

आयकर अपीलीय अधिकरण, अहमदाबाद न्यायपीठ
IN THE INCOME TAX APPELLATE TRIBUNAL,
" C " BENCH, AHMEDABAD
(CONDUCTED THROUGH VIRTUAL COURT AT AHMEDABAD)

BEFORE SHRI WASEEM AHMED, ACCOUNTANT MEMBER
And
Ms MADHUMITA ROY, JUDICIAL MEMBER

आयकर अपील सं./ITA No.2308/AHD/2018
निर्धारण वर्ष/Asstt. Year: 2015-2016

M/s Ganesh Enterprise, 205, Shubh House, 77, Swastik Soc. Opp. C.G. Road, Navrangpura, Ahmedabad. PAN: AAKFG8477D	Vs.	Addl.C.I.T., TDS, Ahmedabad.
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(Applicant)		(Respondent)
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Assessee by :	Shri Jimit Shah, A.R
Revenue by :	Shri L.P. Jain, Sr.D.R

सुनवाई की तारीख / **Date of Hearing** : **03/06/2021**
घोषणा की तारीख / **Date of Pronouncement**: **23/06/2021**

आदेश/ORDER

PER WASEEM AHMED, ACCOUNTANT MEMBER:

The captioned appeal has been filed at the instance of the Assessee against the order of the Learned Commissioner of Income Tax(Appeals)-XIV, Ahmedabad, dated 21/11/2013 arising in the matter of assessment order passed under s.143(3) of the Income Tax Act, 1961 (here-in-after referred to as "the Act") relevant to the Assessment Year 2015-2016.

2. The assessee has raised the following grounds of appeal:

1. *In law and in the facts and circumstances of the appellant's case, the Id.AO as well as the Id.C.I.T(A) has erred in law and has passed the penalty order u/s.271C of the Act imposing penalty on the appellant amounting to Rs.22,23,512. The penalty passed by the Id.AO and confirmed by the Id.CIT(A), is bad in law and therefore deserves to be quashed.*

2. *In law and in the facts and circumstances of the appellant's case, the Ld.CIT(A), has erred in confirming the penalty levied by the Id.AO amounting to Rs.22,23,512/- When no such penalty is leviable on the appellant, the penalty imposed by the Id.AO shall be deleted.*
3. *The appellant craves leave to add, alter or amend and/or withdraw any part of the ground or grounds either before or at the time of hearing of appeal.*

The appellant craves leave to add, amend, alter, edit, delete, modify or change all or any of the grounds of appeal at the time of or before the hearing of the appeal.

3. The only issue raised by the assessee is that the learned CIT (A) erred in confirming the penalty levied by the AO under section 271C of the Act for an amount of Rs. 22,23,512 only.

4. The facts in brief are that there was a survey action under section 133A of the Act at the business premises of the assessee on 15 July 2015 wherein it was found that the assessee has claimed interest expenses for Rs. 22,23,512.00 only for the year under consideration after deducting the TDS under section 194A of the Act but failed to deposit the same in the account of government exchequer. However, the assessee subsequent to survey deposited the impugned amount of TDS along with interest for Rs. 1,66,763.00 aggregating to Rs. 23,90,275.00 dated 30 July 2015. Subsequently an order under section 201(1)/201(1A) dated 29 February 2016 was passed raising the nil demand.

4.1 However, the proceedings under section 271C of the Act were initiated by issuing notice dated 23 May 2016 on account of failure of payment of the TDS amount.

4.2 The assessee in response to such notice vide letter dated 21-10-2016 submitted that the provisions of section 271C of the Act are attracted in a situation where there is a default in deducting the TDS under the provisions of chapter XVIIIB of the Act. The assessee has deducted the TDS but failed to deposit the same within the due date to the account of Government exchequer on account of some financial

difficulty. As there was no default as far as deduction of TDS is concerned, therefore the penalty cannot be attracted under the provisions of section 271C of the Act.

4.3 However, the AO disregarded the contention of the assessee by observing that the assessee is exigible to the penalty under section 271C of the Act even it fails to deposit the amount of TDS to the account of Government exchequer within the due date after deducting the same from the expenses subjected to TDS under chapter XVIIIB of the Act. The AO in holding so relied on the judgment of Hon'ble Kerala High Court in the case of M/s US technologies versus CIT in ITA No. 3 of 2009 dated 16 June 2009 reported in 195 taxman 323. Thus the AO levied the penalty for Rs. 22,23,512.00 under the provisions of section 271C of the Act.

5. Aggrieved assessee preferred an appeal to the learned CIT (A) who confirmed the order of the AO. The learned CIT (A) in confirming the order of the AO also placed his reliance on the judgment of Hon'ble Kerala High Court in the case of Classic Concepts Home India Private Ltd versus CIT reported in 79 taxmann.com 349.

6. Being aggrieved by the order of the learned CIT (A) the assessee is in 2nd appeal before us.

7. The learned AR before us filed a paper book running from pages 1 to 59 and submitted that the judgments of the Hon'ble Kerala High Court relied upon by the authorities below confirming the penalty under the provisions of section 271C of the Act on account of failure for the payment of TDS amount to the account of Government exchequer have been reversed subsequently by the Hon'ble Kerala High Court (full bench) in the case of Lakshadweep development Corporation Ltd versus ACIT reported in 104 taxmann.com 10 vide order dated 19 December 2018. Accordingly the learned AR before us prayed for the waiver of the penalty.

8. On the other hand the learned DR vehemently supported the order of the authorities below.

9. We have heard the rival contentions of both the parties and perused the materials available on record. The provisions of clause 'a' specified under section 271C of the Act has a direct bearing on the issue on hand which reads as under:

Penalty for failure to deduct tax at source.

¹⁰ **271C.** ¹¹[(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
XX
XXXXXX

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.]

9.1 A plain reading of the provisions as discussed above clearly reveals that the penalty can be attracted under section 271C of the Act only in a situation where the assessee failed to deduct the TDS under the chapter XVII-B of the Act. In the case on hand there is no dispute to the fact that the assessee has deducted the TDS with respect to the expenses being interest under the provisions of section 194A of the Act but failed to deposit the same in the account of Government exchequer. For this purpose, the reference is made to the finding of the AO as recorded in his order under section 271C of the Act which is reproduced as under:

A survey verification was carried out on 15.07.2015 at the business premises of the assessee. During the course of verification, it was found that the assessee had deducted tax at source on various payments but had not deposited the same into the government account.

9.2 Similar observation was also made by the learned CIT (A) in his order which is reproduced as under:

It is not the case that appellant has not deducted the tax at source but in this case the tax deducted from the persons to whom payments were made to appellant was not deposited in the government account in time.

9.3 In view of the above concurrent finding of the authorities below, there remains no ambiguity that the assessee has not failed to deduct the TDS on the

expenses as discussed above. The learned DR at the time of hearing has also not brought anything on record against the arguments advanced by the learned AR for the assessee with respect to deduction of TDS on the expenses as discussed above. Accordingly we reached to the conclusion that the assessee has deducted the TDS on the expenses as discussed above but failed to deposit the same in the account of Government exchequer account within the specified time. Thus in such a situation, the penalty under section 271C of the Act is not attracted.

9.4 We also note that the judgments relied by the authorities below in reaching to the conclusion that the assessee is subject to the penalty under the provisions of section 271C of the Act have been reversed by the subsequent judgment of the Hon'ble Kerala High Court of Full Bench in the case of Lakshadweep development Corporation Ltd (*supra*). The relevant extract of the judgment is reproduced as under:

"43. *In the light of the above discussion, the Reference is answered as follows:*

- 1. The finding of the Division Bench in U.S.Technologies International Pvt. Ltd. (supra) and Classic Concepts Home India Pvt. Ltd. (supra) to the effect that Section 271C(1)(b) will take in Section 271C(1)(a) as well, to attract penalty for non-payment of the tax deducted at source, does not reflect the correct provision of law. They stand overruled.*
- 2. The finding and reasoning in U.S.Technologies International Pvt. Ltd (supra) and Classic Concepts Home India Pvt. Ltd. (supra) that the benefit of waiver/reduction of penalty [once good and sufficient reason is established in terms of Section 273B of the Income Tax Act] is not attracted in a case covered Section 271C(1)(b) (involving failure as to non-deposit of the tax deducted at source) is not correct. It also stands overruled.*

44. *Having answered the reference as above, the question is whether anything survives to be considered. It is quite open for this Court to decide the merit as well, by virtue of the specific power conferred under 'Section 7' of the Kerala High Court Act, instead of having the case sent back to the same/appropriate Bench for further consideration, after answering the reference. In view of our declaration that non-remittance of tax deducted at source as in the instant case (which comes under Section 194C of Chapter XVIIIB of the Act) is not covered by Section 271C(1)(b) of the Act to attract penalty, nothing remains to be considered further, either by the Tribunal or by this Court since the verdict passed by the departmental authorities and the Tribunal (copies of which have been produced as Annexures A, B and C) stand contrary to the declaration as above. The said orders stand set aside. The appeals are allowed accordingly."*

9.5 In view of the above, we hold that the assessee cannot be visited with the penalty under the provisions of section 271C of the Act on account of failure on his

part to deposit the amount of TDS deducted on the expenses as discussed above within the time specified under the statute. Accordingly the assessee succeeds in its grounds of appeal.

10. In the result, the appeal filed by the assessee is **allowed**.

Order pronounced in the Court on 23/06/2021 at Ahmedabad.

**Sd/-
(MADHUMITA ROY)
JUDICIAL MEMBER**

(True Copy)

**Sd/-
(WASEEM AHMED)
ACCOUNTANT MEMBER**

Ahmedabad; Dated 23/06/2021
Manish