IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "G" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
MS. KAVITHA RAJAGOPAL (JUDICIAL MEMBER)

ITA Nos. 3111& 3112/MUM/2022
Assessment Years: 2012-13& 2013-14

State Bank of India HRMS Department, 4th floor, CIDCO Tower No. 7, Belapur Railway Station Complex-400614. **TAN No. MUMS 63193 E** **Appellant**	***Vs.***	ACIT (TDS) RG-2(2), Peddar Road, Mumbai-400014. **Respondent**

Assessee by	**:**	Mr. Anand Desai & Mr. Sachin Lopes, AR
Revenue by	**:**	Mr. Paresh Deshpande, DR

ITA Nos. 2837, 3086 to 3089/MUM/2022
Assessment Years: 2011-12, 2014-15 to 2017-18

State Bank of India – LHO OAD Branch, 1st floor, Plot No. C-6G Block, Bandra Kurla Complex, Bandra East, Mumbai-400051. **TAN No. MUMS35652B** **Appellant**	***Vs.***	ACIT-TDS-2(2), Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road, Mumbai-400 002 **Respondent**

Assessee by	**:**	Mr. Shyam Walve, a/w Mr. Tanzil Padvekar i/by P.B. Gujar, Advocate
Revenue by	**:**	Mr. Paresh Deshpande, DR

ITA No. 355/MUM/2023
Assessment Year: 2011-12

State Bank of India – ISB Branch, 3rd Floor, World Trade Centre Arcade Building, Cuffee Parade, Mumbai-400 005. **TAN No. MUMS 38455 E** **Appellant**	***Vs.***	DCIT-TDS-2(2), Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road, Mumbai-400 002. **Respondent**

ITA No. 2744/MUM/2022
Assessment Year: 2012-13

State Bank of India – NRI Branch, 223, Ground Floor, Maker Chamber III, Nariman Point, Mumbai-400021. **TAN No. MUMS 35481 F** **Appellant**	***Vs.***	ACIT-TDS-2(2), Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road, Mumbai-400 002. **Respondent**

ITA Nos. 2764, 3085/MUM/2022
Assessment Year: 2012-13, 2013-14

State Bank of India – CPPC Belapur Branch, 5th floor, Premises No. T 651 & T 751 CPPC, CBD Belapur Stn. Comp, Navi Mumbai-400 614. **TAN No. MUMS 68676 G** **Appellant**	***Vs.***	ACIT-TDS-2(2), Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road, Mumbai-400 002. **Respondent**

ITA No. 2754/MUM/2022
Assessment Year: 2012-13

State Bank of India – Mumbai Main Branch, Mumbai Main Branch, 1st floor,	***Vs.***	ACIT-TDS-2(2), Smt. K.G. Mittal Ayurvedic Hospital Bldg.,

Mumbai Samachar Marg, Near Hornimon Circle, Mumbai-400023.	Charni Road, Mumbai-400 002.
TAN No. MUMS 33977 G	
Appellant	**Respondent**

ITA No. 2765/MUM/2022
Assessment Year: 2013-14

State Bank of India, - RBO II Thane Western Branch, RBO Region 5, Snehal Chamber, Telligali, Andheri East, Mumbai-400069		ACIT-TDS-2(2), Smt. K.G. Mittal Ayurvedic Hospital Bldg., Charni Road, Mumbai-400 002.
TAN No. MUMS 70656 F	***Vs.***	
Appellant		**Respondent**

Assessee by	:	Mr. Ashish Mehta a/w Sneha Mahawar
Revenue by	:	Mr. Paresh Deshpande, DR
Date of Hearing	:	25/04/2023
Date of pronouncement	:	27/04/2023

ORDER

PER OM PRAKASH KANT, AM

The captioned appeals have been filed by the various branches of the assessee bank i.e. M/s State Bank of India in the capacity of deductor of tax at source (TDS), challenging the separate orders passed by the Ld. Commissioner of Income-tax (Appeals) – National Faceless Appeal Centre, Delhi [in short 'the Ld. CIT(A)'] for various respective assessment years in relation to liability raised by the

Assessing officer for non-deduction of tax at source on foreign leg of leave travel concession availed by the employees.

2. In all appeals, identical grounds have been raised in respect of common issue of liability u/s 201(1) and 201(1A) of the Income-tax Act, 1961(in short, the Act) for non-deduction of tax at source on the leave travel concession (LTC) provided to the employees of the assessee bank comprising of foreign leg. The issues-in-dispute being identical in all these appeals, same were heard together and disposed off by way of this consolidated order for convenience and avoid repetition of facts.

3. There are two sets of appeals before us. The first set, where the ld. CIT(A) has not condoned delay in filing the appeal and rejected the appeals as unadmitted being filed beyond the limitation period, but also adjudicated the grounds of appeal on without prejudice basis. The First set of appeals include appeals bearing ITA No. 3111/M/2022; ITA NO. 3112/Mum/2022; ITA No. 355/Mum/2023; ITA No. 2837/Mum/2022; ITA No. 551/Mum/2023. The second set of appeals, where either there was no delay in filing appeal before the ld CIT(A) or the ld CIT(A) has condoned the delay and adjudicated the grounds after admitting the appeals. All the appeals other than first set, falls under category of second set.

First of all, we take up the appeal of the assessee in ITA No. 3111/M/2022 for assessment year 2012-13(out of first set of appeals). The grounds raised by the assessee are reproduced as under:

> *The appellant objects to the order of the Commissioner of Income-tax (Appeals), National Faceless Appeal Centre dated 13 October 2022 for AY 2012-13 on the following among other grounds:*
>
> *Order under section 201(1) and 201(14) barred by limitation*
>
> 1. *The learned CIT(A) erred in not appreciating the provisions of section 201(3) which provide that no order can be passed under section 201(1) deeming a person to be an assessee in default in respect of payments to residents at any time after the expiry of two years from the end of the financial year in which the TDS statement is filed.*
> 2. *The learned CIT(A) erred in not appreciating that order passed is barred by limitation as the impugned order was passed after the expiry of two years from the end of the financial year in which the TDS statement is filed i.e., 31 March 2014 (for quarter 1 to 3) and 31 March 2015 (for quarter 4) and hence is void ab initio.*
>
> *Validity of Proceedings*
>
> 3. *Without prejudice to the above, the learned CIT(A) erred in not appreciating that Order passed under section 201(1) or (14) cannot be passed holding the Bank (i.e., payer) to be an assessee-in-default where the tax authorities have not taken any action against the payee (i.e., the employee in the instant case). Further, the time limit for taking action against the payee under section 147 of the Income-tax Act, 1961 (i.e., by 31 March 2019) has also lapsed and hence, the subject proceedings under section 201 are invalid and barred by limitation.*
>
> *Condonation of delay*
>
> 4. *The learned CIT(A) erred in not granting condonation of delay in filing of appeal of 249 days to the Appellant without appreciating the facts of the case the facts of the case.*
>
> *Opportunity of being heard*

5. *Opportunity of being heard The learned CIT(A) over looked the appellants plea for an adjournment against the notice received by bank on 16.09.2022 for seeking further date for hearing wherein the bank had mentioned that the Professional authorized representative was engaged in due dates pertaining to filing of Tax Audit and Income tax returns. Hence without complying with the principles of Natural Justice the CIT(A) erred upon in passing an order against the appellant without giving opportunity of being heard.*
   Leave fare concession
6. *The learned CIT(A) erred in confirming the 201(1) order of the TDS officer and thereby holding the appellant as an assessee in default on account of non-deduction of tax at source in respect of leave fare concession (LFC provided by the appellant to certain employees of Rs. 66,72,862, where LFC was paid for a journey where the designated place was in India but the same also involved some en-route foreign travel being undertaken by the employee.*
7. *The learned CIT(A) erred in not appreciating that the benefit of exemption under section 10(5) is available to the appellant's employees' even in cases where the journey undertaken by an employee involves a foreign leg, as employee's designated place is in India only and he actually visits the designated place in India*
8. *The learned CIT(A) erred in not appreciating that in case an employee travels outside India during the course of his visit to the designated place in India, the Appellant does not reimburse the entire fare involved for travel to the foreign destination and the said reimbursement is limited to the actual fare for the journey to his hometown/designated place in India, by the shortest route, by the entitled class whichever is lower.*
9. *The learned CIT (A) erred in not appreciating that the Appellant is not required to deduct tax under section 192 of the Act, as LFC reimbursements were made only to employees who fulfilled the express conditions stipulated in section 10(5) read with Rule 2B. Consequently, the learned CIT(A) erred in not appreciating that there can be no liability in the form of interest under section 201(1) of the Act as the appellant*

is not an assessee in default as contemplated under Section 201(1).

10. *The learned CIT(A) erred in not appreciating that once the prescribed conditions as per Rule 2B for eligibility are satisfied and in the absence of any specific bar on travel to a foreign destination during the course of travel to a place in India under section 10(5) there was no default under section 201 with respect to application of TDS.*

11. *The learned CIT(A) erred in not appreciating that the action of the appellant of not deducting tax on reimbursement of LFC involving foreign leg is in accordance with annual Circular on TDS from salaries for FY 2013-14 (i.e., Circular No. 8/2013 dated 10 October 2013) wherein it has been clarified that where the journey is performed in a circuitous route, the exemption is limited to what is admissible by the shortest route. Likewise, where the journey is performed in a circular form touching different places, the exemption is limited to what is admissible for the journey from the place of origin to the farthest point reached in India, by the shortest route.*

Bona fide belief

12. *The learned CIT(A) erred in not adjudicating and appreciating that the appellant was of the bona fide belief that it was not liable to deduct tax at source in respect of LFC reimbursements provided to employees and accordingly, the appellant cannot be held to be an assessee in default within the meaning of section 201.*

13. *The learned CIT(A) erred in not appreciating that in terms of section 192 once an employer has honestly and fairly formed an opinion and arrived at the estimated taxable income and applied TDS accordingly, it cannot be considered as an assessee in default.*

14. *The learned CIT(A) erred in not appreciating that section 192 contemplates deduction only in cases where the salary accrues and the same is paid to an employee; in other words, accrual as well as payment must co-exist in order to attract the provisions of Section 192 as is also held in (2001) SCC OnLine AP 886).*

15. *The learned CIT(A) also erred in not appreciating that the annual Circular on TDS from salaries for FY 2013-14 (Circular No. 8/2013 dated 10 October 2013)*

only requires that the employer to be satisfied that the amount reimbursed towards LTC is exempt under section 10(5) and preserve evidence in respect thereof thus evidencing that only satisfaction that income under section 10(5) is exempt is required from the employer.

Incentive provisions are to be construed liberally

16. *Without prejudice to the above, the learned CIT(A) erred in not appreciating that when the Legislature brings in the statute an incentive provision for the encouragement or advancement of a specific purpose, activity or objective, then such provision has to be liberally interpreted so as to advance the purpose behind it.*

17. *The learned CIT(A) thus erred in not appreciating that incentive provision like section 10(5) should be construed in a liberal and purposive manner, meaning thereby that the Assessing Officer, in such cases, should adopt a liberal and broad-minded approach, so as to fulfill the objective of the legislation and not in a manner as to snatch away the benefit intended to be given by the Legislature.*

Interpretation favorable to the appellant to be adopted

18. *Without prejudice to the above, the learned CIT(A) erred in not appreciating that it is a well settled principle in law that if two views are possible then the view which is favorable to the appellant is to be adopted. Thus, the learned CIT(A) erred in not accepting the favorable view that LFC reimbursements, involving foreign leg restricted only to designated place India portion is not taxable under section 10(5) read with Rule 2B.*

Exemption for Indian leg

19. *Without prejudice to the above, the learned CIT(A) erred in not adjudicating and appreciating that if at all the LFC payments involving a foreign leg are to be held as taxable, the employee is entitled for exemption under section 10(5) to the extent of expenses incurred for travel in India where the employee's designated place is in India and he actually visits the designated place in India.*

Tax Rate and Interest under section 201(1A)

20. *Without prejudice to the above, the learned CIT(A) erred in upholding the action of the TDS Officer of*

applying a flat rate of 30% for computation of TDS instead of applying the actual income-tax rate applicable in the case of the employee and in computing interest under section 201(1A) for the actual period of default.

4. Briefly stated, facts of the case as culled out from the order of lower authorities and submission of the assessee are that the Human Resource Management Service (HRMS) branch of the State Bank of India, Mumbai was undertaking the processing work of salary/pension and perquisites excluding leave travel concession of employees and pensioner of SBI Bank. The said Department handled the salary of the State Bank of India for a time span for 3 years i.e. financial year 2009-10 to financial year 2011-12. The HRMS Department had discontinued the Centralized TDS compliance after 31.03.2012. The Assessing Officer observed that the employees of assessee availed leave travel concession (LTC) for the travel between two places located in India via a place in foreign country and claimed the LTC allowance as exempted u/s 10(5) of the Act. It is the contention of the Assessing Officer that assessee in view of capacity of a deductor tax at source has not deducted tax at source in respect leave travel concession containing foreign leg, which is not exempted under the provisions of the Act. The assessee bank submitted that it was under bonafide belief that even when the journey undertaken by an employee involves a foreign leg, employee was entitled to exemption under section 10(5) of the Act, when the employee's designated place is in India and he actually

visits the designated places. In view of non-deduction of tax at source on the relevant leave travel concession amount, the Assessing Officer raised liability u/s 201(1)/201(1A) of the Act, observing as under:

> *"3. The Assessee vide this show cause notice, was asked to furnish the list the employees who claimed LAC and had also undertaken foreign tour along with amount of LFC and TDS if any deducted on such payments and to justify that in case of son-deduction of TDS why it should not be treated as assessee in default.*

The details of LFC Paid to the employees during the FY 2011-12, AY 2012-13

S No.	Name of the employee s/Shri	Description of the route travelled	Amount of LFC granted to the employees (Rs.)	Date of grant of LFC
1.	Balachandran C (BM)	Bankok, Singapore	2,98,896	01/04/2011
2.	Balakrishnan P	Doha Geneva, Paris	2,93,432	01/04/2011
3.	C Subhaschandran (BM)	Doha Zurich and Paris	2,23,572	01/04/2011
4.	Chacko M J (BM)	Doha Zurich and Paris	2,23,588	01/04/2011
5.	Durgadas AP (BM)	Bankok, Singapore	2,58396	01/04/2011
6.	K Pankajakshan (DM)	Thailand Malaysia and Singapore	2,79,940	01/04/2011
7.	K V Mohandas	Doha Zurich and Paris	1,98,215	01/04/2011
8.	P k Rajendran	Malaysia and Singapore	2,93,192	01/04/2011
9.	P K Sasikumar (BM)	Doha Zurich and Paris	2,23,572	01/04/2011
10.	Pradeep Menon	Doha Zurich and Paris	2,44,378	01/04/2011
11.	Premanandan KK	Thailand Malaysia and Singapore	2,09,613	01/04/2011
12.	Rameshan P (BM)	Columbo, KaulaLampur, Singapore	2,29,640	01/04/2011
13.	Shamshad Begam (BM)	Bahrain Heathrow and London	2,20,374	01/04/2011
14.	Sreedharan PK (BM)	Doha Zurich and Paris	2,24,478	01/04/2011
15.	V P Raguthaman (CM)	Doha Zurich and Paris	2,31,656	01/04/2011
16.	V P Snehaprakarshan (BM)	Bangkok, Singapore	2,98,896	01/04/2011

17.	Balachandran	Delhi & Kolkata and Back Enroute Bangkok Singapore Chennai and Kochi	2,50,024 & 2,98,897	01/04/2011
18.	Xavier Cherian	Cochi to Jammu via Doha Paris	1,56,804	01/04/2011
19.	Joseph Abrahm	Cochin to Srinagar via Singapore	2,45,538	01/04/2011
20.	Josheph T	Kozhikode to Srinagar via Germany Switzerland Germany	2,43,162	01/04/2011
21.	Krishnamoorthy B	Cochin to Srinagar via Bangkok Singapore	3,24,659	01/04/2011
22.	Anjana G	Cochin to Srinagar via Singapore	2,24,912	01/04/2011
23.	Narayan G	Cochin to Jammu via Germany	3,96,950	01/04/2011
24.	Rajesh M U	Cochin Towagah Border via Malaysia Singapore	2,80,971	01/04/2011
25.	Susamma Chacko	Cochin TocodhinTowagah Border via Singapore	1,58,608	01/04/2011
Total			**66,72,862**	

The assessed's representative Shit. Blicy Kumar Behra COB. SBI, attended Nice on 20.03.2019 and he was asked to submit the details in respect of LEC/LTC ava led by the employees. In the subrnission made by SBI, is is stated that their HRMS department is processing unit and they do not make payments to LAC in HRMS System. Therefore, these desails are not aveilable with them. It was further show causeand asked to fie explanation as to why SBI (MUMS63193El should not be treated as assossce in default for non deducting any TDS on payment of IF°C to employees,in response to the same, shr. Buoy Kumar Behra COB, SBI, once again attended us office on 22.03.2019 but he did not submit any of the above mentioned details of LRC involving foreign stopover

7. As the assesse failed to substantiate any deduction of tax at source on the above amount of LFC granted to the employee. The amount of tax not deducted at source and not deposited it in the Govt treasury during the F.Y 2012-1314.Y. 2013-14; is taken at Rs. 20,01,858, - 130% of LFC amount Rs. 66,72,862] - paid)

8. In view of the above discussion, the assessee is held to be a defaulter within the meaning of section 201(1) for non deduction of tax and failing to pay to the Govt Treasury as per the provisions of the Act. It is seen that the assessee is in default in respect of non-deduction and non-deposit of TDS of Rs. 20,01,858/-Further it is aiso liable to pay the interest us 2011Al on the above default as worked out as under:

Default Amount	*Rs.20,01,858/- (30% of Rs.66,72,862/-)*
Default Period:	*1st April 2011 to March 2019*
No. of Month	*96*
Rate of Interest	*1%*
Amount of Interest :	*Rs.19,21,784*

9. The assessee is therefore directed to pay tax of Rs. 20,01,858/- being tax not deducted at source and not deposited in the Government A/c u/s 20111) and interest of Rs.19,21,784/- u/s 201(A) of the IT Act. Thus total TDS payable by assessee amounting to Rs.39,23,642/-

10. The assessee is directed to pay the default amount mentioned above immediately after receipt of this order and certainly within this calendar month. In case of further delay in payment the assessee is requested to recalculate the interest under section 201(LAJ and pay accordingly. If the assessee fails pay the amount within the period specified, proceedings for recovery thereof das be teken in accordarice with CERTI section 222 to 227. 229 and 232 of the Aet without anv further notice."

5. On further appeal, the Ld. CIT(A) found that appeal was filed with a delay of 249 days. The Ld. CIT(A) referred to various decisions on the issue of condonation of the delay and denied condonation of the delay and hence not admitted the appeal. The Ld. CIT(A) alternatively and without prejudice, following the decision of Hon'ble Karnataka High Court also upheld the liability u/s 201(1)/201(1A) of the Act observing as under :

> *"6.7 Meanwhile, the issue has been decided by the* ***Honble' Karnataka HC in the case of SBI Vs ACIT(TDS)*** *vide order dated 17-12-2021 138 taxmann.com 102 where it has been held that Leave travel concession is available for an employee to proceed on leave to any place in India and thereafter return to place of origin in shortest route but without a foreign leg, hence, where employees of assessee-bank reached destination, place in India after taking a foreign tour, they would not be entitled to claim reimbursement as per section 10(5) read with rule 2B and authorities had rightly held assessee to be an 'assessee in default under section 201 (1).*
>
> *6.8In view of above and respectfully following the decision of the Honble HC, the contentions of the appellant are not sustainable. Hence, the order of the AO is upheld. In the result, the appeal of the appellant is dismissed."*

6. Before us, the Ld. Counsel of the assessee submitted that the delay in filing appeal before the Ld. CIT(A) was on account of collecting data from the Thiruvananthapuram Circle of the State Bank of India to which the 25 employees belonged, since non-deduction of tax at source on the leave travel concession pertained to those employees. The Ld Counsel further submitted that the assessee being a public sector undertaking and being in post covid period, it took time in collecting said information, which has caused delay in filing the appeal for a period of 249 days. According to the Ld. Counsel there was a no malafide intention and delay was due to bonafide reasons therefore, the Ld. CIT(A) might be directed to admit the appeal and decide the issue on merit after taking into consideration submission of the assessee.

6.1 Without prejudice, the Ld. Counsel of the assessee submitted that the HRMS Department had performed the activities of

processing of regular salary/payments to its employees whereas concessional and specific payment of the employees such as leave fair concession/leave travel concession were entrusted to the respective branches as per the policy of State Bank of India. Therefore, according to him, in the circumstances SBI HRMS was not responsiblefor deduction of tax at source on leave travel concession as those payments have not been made by the HRMS branch. He submitted that it is the'Thiruvananthapuram' Branch of the SBI, which was responsible for deducting tax at source on leave travel concession.

6.2 The Ld. Counsel without prejudice, further submitted that the "payees" have already paid tax on the said amount of the leave travel concession and therefore, invoking first proviso to section 201(1) of the Act, the assessee seeks to file a certificate from an accountant in the prescribed form so as to be excluded from definition of the "assessee in default" and resultant liability u/w 201(1) and 201(1A) of the Act. The Ld. Counsel submitted that matter may be remitted back either to the Assessing Officer or to the Ld. CIT(A).

7. On the contrary, the Ld. Departmental Representative (DR) relied on the order of the lower authorities and submitted that the assessee is liable for liability u/s 201(1) and 201(1A) of the Act for non-deduction of tax at source on the leave travel concession facility allowed to its employees,involving foreign leg of travel in

viewof the decision of Hon'ble supreme Court in the case of **State Bank of India Vs Assistant Commissioner of income-tax (2022) 144 taxmann.com 131(SC)**.

8. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. As far as issue of contention of assessee for delay in filing appeal before the Ld. CIT(A) is concerned, we are of the opinion that due to collection of the information from another branches, delay has occurred in filing appeal before the ld CIT(A). In our opinion, the reason explained for the delay is bona fide and assessee is not getting any benefit by way of delaying the appeal. In the circumstances, we direct the Ld. CIT(A) to condone the delay for filing the appeal and admit the appeal for adjudication on merit.

8.1 As far as taxability of the LTC containing foreign leg is concerned, the ITAT G bench in decision in the case of **State bank of India Vs Assistant Commissioner of Income-tax, TDS (2021) 123 taxmann.com 447 (Mumbai-Trib)** allowed in favour of the assess observing as under:

> *"8. A plain reading of the above provisions does not indicate any requirement of taking the shortest route for travelling to "any place in India" or putting any kind of restrictions the route to be adopted for going to such a destination. Quite to the contrary, the statutory provisions do envisage the possibilities of someone taking a route other than the shortest route, as is implicit in the restriction that "an amount not exceeding the air economy fare of the national carrier by the shortest route to the place of destination" will only be eligible for exemption under*

section 10(5). What is essentially implies, to give a simple example, is that if someone is based in Mumbai and he decides to go to Delhi via, let us say, Lucknow, Kolkata, or Chennai, the amount admissible for exemption under section 10(5) will be restricted to the price of direct flights between Mumbai and Delhi on the national carrier. This proposition is not even disputed by the income tax department. The question, however, arises whether when the same person goes to Delhi, via Dubai, the exempt leave travel concession being restricted to the price of Mumbai Delhi direct flight. Of course, the stand of the income tax department is that even the cost of the direct flight from Mumbai to Delhi, on the national carrier- assuming that it is less than Mumbai-Dubai-Delhi airfare, will not be admissible leave travel assistance exemption in such a case. That is the approach approved by the coordinate benches as well, and, therefore, we need not question that at this stage. The relevant question, however, is not the actual status of taxation; the relevant question iswhether the assessee employer could be said to unreasonable or malafide in proceeding on the basis that in such a situation also, the cost of a direct flight between Mumbai Delhi on national airlines will be available for exemption under section 10(5). When we look at the detailed statement of facts, extracts from which have been extensively reproduced by us earlier in this order, we do not find anything wrong or unreasonable in the conduct of the assessee employer. There is no specific bar in the law on the travel, eligible for exemption under section 10(5), involving a sector of overseas travel, and, in the absence of such a bar, the assessee employer cannot be faulted for not inferring such a bar. The reimbursement is restricted to airfare, on the national carrier, by the shortest route- as is the mandate of rule 2B. The employee has actually travelled, as a part of that composite itinerary involving a foreign sector as well, to the destination in India. The guidance available to the assessee employer indicates that, in such a situation, the exemption under section 10(5) is available to the employee- though to the extent of farthest Indian destination by the shortest route, and that is what the assessee employer has allowed. In the light of this analysis of the legal position and the factual backdrop, whatever may be the position with respect of taxability of such a leave travel concession in the hands of the employee, the assessee employer cannot be faulted for not deducting tax at source from the leave travel concession facility allowed by him

to the employees. As we hold so, we may add that we have not really addressed ourselves to the larger question with respect to the actual taxability of this leave travel concession in the hands of the employees concerned, even though we have our prima facie reservations on the coordinate benches decisions holding taxability of these amounts in the hands of the employees concerned, because that aspect of the matter is not really relevant as on now. We leave it at that for the time being. The coordinate bench decisions deal with only the issue of taxability of leave travel facility under section 10(5) and not with the broader question about the nature of tax deduction at source liability under section 192, as also the issue about bonafides of the stand of the assessee employer. These decisions, therefore, do not come in the way of our present decision. Once we hold, as we do in this case, that estimation of income, in the hands of the employees under the head' income from salaries', by the employer was bonafide and reasonable, the very foundation of impugned demands raised under section 201 r.w.s 192 ceases to hold good in law. We must, therefore, vacate these demands."

8.2 However, The Hon'ble Supreme Court in the case of **State Bank of India Vs Assistant Commissioner of Income-tax (supra)** held the LTC with foreign leg is taxable observing as under:

"8. These proceedings started with a Spot Verification under Section 133A when it was discerned by the Revenue that some of the employees of the assessee- employer had claimed LTC even for their travel to places outside India. These employees, even though, raised a claim of their travel expenses between two points within India but between the two points they had also travelled to a foreign country as well, thus taking a circuitous route for their destination which involved a foreign place. The matter was hence examined by the Assessing Officer who was of the opinion that the amount of money received by an employee as LTC is exempted under Section 10(5) of the Act, however, this exemption cannot be claimed by an employee for travel outside India which has been done in this case and therefore the assessee- employer defaulted in not deducting tax at source from this amount claimed by its employees as LTC.

There were two violations of the LTC Rules, pointed out by the Assessing Officer:

A. The employee did not travel only to a domestic destination but to a foreign country as well and

B. The employees had admittedly not taken the shortest possible route between the two destinations thus the Applicant was held to be an assessee in default by the Assessing Officer.

The travel undertaken by the employees as LTC was hence in violation of Section 10(5) of the Act read with Rule 2B of the Income Tax Rules, 1962, both of which have been reproduced above. The order of the Assessing Officer was challenged before CIT (A), which was dismissed and so was their appeal before the Income Tax Appellate Tribunal.

9. The Delhi High Court vide its order dated 13.01.2020 dismissed the appeal holding that there was no substantial question of law in the Appeal. It was held that the amount received by the employees of the assessee employer towards their LTC claims is not liable for the exemption as these employees had visited foreign countries which is not permissible under the law.

10. The provisions of law discussed above prescribe that the air fare between the two points, within India will be given and the LTC which will be given will be of the shortest route between these two places, which have to be within India. A conjoint reading of the provisions discussed herein with the facts of this case cannot sustain the argument of the appellant that the travel of its employees was within India and no payments were made for any foreign leg involved.

11. We do not want to get into the role of the travel agencies and the present dynamics of air fare, but it is difficult for us to accept that a person will avail foreign tour without paying any price for it. We leave it at that.

12. It can be seen from the records that many of the employees of the appellants had undertaken travel to Port Blair via Malaysia, Singapore or Port Blair via Bangkok, Malaysia or Rameswaram via Mauritius or Madurai via Dubai, Thailand and Port Blair via Europe etc. It is very difficult to appreciate as

to how the appellant who is the assessee-employer could have failed to take into account this aspect. This was the elephant in the room.

13. The contention of the Appellant that there is no specific bar under Section 10(5) for a foreign travel and therefore a foreign journey can be availed as long as the starting and destination points remain within India is also without merits. LTC is for travel within India, from one place in India to another place in India. There should be no ambiguity on this.

14. The second argument urged by the appellant that payments made to these employees was of the shortest route of their actual travel cannot be accepted either. It has already been clarified above, that in view of the provisions of the Act, the moment employees undertake travel with a foreign leg, it is not a travel within India and hence not covered under the provisions of Section 10(5) of the Act.

15. A foreign travel also frustrates the basic purpose of LTC. The basic objective of the LTC scheme was to familiarise a civil servant or a Government employee to gain some perspective of Indian culture by traveling in this vast country. It is for this reason that the 6th Pay Commission rejected the demand of paying cash compensation in lieu of LTC and also rejected the demand of foreign travel. In para 4.3.4 of the 6th Pay Commission Report dated March, 2008 this is what was said :-

"4.3.4. The demand for allowing travel abroad at least once in the entire career under the scheme is not in consonance with the basic objective of the scheme.

The Government employee cannot gain any perspective of the Indian culture by traveling abroad. Besides, the attendant cost in foreign travel would also make the expenditure under this scheme much higher. The Commission is, therefore, not inclined to concede the demand to allow foreign travel under LTC." This is also an objection of the Revenue which has been raised in its counter affidavit filed by respondent no. 1-Assistant Commission of Income Tax wherein the Revenue has asserted that the provision for LTC was introduced to motivate employees and encourage its employees towards tourism in India and it is for this reason that reimbursement of LTC was exempted. There was no intention of legislature to allow the

employees to travel abroad in the garb of LTC available by virtue of Section 10(5) of the Act. Therefore, the Revenue has a valid objection (apart from other objections which are clearly violative of the Statute), that the intention and purpose of the scheme is also violated in the garb of tour within India, foreign travel is being availed.

16. The aforementioned order passed by the CIT(A) has rightly held that the obligation of deducting tax is distinct from payment of tax. The appellant cannot claim ignorance about the travel plans of its employees as during settlement of LTC Bills the complete facts are available before the assessee about the details of their employees' travels. Therefore, it cannot be a case of bonafide mistake, as all the relevant facts were before the Assessee employer and he was therefore fully in a position to calculate the 'estimated income' of its employees. The contention of Shri K.V. Vishwanathan, learned senior advocate that there may be a bonafide mistake by the assessee-employer in calculating the 'estimated income' cannot be accepted since all the relevant documents and material were before the assessee- employer at the relevant time and the assessee employer therefore ought to have applied his mind and deducted tax at source as it was his statutory duty, under Section 192(1) of the Act."

8.3 Without prejudice, before us the assessee has made two submissions. Firstly, payment of LTC was made by the respective branch of the employee of their posting and not by the assessee ,therefore assessee was not liable for deduction of tax at source on the component of LTC. But we find that assessee has not filed copy of form No. 16 issued either by the assessee or respective branch of the hosting of the employee and therefore it was not possible for us to verify the contention of the assessee. Since we have already restored the appeal to the Ld. CIT(A) for adjudication on merit, the assessee is at liberty to raise such contention before the Ld. CIT(A).

8.4 Secondly, the Ld. Counsel of the assessee before us has submitted that payees have already filed their return of income, taken into account the sum of LTC for computing return of income and already had paid tax on the said LTC amount, therefore invoking the first proviso to section 201(1) of the Act , the assessee shall not deemed to be the assessee in default if the assessee furnishes a Certificate from an accountant in prescribed proforma. The relevant proviso of section 201(1) of the Act is reproduced as under:

> *"201. (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:*
>
> ***Provided that any person, including the principal officer of a company, who fails to deduct the whole or any part of the tax in accordance with the provisions of this Chapter on the sum paid to a resident or on the sum credited to the account of a resident shall not be deemed to be an assessee in default in respect of such tax if such resident—***
>
> ***(i) has furnished his return of income under section 139;***
>
> ***(ii) has taken into account such sum for computing income in such return of income; and***

(iii) has paid the tax due on the income declared by him in such return of income,

and the person furnishes a certificate to this effect from an accountant in such form as may be prescribed17*:*

8.5 Since, we have already remitted the appeal back to the Ld. CIT(A) for adjudication on merit, we feel it appropriate to direct the assessee to file the said certificate under first proviso to section 201(1) of the Act before the Ld. CIT(A), which will be considered by the Ld CIT(A) in accordance with law.

8.6 As far as other grounds of appeal are concerned, we are not adjudicating upon as the Ld. CIT(A) has been directed to admit the appeal for adjudication upon merit and therefore, these grounds are left open for agitating before appropriate forum, if so required.

9. Now we take up the appeal of the same assessee i.e. State Bank of India HRMS Department, Navi Mumbai for assessment year 2014-15 in ITA No. 3112/M/2022. The facts and circumstances and grounds raised in appeals are identical to ITA No. 3111/M/2022 .In this case also the appeal was filed before the Ld. CIT(A) with a delay of 40 days which he has not condoned and not admitted the appeal. The facts and circumstances of the year under consideration are also identical to the facts and circumstances of the assessee for assessment year 2012-13 in ITA No. 3111/M/2022 and therefore following our finding, The Ld. CIT(A) is directed to admit this appeal for adjudication on merit.

10. Before us, the Ld. Counsel of the assessee has submitted on merit that the assessee Department i.e. HRMS Department has during the year under consideration neither issued Form No. 16 nor deducted and deposited the tax either on salary or other leave travel concession and therefore, there was no tax liability under the TAN number HRMS which was ad-hoc and non-existence. The Ld. Counsel however submitted that in respect of liability u/s 201(1) of the Act the assessee shall furnish a certificate from the accountant complying the conditions prescribed under first proviso to section 201(1) of the Act. In view of facts and circumstance, we direct the Ld. CIT(A) to consider above submission of the assessee while adjudicating the appeal on merit.

11. Now, we take up the remaining appeals of the first set of the appeals i.e. ITA No. 355/Mum/2023; ITA No. 2837/Mum/2022; ITA No. 551/Mum/2023. The reasons stated for delay in filing these appeals before the Ld. CIT(A) are identical to the reasons stated in ITA No.3111/Mum/2022 and 3112/Mum/2022, therefore, to have consistency in our decisions, we direct the Ld. CIT(A) to condone the delay in filing the appeal and admit these appeals for adjudication on merit. In these appeals also before us, the learned Counsel of the assessee submitted that payees have complied all the three conditions prescribed under first provision of section 201(1) of the Act i.e. employees have filed the return of income, employees have declared the said LTC amount as their income in

the return of income filed and employees have paid tax on the said amount of LTC, which was liable for deduction of tax at source. The learned Counsel submitted that assessee is willing to file a certificate from the accountant as prescribed under provisio to section 201(1) of the Act. Since we have directed the Ld. CIT(A) to admit the appeal and adjudicate on merit, he is further directed to take into consideration the submission of the assessee in relation to invoking of first proviso to section 201(1) of the Act and decide the issue in accordance with law.

11.1 As far as other grounds of appeal are concerned, we are not adjudicating upon as the Ld. CIT(A) has been directed to admit the appeal for adjudication upon merit and therefore, these grounds are left open for agitating before appropriate forum, if so required.

12. Now we take up the appeal having ITA No. 3087 to 3089/Mum/2022 for assessment year 2015-16 to 2017-18 respectively (out of second set of appeals). In these appeals, the Ld. Counsel of the assessee has filed an application under Rule 11 for admission of additional ground. In the additional ground, the Ld. Counsel of the assessee has submitted that during the period corresponding to the assessment year 2015-16 to 2017-18, the assessee was restrained by the Hon'ble Madras High Court for deducting tax at source on the LTC payments to its employees and therefore, the assessee could not deduct tax at source otherwise, the assessee would have been liable for contempt of court and

therefore, the assessee is not in default. The relevant additional ground raised by the assessee is reproduced as under:

> *"a.On the facts and in law, the learned AO has erred in passing order under Section 201 of the Act treating the Appellant to be in 'Assessee in default under Section 201 of the Act, without considering the Interim Order of the Hon'ble High Court of Madras passed on 16 February 2015, restraining the Appellant bank from deducting Tax at sourceon LFC payment made to its employees till finaldisposal of Writ Petition.*
>
> *b. On the facts and in law, the learned AO haserred by treating the Appellant as Assessee indefault without appreciation that deduction of TDSwould have led to the defiance and disobedience ofthe Interim Order of the Hon'ble High Court ofMadras dated 16 February 2015 which would have entailed contempt proceeding againstAppellant when the Hon'ble High Court of Madras has categorically restrained the Appellant from deducting Tax at source on LFC payment made toits employees.*
>
> *c. On the Facts and in law, the Ld. Assessing Officer erred in treating the appellant as assesses in defaultunder section 201 of the Act when the Hon'bleHigh court of Madras has specifically observedthat that if the Writ Petition No. 11991 of 2014 is dismissed, 'employees' will liable to pay tax on the amount paid by bank, thereby casting liability onthe employees to pay the tax on the amount pay bybank and therefore, the Appellant Bank is out of the Purview of Section 201 of the Act.*
>
> *d. On the facts and in law, the Ld. Assessing officererred in holding that appellant bank ought to have deducted TDS on payments made to its employeeson LTC payment made to its employees when by virtue of order of the Hon'ble High Court of Madras dated 16th February 2015, the paymentmade by the appellants to its employees would notamount to 'income' so as to enable the AppellantBank to deduct tax at source. Therefore, theAppellant was correct in not deducting TDS onpayments made for LTC.*
>
> *e. The Appellants craves leave to add, amend or omitany of the ground as and when required with theleave of this Hon'ble Court."*

12.1 Alternatively before us, the Ld. Counsel of the assessee submitted that assessee has complied the three conditions as provided under the first proviso to section 201(1) of the Act and the assessee is willing to file certificate from an accountant if matter is restored back to the Assessing Officer.

13. We have heard rival submission of the parties on the issue-in-dispute and perused the relevant material on record. We find that if the assessee fulfills the three conditions prescribed under the first proviso to section 201(1) of the Act, then assessee might not deem to be in default under section 201(1) of the Act. In the facts and circumstances in the case, we feel it appropriate to restore the matter back to the Ld. Assessing Officer with the direction to the assessee to file necessary certificate as prescribed under the first proviso to section 201(1) of the Act and matter will be decided in accordance with the law. It needless to mention the assessee shall be afforded adequate opportunity of being heard. Since, we have already restored the matter back to the Assessing Officer for deciding in view of first proviso to section 201(1) of the Act, we are not adjudicating upon other grounds raised by the assessee in the appeal alongwith additional ground and same are left upon to be agitated at appropriate forum if so required. The grounds of appeal for assessment year 2015-16 ;2016-17 and 2017-18 are accordingly allowed for statistical purposes.

13.1 The grounds raised in other appeals out of the second set of appeals are identical and therefore, same are decided *mutatis mutandis*.

14. In the result, all the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open Court on 27/04/2023.

Sd/-	**Sd/-**
(KAVITHA RAJAGOPAL)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 27/04/2023
Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai