IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH: B : NEW DELHI

BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
AND
SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER

ITA Nos.8063 & 8064/Del/2019
Assessment Year: 2011-12

Income Tax Officer, TDS Ward-74(1), Laskmi Nagar, New Delhi	vs.	Delhi Police, 8th Floor, MSO Building, DCP Head Quarter/GA I.P Estate, New Delhi 110002 PAN DELD04658D
(Appellant)		(Respondent)

For Revenue :	Ms. Kirti Sankratyayan Sr.DR
For Assessee :	Shri J K Handa, FCA

Date of Hearing :	21.12.2022
Date of Pronouncement :	20.01.2023

ORDER

PER CHANDRA MOHAN GARG, J.M.

These appeals filed by the Revenue is directed against the order dated 31.07.2019 of the Ld. CIT(A), New Delhi, relating to Assessment Year 2011-12.

Revenue Appeal ITA No. 8064/Del/2019

2. The ground of appeal raised by the revenue read as under:-

> *1. That on the facts and circumstance of the case that the Ld. CIT(A) has erred in deleting the penalty levied u/s. 271C as penalty levied is consequential in nature to the order passed u/s. 201(1)/201(1A) for default for short/non-deduction in the Ld. CIT(A) order 187/15-16/18-19/4088 dated 22.07.2019 and second appeal is being filed to ITAT against the said Ld. CIT(A) order.*

3. The learned Senior Departmental Representative supporting the assessment order submitted that the AO was right in imposing u/s. 271C of the Income Tax Act 1961, because the deductor assessee has failed to deduct TDS in accordance with the provision of chapter xvii-b of the Act. He further explained that the assessee deductor was under statutory obligation to deduct TDS on the payments on hiring and there was no reasonable cause for non deduction of such due TDS therefore the AO was right imposing penalty u/s. 271C of the Act.

4. Replying to the above the learned assessee representative vehemently supporting the first appellate order submitted that the AO impose penalty u/s. 271C of the Act, without considering the

entire facts and circumstances of the case which was rightly deleted by the Ld. CIT(A) by holding that it is not clear at all as to with regard to what payments the appellant did not deduct tax at source and when the AO himself is not sure at all, there is no question of levy of penalty u/s. 271C of the Act. The learned AR also submitted that the Ld. CIT(A) has rightly noted that the appellants conduct is not contumacious penalty cannot be levied u/s. 271C of the Act, as per judgment of Hon'ble Supreme Court in the case of CIT vs. Bank of Nova Scotia 380 ITR 550 (SC) and judgement of Hon'ble jurisdictional Delhi High Court in the case of CIT vs ITOCHU Corp., reported as 268 ITR 172 (Delhi) and CIT vs. Mistui & Co. Ltd., reported as 272 ITR 545.

5. On careful consideration above submissions from the first appellate order we observe that the Ld. CIT(A) has granted the relief to the assessee with following observations and findings:-

> *10.1 It is trite law that penalty proceedings have to be strictly construed. For this proposition I rely upon the order of Hon'ble Supreme Court in the case of T. Ashok Pai vs. CIT, reported as 292 ITR 11(SC). Further, the Hon'ble Delhi High Court in the case of CIT vs. SAS Pharmaceuticals, reported as 335 IT 259*

have held that penalty proceedings have to be strictly construed (para 12 of that order). In the case at hand, it is not clear at all as to with regard to what payments did the appellant not deduct tax at source. When the A.O. himself is not sure at all, there is no question of levy of penalty u/s 271C of the Act. Further, the appellant's conduct is not contumacious. When the appellant's conduct is not contumacious, penalty cannot be levied, as held by Hon'ble Supreme Court in the case of CIT vs. Bank of Nova Scotia, reported as 380 ITR 550 (SC). This concept finds elaboration by Hon'ble Delhi High Court in the case of CIT vs. ITOCHU Corpn., reported as 268 IT 172 (Delhi) and CIT vs. Mistui & Co. Ltd., reported as 272 IT 545.

Even from a reading of both the orders (the order dated 26.03.2013 and the order dated 27.11.2013), it is clear that the appellant was not granted reasonable opportunity. When the appellant was not granted reasonable opportunity, there is violation of provisions of section 274 of the Income Tax Act, 1961 and penalty cannot be levied.

In view of the aforesaid analysis, I am of the view that penalty amounting to Rs. 1,77,99,890/-, levied u/s 271C of the Income Tax Act, 1961 deserves to be deleted.

11. Since the penalty has been deleted, the appellant's additional ground/grievance of penalty being barred by limitation is not being considered. In final analyses, the appellant succeeds in appeal.

6. On careful and logical analysis of the basis taken by the AO for imposing penalty u/s. 271C of the Act and findings recorded by the Ld. CIT(A) for deleting said penalty. First of all we are in agreement with the Ld. CIT(A) that the AO himself was not sure at all as to with regard to what payments the assessee failed to deduct TDS at source. When the AO himself was not sure about the omission or non-compliance of TDS provision by the assessee then the penalty u/s. 271C of the Act cannot be held as sustainable. In the case of CIT vs. Bank of Nova Scotia (supra) the Hon'ble Supreme Court held that when the appellant's conduct is not contumacious then the penalty cannot be levied. This preposition has been consistently followed by lower authorities and Hon'ble jurisdictional High Court of Delhi in the case of CIT vs. ITOCHU Corp (supra) and CIT vs. Mistui & Co. Ltd., (supra). Therefore we are unable to see any valid reason to interfere with the findings arrived by the Ld. CIT(A) and thus uphold the same resultantly appeal of revenue ITA no. 8064/Del/ 2019 is dismissed.

ITA 8063/Del/2019

7. The grounds of appeal raised by the revenue read as under:-

1. That on the facts and circumstances of the case the Ld.CIT(A) has erred in directing the AO to ascertain whether the assessee was required to deduct tax by ignoring the provision of section 194C & 194J of the Act ignoring the nature of expenses incurred by the Delhi Police.

2. That on the facts and circumstances of the case that the Ld. CIT(A).CIT(A) has erred in directing the AO to verify, determine the default, ascertain whether any TDS was required to be deducted as the same is not vested in the powers of the Ld.CIT(A) u/s section 251 of the Act.

3. That on the facts and circumstances of the case, the Ld CIT(A) has erred in giving relief to assessee that default u/s 201(1) of the Act cannot be fastened on a deductor if the amount has been included by the recipient in his income and tax thereon paid by him. However, the interest portion u/s 201(1A) of the Act for short/non-deduction is still lying due on the assessee.

8. The learned Senior Departmental Representative supporting the action of the AO submitted that the Assessing

Officer rightly assumed that the assessee has paid/credited bills for hiring, others and purchases which was liable to TDS deduct at source in accordance with provision of section 194C/194J of the Act, on the amounts credited/paid to the respective recipients. The learned DR also contended that as there was no evidence brought before the AO by the assessee to established that the due tax deduct at source therefore assessee was rightly deemed as assessee in default with the meaning of section 201(1) and the assessee was rightly held liable to pay interest u/s. 201(1A) of the Act on this amount. The learned senior DR submitted that the Ld. CIT(A) has granted relief to the assessee by taking a hyper technical approach without any reasonable basis and justified ground. Therefore the impugned first appellant order may kindly be set aside by restoring that of the AO.

9. Replying to the above the learned assessee representative drawing our attention towards relevant part of the first appellate order submitted that the Assessing Officer passed assessment order in a hasty manner without considering the submissions of the assessee in the right perspective therefore the Ld. CIT(A) was right

in deleting the impugned demand of TDS amount and interest thereon. The Ld. AR further drawing our attention towards first appellate order submitted that the CIT(A) has not granted any relief to the assessee but simply remitted the matter to the file of Assessing Officer for required verifications. Therefore there is no fault in the first appellate order and the same may kindly be upheld.

10. Replying to the above the learned senior DR submitted that the Ld. CIT(A) has no right to remand the matter to the file of the Assessing Officer for re-adjudication therefore the first appellate order do not survive only on this count. However, in all fairness the Ld. CIT DR submitted that the Ld. CIT(A) could have called remand report from the AO on the required examination and verification of documents and thereafter he was required to adjudicate the first appeal. The learned senior DR submitted that the department has not serious objection if the Assessing Officer, after due examination and verification of the relevant documents decide the issue afresh after allowing due opportunity of hearing to the assessee.

11. On careful consideration of submissions we are of the considered view that as per provision of sub section 6 of section 250 of the Act, the Ld. CIT(A) is required to the adjudicate the appeal himself on the all grounds of appellant assessee raised in form no 35. The Ld. CIT(A) is not empowered to remand the case to the file of AO. However the Ld. CIT(A) if required may call remand report of the Assessing Officer on certain issue on which certain examination and verification of documents and faxed are required to be made by AO and thereafter taking on record remand report of the AO and rejoinder of the assessee may adjudicate the grievance/ground of the assessee. It is a peculiar situation of the present case that is listed calling remand report and allowing the assessee to place its rejoinder the Ld. CIT(A) limited the matter to the file of AO for proper verification after allowing due opportunity of hearing to the assessee and to frame fresh assessment order. Therefore in our considered opinion if the said order is set aside and the Ld. CIT(A) is again ask to adjudicate the first appeal afresh by following the procedure as noted above then there would be multiplicity of proceedings and therefore as agreed by learned representative both the sides. We are of the view that there would be no illegality or

absurdity if the issue is adjudicated by the AO afresh after allowing due opportunity of hearing to the assessee, therefore we refrain to interfere with the ongoing proceedings before the AO. Before we part, we make it clear that when the issue is examined and verified by the AO after allowing due opportunity of hearing to the assessee. Then no prejudice would be caused to any party. Therefore we are unable to see any valid reason to interfere with the findings arrived by the Ld. CIT(A). Accordingly, appeal of the revenue is disposed of with the directions to the AO to expedite the proceedings as per the directions of the first appellate order.

12. In the result appeals of revenue are disposed of. In the manner as indicated above.

Order pronounced in the open court on 20.01.2023.

Sd/-	Sd/-
(ANIL CHATURVEDI)	(CHANDRA MOHAN GARG)
ACCOUNTANT MEMBER	JUDICIAL MEMBER

Dated: 20th January, 2023.

NV/-

Copy forwarded to :

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

// By Order //

Asstt. Registrar, ITAT, New Delhi