalore	
19-20	2397 & 2398/Bang/2017	2015-16	M/s KPTCL, Davangere	
21-22	2399 & 2400/Bang/2017	2015-16	M/s KPTCL, Shimoga.	
23-24	2401& 2402/Bang/2017	2015-16	M/s KPTCL, Hassan	
25-26	2403 & 2404/Bang/2017	2015-16	M/s KPTCL, Holenarasipura	
27-28	2405 & 2406/Bang/2017	2015-16	M/s KPTCL, Mangalore	
29-30	2407 & 2408/Bang/2017	2015-16	M/s KPTCL, Bagalkot	
31-32	2409 & 2410/Bang/2017	2015-16	M/s KPTCL, Karkala.	
33-34	2411 & 2412/Bang/2017	2015-16	M/s KPTCL, Mangalore	
35-36	2413 & 2414/Bang/2017	2015-16	M/s KPTCL, Kolar	
37-38	2415 & 2416/Bang/2017	2015-16	M/s KPTCL, Bangalore	
39-40	2417 & 2418/Bang/2017	2015-16	M/s KPTCL, Munirabad	
41-44	2419 to 2422/Bang/2017	2015-16	M/s KPTCL, Bangalore	
45-46	2423 & 2424/ Bang/2017	2015-16	M/s KPTCL, Belgaum	
47-48	2425 & 2426/Bang/2017	2015-16	M/s KPTCL, Bangalore	
49-50	2427 & 2428/Bang/2017	2015-16	M/s KPTCL, Dodaballapur	
51-52	2429 & 2430/Bang/2017	2015-16	M/s KPTCL, Kalburgi	
53-54	2431 & 2432/Bang/2017	2015-16	M/s.KPTCL, Bangalore.	
55-56	2433 & 2434/Bang/2017	2015-16	M/s KPTCL, Mysore	
57-58	2435 & 2436/Bang/2017	2015-16	M/s KPTCL, Davangere	
59-60	2437 & 2438/Bang/2017	2015-16	M/s KPTCL, Tumkur	
61-62	2439 & 2440/Bang/2017	2015-16	M/s KPTCL, Talaguppa	
63-64	2441 & 2442/Bang/2017	2015-16	M/s KPTCL, Hassan	
65-66	2443 & 2444/Bang/2017	2015-16	M/s KPTCL, Bangalore	
67-68	2445 & 2446/Bang/2017	2015-16	M/s KPTCL, Kalburgi	

Sl. No.	ITA No.	Assessment Year	Appellant	Respondent
69-70	2447 & 2448/Bang/2017	2015-16	M/s KPTCL, Bijapur	The ITO (OSD), (TDS), LTPU, Bengaluru.
71-72	2449 & 2450/Bang/2017	2015-16	M/s KPTCL, Shimoga.	
73-74	2451 & 2452/Bang/2017	2015-16	M/s KPTCL, Bangalore	
75-76	2453 & 2454/Bang/2017	2015-16	M/s KPTCL, Mysore	
77-78	2455 & 2456/Bang/2017	2015-16	M/s KPTCL, Hassan	
79-80	2457 & 2458/Bang/2017	2013-14	M/s KPTCL, Bangalore	

Appellant by	:	Shri A. Shankar, Advocate
Respondent by	:	Shri K.V. Aravind, Advocate & Standing Counsel

Date of hearing	:	22.01.2019
Date of Pronouncement	:	08.02.2019

O R D E R

Per Bench

In these group of appeals filed by M/s Karnataka Power Transmission Corporation Ltd.(hereinafter referred to as KPTCL or Assessee), against different orders of CIT(Appeals), the only issue involved is as to, whether KPTCL can be considered as "Assessee in Default" under the provisions of Section 201(1) of the Income Tax Act, 1961 ["the Act"] for not deducting tax at source; and, whether KPTCL is liable to pay interest on tax not deducted at source u/s.201(1A) of the Act?

2. The issue arises for consideration on the following facts and circumstances. KPTCL paid "Cash equivalent of unutilized leave at the time of their retirement" to its employees. Under Section 17(1)(va) "Salary" includes — (va) **any payment received by an employee in respect of any period of leave not availed of by him.** Under Section 192 of the Act, "Any person responsible for paying any income chargeable under the head "Salaries" shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of the

rates in force for the financial year in which the payment is made on the estimated income of the assessee under this head for that financial year. KPTCL, as an employer, was bound to deduct tax at source on the salaries paid to its employees by including the payment received by an employee in respect of any leave period not availed by the employee. **Section 201(1) & (1A) of the Act lays down consequences if tax is not deducted at source when there is a requirement to deduct tax at source laid down under any provisions of the Act and it reads thus:-**

> **"Section-201: Consequences for failure to deduct or pay**.
>
> (1) Where any person, including the principal officer of a company,—
>
> (a) who is required to deduct any sum in accordance with the provisions of this Act; or
>
> (b) referred to in sub-section (1A) of section 192, being an employer,
>
> does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:
>
> ……..
>
> (1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest,—
>
> (i) at one per cent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted; and

(ii) at one and one-half per cent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of section 200:]

……..”

3. Section 10(10AA) of the Act provides for certain exemption when payments are received by an employee in respect of leave period not availed by the employee. **Section 10(10AA) of the Act provides for the following exemption viz.,:-**

“**Section 10: Incomes not included in total income.**

In computing the total income of a previous year of any person, any income falling within any of the following clauses shall not be included—

.....

(10AA) (i) any payment received by an employee of the Central Government or a State Government, as the cash equivalent of the leave salary in respect of the period of earned leave at his credit at the time of his retirement whether on superannuation or otherwise;

(ii) any payment of the nature referred to in sub-clause (i) received by an employee, other than an employee of the Central Government or a State Government, in respect of so much of the period of earned leave at his credit at the time of his retirement whether on superannuation or otherwise as does not exceed ten months, calculated on the basis of the average salary drawn by the employee during the period of ten months immediately preceding his retirement whether on superannuation or otherwise, subject to such limit as the Central Government may, by notification in the Official Gazette, specify in this behalf having

regard to the limit applicable in this behalf to the employees of that Government:

4. It is not in dispute that the Specified Limit in the case of employee other than an employee of the Central Government or a State Government i.e., employee falling within clause (ii) of Sec.10AA is Rs. 3,00,000 in salary to employees who retire, whether on superannuation or otherwise, after 1.4.1998 Vide Notification No. 123/2002 dated 31-5-2002.

5. As can be seen from the above provisions, if the employee to whom payment is made for unutilized leave period is an employee of Central or State Government, then the entire payment so made is exempt and therefore, an employee in such circumstances is not obliged to deduct tax at source on such payment. If, on the other hand, the person to whom such payment is made is not a Central or State Government employee, then only Rs.3 lacs is exempt and the remaining sum is taxable and the employer has to deduct tax at source on payment in excess of Rs.3 lacs towards unutilized leave period.

6. Sec.10(10AA) does not define as to who is to be regarded as employee of Central or a State Government. The revenue's case is KPTCL is not State Government, but a statutory corporation and therefore its employees cannot be regarded as employees of State Government and therefore, they ought to have deducted tax at source on payments above Rs.3 lacs on account of earned leave at the time of retirement.

7. KPTCL, in the present group of cases, did not deduct tax at source on payments made to its retirement employees towards unutilized leave period where such payment was made in excess of Rs.3 lacs. It is in this scenario that the Income-tax Authorities initiated proceedings against the Assessee u/s.201(1) & 201(1A) of the Act for treating KPTCL as an

Assessee in default and also for levying interest on tax not paid to the credit of the Central Government for the period on which the tax deducted ought to have been remitted till such time they were actually remitted.

8. The plea of KPTCL was that its employees were employees of the State Government and therefore the entire payment to its employees towards unutilized leave period on retirement was exempt u/s.10(10AA)(i) of the Act. The revenue held that KPTCL was a statutory Corporation and therefore its employees were not employees of State Government and therefore KPTCL ought to have deducted tax at source on payment to employees towards unutilized leave period on retirement in excess of Rs.3 lacs which alone was exempt u/s.10(10AA)(ii) of the Act. In other words, the stand of the revenue was that the clause applicable for determining liability to deduct tax at source was Sec.10(10AA)(ii) and not Section 10(10AA)(i) of the Act.

9. Both the AO and the CIT(A) rejected the plea of KPTCL and that is how KPTCL is in appeal before the Tribunal. The appellants in these appeals are the various divisions of KPTCL situate at various Districts in the State of Karnataka. The various divisions of KPTCL was represented by Mr. A. Shankar, Senior Advocate for Mr. S. Annamalai, Mr. Narendra Sharma and Mr. V. Ravishankar, Advocates on record. The revenue was represented by Shri K.V. Aravind, Advocate and Standing Counsel for the Department.

10. Five propositions were canvassed on behalf of KPTCL by the learned counsels for KPTCL challenging the orders of CIT(A) confirming the action of the AO in holding KPTCL to be an Assessee in default u/s.201(1) of the Act. They are:-

(i) Assumption of jurisdiction by the respondent in all these appeals is bad in law and hence the orders passed u/s.201(1) & 201(1A) of the Act are invalid.

(ii) The orders passed u/s.201(1) & 201(1A) of the Act are beyond the period of limitation and hence barred by time.

(iii) The payments in question for which KPTCL was treated as "Assessee in default" for not deducting tax at source were not in the nature of income within the meaning of Sec.17(1)(va) of the Act and therefore there was no obligation on the part of the Assessee to deduct tax at source;

(iv) The provisions of Sec.10(10AA)(i) of the Act are applicable in the case of the Assessee as the employees of KPTCL are to be regarded as employees of State Government;

(v) The provisions of Sec.201(1) & 201(1A) of the Act are not attracted in the present case because the non deduction of tax at source by KPTCL was under the bonafide belief that it was not obliged to deduct tax at source on payments in excess of Rs.3 lacs towards unutilized leave period as it believed that its employees were employees of State Government and therefore the applicable provisions will be only Sec.10(10AA)(i) of the Act.

11. It is not in dispute before us that identical issue in the case of KPTCL, the appellant, in all these appeals came up for consideration before this Tribunal in ITA No.2223/Bang/2017 to 2300/Bang/2017 and this Tribunal by its order dated 2.5.2018 allowed the appeals of KPTCL holding as follows:-

> "11. We have heard the parties on proposition (iv) and (v) alone as there are decisions of ITAT Bangalore Bench on identical facts and identical issues. As far as proposition No. (iv) is concerned, it was submitted by the learned DR that this Tribunal in the case of Central Food Technological Research Institute Vs. The ITO

(TDS), Mysore, ITA No.1607 to 1611/Bang/2013 order dated 4.7.2014 this Tribunal has already taken a view on identical facts and circumstances of the case of the Assessee that employees of Statutory Corporations cannot be regarded as employees of the State or Central Government. In view of the aforesaid decision of the Tribunal, we hold that there is no merit in proposition No.(iv) canvassed by the parties before us.

12. As far as proposition No.(v) set out above, we have heard the rival submissions. Before the Tribunal submissions were made on behalf of KPTCL by the learned counsel for KPTCL pointing out the historical background under which KPTCL came into existence. Prior to enactment of Electricity Act, 2003 (Central Act) supply of Electricity was governed by the Electricity (Supply) Act, 1948 (again a Central Act). As per Section 5(1) of the Electricity (Supply) Act, 1948, every State had to constitute a State Electricity Board (SEB) by notification in Official Gazette. Sec.12 of the said Act stipulated that SEBs so constituted shall be a body corporate having perpetual succession and a common seal with power to acquire and hold property both movable and immovable and shall be capable of suing and be sued. That is how Mysore electricity Board came to be established on 1.10.1957 which was subsequently named as Karnataka State Electricity Board (KEB). Employees of State Government became employees of KEB.

13. In view of losses incurred by KEB, Government of Karnataka came out with general policy proposing fundamental and radical reforms in the power sector. Accordingly, Karnataka Electricity Reforms Act, 1999 (KERA) was enacted by the Karnataka State Legislature which advocated division of the functions of generation, transmission & Distribution of electricity and each function to be performed was entrusted to various statutory corporations. The function of generation of electricity was transferred to Visweshwaraiah Vidyuth Nigama Limited way back in 1970. By Section 14(3) of KERA, KPTCL was incorporated and the function of transmission and distribution of electricity was transferred to KPTCL. Subsequently the distribution function was given to four independent distribution

companies in 2002 viz., BESCOM, MESCOM, HESCOM, GESCOM. Employees of KEB became employees of KPTCL.

14. It is the plea of KPTCL that after its inception till AY 2012-13 it has been deducting TDS by considering its employees as employees of State Government in view of the historical background under which KPTCL came into existence. The revenue has accepted in the past the manner in which tax was deducted at source by KPTCL by considering the employees of KPTCL as employees of State Government. It was pointed out that it is only in AY 2012-13, that the revenue took the stand that employees of KPTCL were not to be regarded as employees of State Government because employment under KPTCL cannot be equated with an office or post in connection with the affairs of such State. It was for the first time that the revenue took the stand that Statutory Corporations such as KPTCL were not to be regarded as State Government. It has also been contended that the Assessee has been filing return of TDS for AY 2013-14 in the status of Statutory body (State Govt.) in form No.27A.

15. The learned counsel for KPTCL drew our attention to the Tripartite Agreement dated 31.7.1999 under the provisions of Sub-Section 2 of Section 15 of the Karnataka Electricity Reform Ordinance, 1999 between the Government of Karnataka and KEB and KEB Employees Union, wherein on corporatization of the transmission and distribution business by forming KPTCL employees of erstwhile KEB expressed apprehension that their services will be privatized. KEB under the tripartite agreement allayed their fears and assured them that all that the employees will get as employees of KEB will continue to be available even after formation of KPTCL. Attention was drawn to some of the documents in the paper book filed regarding the extent of control and protection that the employees of the restructured corporate entities of the erstwhile KEB were subject to or given by the State Government.

16. The learned counsel for KPTCL also submitted that the issue whether the Assessee was obliged to deduct tax at source on unutilized leave on retirement u/s.192 of the Act which casts obligation on an employer to deduct tax at source on salaries

paid. It was argued that under clause (va) to Sec.17(1) of the Act it is only "**any payment received by an employee in respect of any period of leave not availed of by him".** It was submitted that on retirement the employer employee relationship between KPTCL and the retiring employee ceases and any payment made thereafter cannot be strictly termed as "Salary". Our attention was drawn to Finance Act, 2018 which inserted Sec.56(2)(xi) w.e.f. 1.4.2018 to avoid a possible plea that may be taken in such cases by holding that any payment post retirement will also be chargeable to tax under income from other sources, if it is not chargeable under the head income from salaries. To highlight the legal position that deeming provisions should receive strict construction in fiscal statute, the learned counsel referred to the decision of the Hon'ble Supreme Court in the case of V.M.Salg**aocar & Bros.(P) Ltd. Vs. CIT** 243 ITR 383(SC).

17. The learned counsel for the Assessee pointing out the above circumstances submitted that u/s.192(1) of the Act the obligation of the employer is only to deduct tax on the estimated income of the Assessee under the head Salaries for that financial year. If the estimate is made bonafide and tax deducted on such bonafide estimate then there can be no proceedings treating the person responsible for deducting tax at the time of payment, as "Assessee in default". The learned Counsel for KPTCL placed reliance on a decision of the ITAT Bangalore Bench in the case of Indian Institute of Science Vs. DCIT ITA No.1589/Bang/2014 for AY 2010-11 order dated 27.2.2015 on identical facts. In the aforesaid decision, the Tribunal took the view that the estimate of income under the head salary made by the Assessee on the belief that its employees were to be equated with State Government employees was a bonafide estimate and therefore the Assessee has discharged its obligation u/s.192 of the Act and hence proceedings u/s.201(1)(& 201(1A) of the Act were to be quashed. Reliance was also placed on the decision of the Hon'ble Bombay High Court in the case of CIT Vs. Kotak Securities Ltd. 340 ITR 333 (Bombay) wherein the Hon'ble Bombay High Court took the view that when the question whether there was an obligation to deduct tax at source or not on a particular payment, is highly debatable then the Assessee cannot be held to be a defaulter for not deducting tax at source

and consequently no disallowance u/s.40(a)(ia) of the Act for non deduction of tax at source should be made.

18. The learned DR submitted that no attempt whatsoever was made by KPTCL to show that the estimate of income under the head salaries made by it was bonafide. According to him there is always an option u/s.197 of the Act for the Assessee to approach the AO to clarify doubts regarding the correct rate of tax or the income on which tax has to be deducted. We observe that Sec.197 of the Act is only with regard to rate of tax or non deduction of tax at source and probably not applicable to resolve the question whether an item of income is taxable or not taxable. According to him KPTCL should have obtained estimate from the employees and only then their action can be said to be bonafide. The learned DR further placed reliance on the following decisions.

(i) SBI Vs. ACIT ITA No.1395 to 1412, 1424 to 1426, 1456 to 1458/Bang/2018 order dated 6.4.2018.
(ii) Syndicate Bank Vs. ACIT ITA No.1398 to 1403 and 1435 to 1477/Bang/2016 dated 6.4.2017.
(iii) CIFCO Finance Ltd. Vs. ITO (2007) 13 SOT 376 (Mum)
(iv) Ernakulam District Co-operative Bank Vs. ACIT (2005) 142 Taxman 98 (Kerala)
(v) CIT(TDS) Vs. Director, DPS (2011) 14 Taxman.com 45 (P & H)
(vi) Drawing & Disbursing Officer Vs. ACIT 115 ITD 411 (All)

19. It was submitted on identical facts such as the Assessee the ITAT Bangalore Bench confirmed orders u/s.201(1) of the Act in the case of Central Food Technological Research Institute (supra) and CSIR National Aerospace Laboratories Vs. ACIT ITA No.453 to 456/Bang.2014 order dated 27.8.2014.

20. We have very carefully considered the rival submissions. We are of the view that the facts and circumstances of the present case are identical to the case of Indian Institute of Science(supra) decided by the ITAT Bangalore Bench. In the said case the

deduction of tax at source was u/s.192 of the Act. The question was valuation of perquisites in the form of rent free accommodation provided to employees of a statutory corporation such as the Assessee. The Assessee in that case took similar plea of bonafide belief as raised by KPTCL in the present proceedings. The Tribunal considered the submissions and firstly found that the law on the issue of bonafide belief in the matter of estimating of income under the head "salaries" for the purpose of Secc.192 of the Act, was explained in a decision of ITAT Bangalore in the case of ACIT Vs. Infosys BPO Ltd. 150 ITD 132 (Bang) in the following manner:-

> *"26. It is no doubt true that TDS is to be made at the time of payment of salary and not on the basis of salary accrued. Sec.192(3) of the Act permits the employer to increase or reduce the amount of TDS for any excess or deficiency. We have already noticed that the fact that bills/evidence to substantiate incurring of expenditure on medical treatment up to Rs.15,000/- and the availing of the LTC by the employees and the fulfilment of the conditions contemplated by Sec.10(5) of the Act for availing exemption by the employees so availing LTC, have not been disputed by the AO. Even assuming the case of the AO, that at the time of payment the Assessee ought to have deducted tax at source, is sustainable; the Assessee on a review of the taxes deducted during the earlier months of the previous year is entitled to give effect to the deductions permissible under proviso (iv) to Sec.17(2) or exemption u/s.10(5) of the Act in the later months of the previous year. What has to be seen is the taxes to be deducted on income under the head 'salaries' as on the last date of the previous year. The case of the AO is that LTC and Medical reimbursement should be paid at the time the expenditure is incurred or after the expenditure is incurred by way of reimbursement and not at an earlier point of time. If it is so paid, then, even though the payment would not form part of taxable salary of an employee, the employer has to deduct tax at source treating it as part of salary, is contrary to the provisions of Sec.192(3) of the Act and cannot be sustained. The reliance placed by the AO on the expression "actually incurred" found in Sec.10(5) of the Act and proviso (iv) to Sec.17(2) of the Act, in our view cannot be sustained. In any event, the interpretation of the word "actually paid" is not relevant while ascertaining the quantum*

of tax that has to be deducted at source u/s.192 of the Act. As far as the Assessee is concerned, his obligation is only to make an "estimate" of the income under the head "salaries" and such estimate has to be a bonafide estimate.

27. The primary liability of the payee to pay tax remains. Section 191 confirms this. In a situation of honest difference of opinion, it is not the deductor that is to be proceeded against but the payees of the sums. To reiterate, the payment towards medical expenditure and leave travel is made keeping in view the employee welfare. The exclusion in respect of payment towards medical expenditure and leave travel is considered after verifying the details and evidence furnished by the employees. No exemption is granted in the absence of details and/or evidence. The exemption in respect of medical expenditure is restricted to expenditure actually incurred by the employees, or Rs. 15,000/- whichever is lower. The exemption is granted even if the payment precedes the incurrence of expenditure. The requirements/conditions of section 10(5) and proviso to section 17(2) are meticulously followed before extending the deduction/exemption to an employee. No tax can be recovered from the employer on account of short deduction of tax at source under section 192 if a bona fide estimate of salary taxable in the hands of the employee is made by the employer, is the ratio of the following decisions.

CIT vs. Nicholas Piramal India Ltd (2008) 299 ITR 0356 (BOMBAY);
CIT v. Semiconductor Complex Ltd [2007] 292 ITR 636 (P&H)
CIT vs. HCL Info System Ltd. [2006] 282 ITR 263 (Del)
CIT v Oil and Natural Gas Corporation Ltd [2002] 254 ITR 121 (Guj)
ITO v Gujarat Narmada Valley Fertilizers Co. Ltd [2001] 247 ITR 305 (Guj)
CIT v Nestle India Ltd (2000) 243 ITR 0435 (DEL)
Gwalior Rayon Silk Co. Ltd. v. CIT [1983] 140 ITR 832 (MP)
ITO v G. D. Goenka Public School (No. 2) [2008] 306 ITR (AT) 78 (Del)
Usha Martin Industries Ltd. V. ACIT (2004) 086 TTJ 0574 (KOL)
Nestle India Ltd. v. ACIT (1997) 61 ITD 444 (Del)
Indian Airlines Ltd. v ACIT (1996) 59 ITD 353 (Mum)"

21. The Tribunal thereafter proceeded to hold as follows:-

> "19. We have considered the rival submissions. In our view, the plea of the Assessee that it made a bona fide estimate of employee's salary by valuing the perquisites in the form of residential accommodation provided to the employees by valuing the same as if employees were employees of Central Govt. has to be accepted. In this regard, it is clear from the records that the position with regard to the assessee not being a Central govt. was brought to its notice by the department only in the proceedings initiated in 2013. Even thereafter, the Assessee has been taking a stand that its employees or employees of Central Govt. As held in several decision referred to by the ld. counsel for the Assessee, the obligation of the Assessee is only to make a bonafide estimate of the salary. In our view, in the facts and circumstance of the present case, assessee has made such an estimate. The Assessee's obligation u/s.192 is therefore properly discharged and hence proceedings u/s.201(1) & 201(1A) of the Act have to be quashed and are hereby quashed."

22. We are of the view that the circumstances explained by the learned counsel for KPTCL regarding the manner of formation of KPTCL and the action of the revenue in not questioning KPTCL's action in the past several years after its formation and the manner of exercise of control and affording protecting to employees of KPTCL by the State Government were definitely factors which weighed with KPTCL when it made estimate of its employees income under the head "Salaries". There is no reason for them to think that its estimate of employee's income under the head "Salaries" was incorrect as the belief it entertained was that its employees were to be regarded as employees of State Government and that its employees are entitled to exemption of the entire sum of unutilized leave encashment u/s.10(10AA)(i) of the Act.

23. With regard to the decisions cited by the learned DR in the case of Central food Technological Research Institute(supra) and CSIR National Aerospace Laboratories (supra) rendered by the ITAT Bangalore Benches, the said decisions are identical to the case of the Assessee but in those decisions the issue of bonfide estimate while deducting tax at source was never considered nor raised by the parties. Therefore that decision will help the plea of the revenue only to the extent to hold that the employees of KPTCL cannot be regarded as employees of State Government.

24. With regard to the other decisions cited by the learned DR, those are cases in which the person obliged to deduct tax at source were at no point of time instrumentality of State. They were either private parties or Banks. Those decisions are therefore neither relevant nor germane to the issue under consideration in these appeals.

25. For the reasons given above, we hold that KPTCL has discharged its obligation u/s.192 and hence proceedings u/s.201(1) & 201(1A) of the Act deserves to be quashed and are hereby quashed. All the appeals of KPTCL are allowed.

26. In the result, all the appeals of the assessee are allowed."

12. The facts and circumstances in these appeals are similar and the proceedings in these appeals and the appeals already decided by the Tribunal started simultaneously as evidenced by the Chart filed by the learned counsel for the Assessee, which is placed on record. The learned Standing counsel for the revenue, however, submitted that the following contentions which were not put forth in the appeals decided by the Tribunal and the contentions in the Miscellaneous Application seeking rectification of the earlier order of the Tribunal (copies of which were filed before us), may be considered. Similar submissions were already considered by this Tribunal in MP No.175/Bang/2018 to 252/Bang/2018 in ITA

No.2223/Bang/2017 to 2300/Bang/2017 by order dated 4.1.2019. We shall now deal with the contentions of the revenue.

13. The learned Standing Counsel submitted the Hon'ble Supreme Court in the case of *CIT Vs. Eli Lilly & Co.(India) Pvt. Ltd. (2009) 178 Taxman 505(SC)* while cancelling penalty u/s.271C of the Act for non-deduction of tax at source on the ground that the estimate of salary for the purpose of deduction of tax at source by the Assessee in that case was *bonafide* and therefore no penalty should be levied, nevertheless observed that the Assessee was liable to proceeded against u/s.201(1) & 201(1A) of the Act. It is the plea of the Assessee that by implication, the Hon'ble Supreme Court has held that *bonafide* belief for non-deduction of tax at source cannot be a defence to an action u/s.201(1) & 201(1A) of the Act. We are of the view that the said decision was rendered in the context of Sec.271C penalty for failure to deduct tax at source. The defence to such an action was *bonafide* belief of the Assessee that it was not liable to deduct tax at source on home salary paid to expatriate employees outside India. The Hon'ble Supreme Court observed on the scope of Sec.201(1) & 201(1A) of the Act in para-34 of its judgment that liability u/s.201(1) is in the nature of vicarious liability. From these observations it cannot be inferred that the Hon'ble Supreme Court has held that in an action u/s.201(1) of the Act, the payer cannot plead bonafide estimate of income under the head salaries as a defence.

14. The learned standing counsel submitted that Sec.192 of the Act does not use the expression "Bonafide" at all and to incorporate the concept of bonafide in proceedings u/s.201(1) of the Act is itself not permissible. In this regard he drew our attention to decision of Hon'ble Supreme Court in the case of *CIT Vs. Calcutta Knitwear 362 ITR 673 (SC)*

wherein the Hon'ble Supreme Court has held that it is not permissible to read into a section words which are not present in the section.

15. We have considered the submission of the learned standing counsel and are of the view that Sec.192 of the Act uses the word "estimate" and therefore the statutory intention is that it should be an approximation. It is in that view that the concept of bonafide estimate was profounded in the several decisions which are referred to in the earlier of the Tribunal in the case of KPTCL which we have extracted in the earlier paragraph-10 of this order. This contention therefore is devoid of any merit.

16. The learned standing counsel for the Department submitted that the Tribunal erred in concluding that the estimate made by the Assessee of income of its employees under the head salaries was *bonafide*. According to him, the employees of the Assessee were not employees of State and therefore the leave encashment salary was exempt only upto Rs.3 lacs. To the extent of payment of leave encashment above Rs.3 lacs by the Assessee to its employees the same was not exempt and ought to have been considered while estimating income of the Assessee. In this regard, he drew our attention to a decision of the Hon'ble Karnataka High Court in the case of *Karnataka Electricity Board ILR 2006 KAR 3384 = 2007(1) Kar LJ 147*, wherein the question was whether the benefit of free power can be denied to the future employees KPTCL when such benefit was available to erstwhile employees of KEB who became employees of Statutory corporation KPTCL by law passed by State Legislature. The contention was that there was discrimination between employees who continued in service in the erstwhile KEB and those who would become employees of KPTCL in future. The Hon'ble Court held that there was no such discrimination as the two set of employees formed a distinct class and therefore could be treated differently and that there was no violation of

Article 14 of the Constitution. It is the contention of the learned standing counsel that in the light of this decision rendered as early as 26.7.2006 in the case relating to the Assessee would show that the Assessee must be having sufficient knowledge that its employees cannot be equated with employees of State Government and therefore the plea of *bonafide* belief while estimating income of employee ought not to have been accepted by the Tribunal.

17. We have considered the above submission. The decision cited by the learned counsel for the Assessee shows that the benefit of free supply of power was given to erstwhile employees of KEB who became employees of KPTCL on its creation. Therefore, they were also considered as eligible for all benefits that employee of the State enjoyed and that such concession was withdrawn only for future employees of KPTCL. Therefore, the belief of the Assessee that its employees were to be regarded as employees of State cannot be said to be not *bonafide*, at least to the extent of erstwhile employees of KEB. The decision was rendered in the context of discrimination under Article 14 of the Constitution and cannot be applied to a case where *bonafide* belief is used as defence to an action to proceedings u/s.201(1) & 201(1A) of the Act. Such defence deserves to be looked at from different perspective. The liability of the employees for payment of taxes is primary liability and the liability of KPTCL is only vicarious liability and recovery of taxes through Tax deduction at source is only a mode of collection of taxes. The revenue always has the option and the right to collect taxes from employees concerned. In that view of the matter, the argument advanced in this regard is held to be not acceptable.

18. The next contention of the learned standing counsel for the Department was that there was no basis for formation of such *bonafide* belief by KPTCL, especially in the light of the decision of the Hon'ble

Karnataka High Court referred to in paragraph-21 of this order. He relied on decisions of the Hon'ble Supreme Court in the case of *ITO Vs. TechSpan India (P) Ltd. (2018) 92 taxmann.com 361 (SC)* and *DGIT(Inv.) Vs. Spacewood Furnishers (P) Ltd. 374 ITR 595(SC)*. In the first decision, the question arose in the context of validity of initiation of proceedings u/s.147 of the Act and the Court had to examine as to whether the reassessment proceedings u/s.147 of the Act. The Hon'ble Court held that for challenging the validity of initiation of reassessment proceeding on change of opinion, it has to be verified whether in the assessment made earlier there was expression opinion either expressly or by implication. According to him, in the present case the Assessee has set out the basis on which they formed belief that its employees were to be regarded as employees of State. In the second decision, the question arose in the context of recording of satisfaction before issue of warrant of authorization u/s.132 of the Act for search and seizure proceedings. The Hon'ble Court observed that there must be application of mind to the material and thereafter bonafide and honest opinion has to be formed. According to him in the present case, the Assessee did not have any material based on which he formed bonafide belief that its employees are employees of State.

19. We have considered the above submission and are of the view that the same is without any merit. The above are cases where challenge to the action by authorities who were vested with power to take particular action invading the right of privacy or for initiating proceedings for levy of tax. It may not be appropriate to read the observations of the Hon'ble Court in the context of the present case. The obligation of the Assessee u/s.192 is only to make *bonafide* estimate of income of his employee under the head salaries. Such obligation cannot be tested on the parameters laid down on exercise of power by authorities under the Act exercising powers

u/s.132 or u/s.147 of the Act. Apart from the above, we have already set out the circumstances under which belief was formed by the Assessee while deducting tax at source on salary paid to its employees in the earlier order of the Tribunal which is extracted in paragraph-10 of this order. We are of the view that said conclusions will hold good for the present appeals also, as the facts and circumstances are same in these appeals and the appeals already decided by the Tribunal.

20. For the reasons given above and respectfully following the decision of the Tribunal referred to paragraph-10 of this order, we hold that KPTCL has discharged its obligation u/s.192 and hence proceedings u/s.201(1) & 201(1A) of the Act deserves to be quashed and are hereby quashed. All the appeals of KPTCL are allowed.

21. In the result, all the appeals of the assessee are allowed.

Pronounced in the open court on this 08th day of February, 2019.

Sd/-	Sd/-
(JASON P. BOAZ) Accountant Member	(N.V. VASUDEVAN) VICE PRESIDENT

Bangalore,
Dated, the 08th February, 2019.

/ Desai Smurthy /

Copy to:

1. The Appellant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Assistant Registrar,
ITAT, Bangalore.