

आयकर अपीलीय अधिकरण, इंदौर न्यायपीठ, इंदौर
**IN THE INCOME TAX APPELLATE TRIBUNAL
INDORE BENCH, INDORE**

BEFORE SHRI VIJAY PAL RAO, JUDICIAL MEMBER
AND
SHRI B.M. BIYANI, ACCOUNTANT MEMBER

ITA No.264/Ind/2018
(Assessment Year:2010-11)

Idea Cellular Ltd. 139-140 Electronics Complex Pardeshipura Indore	Vs.	JCIT Indore
(Appellant / Assessee)		(Revenue)
PAN: AAACB 2100P		
Assessee by	Shri Sumit Nema, Sr. Adv. And Gagan Tiwari, Adv.	
Revenue by	Ms. Simran Bhullar, CIT-DR	
Date of Hearing	20.09.2023	
Date of Pronouncement	22.09.2023	

O R D E R

PER VIJAY PAL RAO, JM:

This appeal by the Assessee is directed against order dated 03.11.2022 of Commissioner of Income Tax Indore dated 01.02.2018 arising from penalty levied u/s 271C of the Income Tax Act for A.Y.2011-12.

2. Earlier this appeal of the assessee was disposed of by this Tribunal vide composite order dated 25.10.2019. Thereafter, the assessee filed the Misc. Application No.3 of 2020 seeking recalling of the earlier order. The Tribunal vide order dated 1st September 2023 recalled the earlier order dated 25.10.2019 to the extent of ITANo.264/Ind/2018 due to the reason that in the composite order the Tribunal did not dispose of/decided

grounds raised by the assessee for A.Y.2010-11. Accordingly the appeal was directed to be fixed for fresh hearing and adjudication. The assessee has raised the following grounds of appeal:

“GROUND I: LEVY OF PENALTY UNDER SECTION 271C OF THE INCOME TAX ACT 1961 (" ACT") AMOUNTING TO RS 6,71,51,801/

1. On the facts and circumstances of the case and in law, the Hon'ble Commissioner of Income Tax - Appeals, [“the ld. CIT(A)“], erred in upholding the order passed by DCIT, TDS, Indore (TDS Officer) in levying a penalty of Rs 6,71,51,801/- under section 271C of the Income Tax Act 1961(“ the Act“) on the alleged ground that Appellant has failed to deduct TDS under section 194H of the Act in respect of discount allowed to prepaid distributors and there was no reasonable cause for such non deduction.

2. He failed to appreciate and ought to have held that:

a) The Appellant had acted under a honest and bona-fide belief that tax was not deductible under section 194H of the Act on 'discount allowed to the prepaid distributors'.

b) Without prejudice, in absence of payment or credit, the Appellant not being a person responsible for paying income by way of commission to the prepaid distributors and amount on which tax ought to be deducted, the mechanism to deduct TDS fails.

c) There was 'reasonable cause' for non-deduction of TDS in view of failure of machinery provisions as also fact that contrary views have been taken by High Courts and ITAT.

3. The Appellant therefore prays Learned AO be directed to delete the aforesaid penalty of Rs 6,71,51,801/- levied under section 271C of the Income Tax Act.”

2. The Ld. senior counsel has submitted that an identical issue has been considered by this Tribunal in assessee's own case for A.Y.2011-12 to 2014-15 in ITANo.261 of 2018 & ITANo.266 to 269/Ind/2018 vide order dated 03.05.2023 wherein the tribunal has deleted the penalty levied by the AO u/s 271C of the Act.

3. On the other hand, Ld. DR has relied upon the orders of the authorities below.

4. Having considered the rival submissions as well as relevant material on record at the outset, we note that an identical issue of levy of penalty u/s 271C of the Act due to failure on the part of the assessee to deduct TDS in respect of sale of SIM card and prepaid recharge vouchers for A.Y.2008-09, 2011-12 and 2014-15 has been considered by this Tribunal vide order dated 03.05.2018 in para 8 to 15 as under:

“8. We have considered rival submission as well as relevant material on record. There is no dispute that whether the transaction of allowing discount/commission to the distributors by the assessee as well as other telecom service providers for sale of SIM Card and prepaid Recharge Vouchers would fall in the ambit of section 194H or not is a highly debatable issue as there are a series of decisions of this tribunal, as well as various High Courts on this point. Some of the judgment of Hon’ble High courts are in favour of the assessee and some are in favour of the revenue upholding that the transactions of sale of SIM Card and Recharge vouchers are in the nature of sale and discount allowed by the assessee to the distributors is in the nature of commission attracting the provision of section 194H and consequently, the assessee was rightly held as deemed to be an assessee in default as per the provision of section 201 of the Act. Similarly, a good number of other decisions have held that transaction in question does not fall in the ambit of section 194H and thereby the assessee was not liable to deduct TDS at source on these transactions. Apart from a series of decisions of this Tribunal there are divergent views of Hon’ble High courts on this issue of liability of the assessee to deduct tax u/s 194H, some of those decisions are as under:

In favour of the assessee

- (i).Bharti Airtel Ltd. Vs. DCIT Bangalore (2015) 372 ITR 33 (Karnataka)*
- (ii). Hindustan Coca Cola Beverage P. Ltd. Vs. CIT (2018) 402 ITR 539 (Rajasthan)*
- (iii). CIT vs. Dex Travel P. Ltd. 172 Taxman 142 (Delhi)*

In favour of the Revenue

- (i).Bharti Cellular ltd. Vs. AcIT (2011) 244 ITR 185 (Calcutta)*
- (ii). Vodafone Essar Cellular ltd. Vs. AcIT (2011) 332 ITR 255 (Kerala)*

9. It is clear from the above mentioned decisions that the issue of applicability of section 194H in respect of the transactions in question is highly debatable and now pending adjudication before the Hon’ble Supreme Court in SLP no.22317 of 2011 as well as in SLP no.36446

to 3645 of 2010. The Ld. Sr. counsel for the assessee has stated that the Hon'ble Supreme Court has granted interim relief to the assessee against recovery of tax.

10. It is undisputed fact that this is debatable issue having two possible views and the assessee was of the view that it was not under obligation to deduct tax at source as per the provisions of chapter XVII of Income Tax and particularly u/s 194H of the tax. This belief of the assessee is one of the possible view and therefore failure to deduct the tax at source in respect of the discount/commission allowed to the distributors in light of divergent decisions by the different High Courts as well as by the different benches of this Tribunal clearly established the genuine and bona fide decision of the assessee not to deduct tax u/s 194H. Hence there was a reasonable cause as provided u/s 273B of the Act to have not deducted TDS on these transactions.

11. Hon'ble Supreme Court in the case of Singapore Airlines Ltd. Vs. CIT (supra) while considering the issue of penalty levied u/s 271C has held in para 59 to 62 as under:

59. The denouement of our examination of these issues concerns the levy of penalties under [Section 271C](#) of the IT Act. The Assessing Officer had initially directed that penalty proceedings be commenced against the Assesseees for the default in subtraction of TDS but we are informed that this process was put in cold storage while the airlines and the revenue were contesting the primary issue of the applicability of Section 194H before various appellate forums. [Section 271C](#) provides for imposition of penalties for failure to adhere to any of the provisions in Chapter XVII B, which includes [Section 194H](#). This provision must be read with [Section 273B](#) which excuses an otherwise defaulting Assessee from levy of penalties under certain circumstances. The twin provisions read as follows:

[Section 271C](#): Penalty for Failure to Deduct Tax at Source:

(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

(b) Pay the whole or any part of the tax as required by or under,

(i) Subsection (2) of Section 115O; or

(ii) Second proviso to [Section 194B](#), 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. (2) Any penalty imposable under Subsection (1) shall be imposed by the Joint Commissioner.

xxx [Section 273B](#): Penalty not to be imposed in Certain Cases:

Notwithstanding anything contained in the provisions of clause (b) of Subsection (1) of [Section 271](#), [Section 271A](#), [Section 271AA](#), [Section 271B](#), [Section 271BA](#), [Section 271BB](#), [Section 271C](#), [Section 271CA](#), [Section 271D](#), [Section 271E](#), [Section 271F](#), [Section 271FA](#), [Section 271FB](#), [Section 271G](#), clause (c) or clause (d) of Subsection (1) or Subsection (2) of [Section 272A](#), Sub section (1) of [Section 272AA](#), or Subsection (1) of [Section 272BB](#) or Subsection (1A) of [Section 272BB](#) or Subsection (1) of [Section 272BBB](#) or clause (b) of Sub section (1) or clause (b) or clause (c) of Subsection (2) of [Section 273](#), no penalty shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provisions if he proves that there was reasonable cause for the said failure.

60. The ambit of “reasonable cause” under [Section 273B](#) requires our scrutiny before we reach the conclusion that the Assessing Officer is required to also calculate potential penalties to be levied against the Assesseees. This Court in *Eli Lilly & Co. (Supra)* had elaborated, in the passage extracted below, on the context in which [Section 273B](#) may be utilized:

94...[Section 273B](#) states that notwithstanding anything contained in [Section 271C](#), no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person or the assessee proves that there was a reasonable cause for the said failure. Therefore, the liability to levy of penalty can be fastened only on the person who do not have good and sufficient reason for not deducting tax at source. Only those persons will be liable to penalty who do not have good and sufficient reason for not deducting the tax. The burden, of course, is on the person to prove such good and sufficient reason.

95. In each of the 104 cases before us, we find that nondeduction of tax at source took place on account of controversial addition. The concept of aggregation or consolidation of the entire income chargeable under the head "Salaries" being exigible to deduction of tax at source under [Section 192](#) was a nascent issue... The tax-deductorassessee was under a genuine and bona fide belief that it was not under any obligation to deduct tax at source from the home salary paid by the foreign company/HO and, consequently, we are of the view that in none of the 104 cases penalty was leviable under [Section 271C](#) as the respondent in each case has discharged its burden of showing reasonable cause for failure to deduct tax at source.

61. We find some parallels between the facts of the present case and the situation in *Eli Lilly & Co. (Supra)*. The liability of an airline to deduct TDS on Supplementary Commission had admittedly not been

adjudicated upon by this Court when the controversy first arose in AY 200102. While learned Counsel for the Revenue, Mr. Kumar, has notified us that various airlines were deducting TDS under [Section 194H](#) at that time, this does not necessarily mean that the position of law was settled. Rather, it appears to us that while one set of air carriers acted under the assumption that the Supplementary Commission would come within the ambit of the provisions of the [IT Act](#), another set held the opposite view. The Assessee before us belong to the latter category. Furthermore, as we have highlighted earlier, there were contradictory pronouncements by different High Courts in the ensuing years which clearly highlights the genuine and bona fide legal conundrum that was raised by the prospect of [Section 194H](#) being applied to the Supplementary Commission.

62. Hence, there is nothing on record to show that the Assessee has not fulfilled the criteria under [Section 273B](#) of the IT Act. Though we are not inclined to accept their contentions, there was clearly an arguable and “nascent” legal issue that required resolution by this Court and, hence, there was “reasonable cause” for the air carriers to have not deducted TDS at the relevant period. The logical deduction from this reasoning is that penalty proceedings against the airlines under [Section 271C](#) of the IT Act stand quashed.

12. The Hon’ble Supreme Court after considering an arguable and nascent legal issue that required resolution by the Apex Court has held that there was a reasonable cause for the airlines who have not deducted TDS at the relevant period and consequently the penalty proceedings u/s 271C were quashed. In case of the assessee before us the issue involved in the quantum proceeding holding the assessee as assessee in default for non-deduction of tax at source u/s 194H of the Act and consequently, was liable to pay the tax u/s 201 & 201A of the Act has travelled up to the Hon’ble Supreme Court and pending adjudication. The nature of the said issue itself highlights genuine and bona fide belief on the part of the assessee for not deducting tax at source on these transactions as the said issue has undergone the various stages of examination and pronouncements resulting divergent decisions at the level of this Tribunal as well as at the level of the Hon’ble High Courts and finally reached to the Hon’ble Supreme Court for final resolution. The Hon’ble Allahabad High Court in the case of *CIT-TDS vs. GM (Telecome) BSNL (supra)* has also considered the issue of levy of penalty u/s 271C on the identical facts in para 5 as under:

5. There can be no dispute about the fundamental principle of law that ignorance of law is no excuse. Section 273B of the Act, however, stipulates that notwithstanding anything contained in Section 271C, no penalty shall be imposed on a person or assessee for any failure to deduct tax at source, if it is proved that there was a reasonable cause for such failure. That the

assessee was liable to deduct tax at source is beyond dispute. The only issue is as to whether reasonable cause for a failure to deduct tax at source under Section 194H had been shown. The CIT(A) has exercised his discretion particularly having regard to the fact that at the relevant time, there was a decision in Idea Cellular Ltd. (supra) and in view whereof the assessee was under a bona fide belief that tax was not liable to be deducted on commission/trade discount. This is, at least, a possible view to take and which has been sustained by the Tribunal. In fact, it must be emphasised that the Tribunal has not laid down the proposition that ignorance of law can furnish an excuse for non-deduction of tax at source and the learned counsel is right in saying that this proposition would be unsustainable. However, this is a case where, on a review of facts, it was found that a reasonable cause had been shown under Section 2738. Hence, the imposition of penalty which was deleted by the CIT(A) has been affirmed by the Tribunal. 6. The appeal filed by the revenue, in these circumstances, will not give rise to any substantial question of law. It is, accordingly, dismissed.”

13. Delhi Bench of the Tribunal in case of Vodafone Idea Ltd. New Delhi vs. ACIT-TDS (supra) while considering this issue of levy of penalty u/s 271C has held in para 10 as under:

“10. We have heard both the parties and perused all the relevant material available on record. The issue on which the penalty u/s 271C is imposed is debatable as different courts have taken diverse views. Therefore, the fact remains that the assessee has reasonable cause for non deduction of tax at source on the discount allowed to the prepaid distributor as there are decisions of the Hon'ble High Courts and Tribunal taking diverse views. Thus, it is contesting issue and the assessee has reasonable cause not to deduct the tax at source. Therefore, the action of non deduction of tax in the present case will not attract the penalty u/s 271C. Since this issue is decided in case of assessee's own case for earlier assessment years the same will be followed.”

14. Similar in another decision in case of Vodafone Idea Ltd. New Delhi vs. DCIT-TDS (supra) vide order dated 29.09.2017 the Allahabad Bench of the Tribunal has decided this issue in para 98 and 99 as under:

98. This takes us to the penalty levied by TDS Officer u/s 271C of the Act. The case of assessee is that under similar circumstances the ITAT Hyderabad Bench (2009) [317 ITR (A.T.) 176] vide its order dated 26.02.2009 had taken a view that the relationship between a cellular operator and distributor is on 'principal to principal' basis and 'discount' given by the

assessee cannot be considered as 'brokerage' or 'commission'. It had also taken support of an earlier decision of the ITAT Delhi Bench passed on 28.03.2008 [313 ITR (A.T.) 55] whereby it was concluded that the provisions of section 201(1) and 201(1A) are not applicable, under identical circumstances. In such an event of matter - since the decision of ITAT Delhi Bench was already available before the commencement of Previous Year relevant to Assessment Year 2010-2011 the assessee's stand that it need not deduct tax at source can be taken as a 'reasonable cause'. Hon'ble Supreme Court, in the case of in the case of CIT vs. Eli Lilly (312 ITR 225), observed that if non-deduction of tax at source took place on account of controversial addition and if the tax deductor was under genuine and bonafide belief that it was not under any obligation to deduct tax it amounts to 'reasonable cause' and penalty u/s 271C is not leviable. Hon'ble Delhi High Court in the case of Woodward Governors India Private Limited (supra) observed that the expression "reasonable cause" has to be understood in the backdrop of the circumstances of each case and if an assessee does not deduct tax, based on its understanding of a particular provision, the same may constitute a 'reasonable cause'. Similarly, Hon'ble Delhi High Court, in the case of Pradeep Agencies Joint Venture (supra), observed that when a later judgment is in favour of the assessee, which matches the line of thinking of the assessee it can be considered as a 'reasonable cause'.

99. No doubt assessee has not specifically submitted before the Tax Authorities that non-deduction of tax at source was based on it's understanding of provisions of section 194H of the Act, which in turn constitutes a 'reasonable cause'. But the fact remains that by the time the assessee was under obligation to deduct tax at source for the AYS under consideration, there were judgments in favour of assessee and even after the decisions of Hon'ble Delhi High Court and Kerala High Court, Hon'ble Karnataka High Court had taken a different view of the matter which implies that non- deduction of tax was based on such understanding of relevant provisions of the Act in which event penalty is not imposable u/s 271C of the Act. We therefore set aside the order passed by AO as well as Ld CIT (A) on this aspect and hold that penalty u/s 271C is not imposable, in the circumstances of the case.

15. In view of the facts and circumstances of the case as discussed above as well as binding precedence of Hon'ble Supreme Court, Hon'ble High Courts and decisions of the Coordinate Benches of this Tribunal in assessee's own case, the penalty levied by the AO u/s 271C is not justified and liable to be deleted. We order accordingly.

5. Thus, the Tribunal has deleted the penalty levied u/s 271C by considering the fact that the issue of applicability of provisions of section 194H in respect of the transactions of sale of SIM Card and prepaid recharge vouchers is a highly debatable issue on which divergent decisions have been given by different Hon'ble High Courts. Therefore, when the issue is highly debatable issue then the case would fall in the category of genuine and bona fide explanation on the part of the assessee for non-deduction of tax at source on these transactions. Accordingly to maintain rule of consistency the penalty levied by the AO u/s 271C is deleted.

6. In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open court on 22.09.2023

Sd/-

(B.M. BIYANI)
Accountant Member

Indore, 22 .09.2023

Patel/Sr. PS

Copies to: (1) *The appellant*
(2) *The respondent*
(3) *CIT*
(4) *CIT(A)*
(5) *Departmental Representative*
(6) *Guard File*

Sd/-

(VIJAY PAL RAO)
Judicial Member

By order

*Sr. Private Secretary
Income Tax Appellate Tribunal
Indore Bench, Indore*