

IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH : KOLKATA

[Before Hon'ble Sri N.V.Vasudevan, JM & Shri Waseem Ahmed, AM]

I.T.A No.s 464 & 465/Kol/2014

Assessment Year : 2008-09 & 2009-10

M/s. Twenty First Century Securities Ltd. Kolkata (Appellant)	-vs.-	I.T.O. Ward-59(4)(TDS) Kolkata (Respondent)
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For the Appellant : Shri Ravi Tulsian, FCA

For the Respondent : Shri Sallong Yaden, Addl. CIT(DR)

Date of Hearing : 20.01.2017.

Date of Pronouncement : 03.02.2017.

ORDER**Per N.V.Vasudevan, JM**

These are appeals by the Assessee against two orders both dated.28.11.2013 of CIT(A) –I, Kolkata, relating to AYs 2008-09 & 2009-10 respectively.

2. The undisputed facts are that the Assessee paid interest to M/S.MKJ Enterprises Ltd., and M/S.Amrit Sales Promotion Pvt.Ltd. in AY 2008-09. The Assessee was under an obligation to deduct tax at source on the aforesaid payments made u/s.194A of the Income Tax Act, 1961 (Act). It is also not in dispute that the persons to whom the Assessee was to pay interest had obtained a certificate from their respective Assessing Officers u/s.197 of the Act authorising the Assessee to deduct tax at a lesser rate of tax. The amount mentioned in such certificate was lesser than the actual amount of interest paid. The Assessee however deducted tax at source at a lesser rate on the entire payment, i.e., over and above the sum specified in the certificate u/s.197 of the Act. The details of such payment are as follows:

	Amount of interest Specified in the certificate u/s.197	Amount of interest paid by the Assessee
M/S.MKJ Enterprises Ltd.	Rs.5,85,493	Rs. 6,26,559
M/S.Amrit Sales Promotion Pvt.Ltd.	Rs.44,44,14,448	Rs.5,47,02,126

3. The AO was of the view that the deduction of tax at the rate specified in the certificate u/s.197 of the Act was valid only in respect of the amount specified in the certificate and in respect of the remaining sum, the Assessee ought to have deducted tax at source at the normal applicable rate. To the extent the Assessee failed to do, the AO held that there was short deduction of tax at source and he levied interest u/s.201(1A) of the Act in respect of such short deduction of tax at source, as per the following details:

Deductee	Payment made	Specified as per 197(1)	Excess amount paid	Short deduction	Date of payment	Month of default	Interest
Amrit Sales Promotion P.L.	626559	585493	41066	8036 @ 19.57%)	31/03/2008	6	482
MKJ Ent.Ltd.	54792126	44441448	10350678	2228500 @ 21.53%	31/03/2008	7	155995

156477

4. On the excess amount as specified in the 197(1) certificate, Tax was deducted @ 1.03% instead of 20.6% in the case of Amrit Sales Promotion P.Ltd and @ 1.13% instead of 22.66% in the case of MKJ Enterprises Limited. The deductees submitted their return of income on 14.10.2008 and 12.09.2008 respectively. Therefore interest on tax short deducted was alone levied by the AO u/s.201(1A) of the Act.

5. In AY 2009-10, the facts are similar. In that year interest was paid by the Assessee to M/S.MKJ Enterprises Ltd. The short deduction of tax at source in this year was on a sum of Rs.46,484 on which the AO imposed interest u/s.201(1A) of the Act of Rs.11,247/-.

6. On appeal by the Assessee against the orders of the AO u/s.201(1A) of the Act for both the Assessment years, the CIT(A) confirmed the order of the AO. Hence these appeals by the Assessee before the Tribunal.

7. The plea of the Assessee before the AO was that the payees had paid taxes on the interest income and had filed their returns of income for the respective AYs and therefore there was no default or loss to the revenue. This argument was held to be not acceptable by the revenue authorities in so far as it concerns the levy of interest u/s.201(1A) of the Act.

8. Before the Ld. C.LT.(A), the assessee agitated two issues as under:

(1) Whether, the A.O. was justified to hold on misinterpretation of 197(1) certificate that lower rate of interest @ 1 % shall be restricted as per Annexure attached to the said certificate to the interest amount of Rs.4,44,41,448/-and not Rs.5,47,92,126/- actually paid to M/s.MKJ Enterprises Ltd. and similarly Rs.5,85,493/- and not Rs.6,26,559/- paid to M/s.Amrit Sales Promotion P. Ltd.?

(2) Whether, in consequence of such action as (1) above, the A.O. was justified in raising interest demand of Rs.1,55,995/ - u/s.201(1A) of the Act on the assessee?

The arguments advanced before the Ld. C.I.T.(A), in brief, were on following counts:

- That a perusal of 197(1) certificate would reveal that the Principal Officers of the organizations as per attached Annexure were authorized to deduct tax @ 1 % and hence in the case of the assessee-deductor, there was no short deduction of TDS.
- That the Ld. A.O. admitted that in the instant case, the assessee was not an assessee-in-default in terms of sec.201(1) of the Act.
- That the Ld. A.O. on erroneous interpretation took the estimated figure shown in the Annexure as gross payment of interest during the year and hence treatment of such an estimated figure as representing actual amount of interest liable for deduction of tax at normal rate was erroneous and reliance on the decision of Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P) Ltd. (supra) was thus misplaced.

- That the deductees had paid excess advance tax and/or had excess TDS credit and hence they claimed refund of tax. Hence interest could not be levied in such circumstances u/s.201(1A). Several case laws were relied upon in support of the above settled position in law.

9. The Ld. C.I.T.(A), however, found the explanation of the assessee not acceptable as, according to him, the Ld. A.O. has rightly considered the applicability of the decision of Hon'ble Supreme Court in the case of CIT vs. Hindustan Coco Cola Beverages Pvt. Ltd. [293 ITR 226 (SC)] to hold that the amount to be deducted was specifically mentioned in the Annexure and hence the assessee-deduction was liable to pay interest u/s.201(1A). He further held relying on CBDT Circular No. 275 dated 29.01.1997 that the interest would be chargeable even if the deductee had nil income or was claiming a loss as the charging of interest under this section is mandatory and is compensatory in nature. The interest charged upon the assessee u/s.201(1A) was thus upheld.

10. Before us the submission of the learned counsel for the Assessee was that the certificate issued by the AO u/s 197(1) of the Act clearly specifies that the assessee was authorised to pay any sum by way of interest other than interest on securities as referred to in section 194A of the Act after deducting the tax at source @ 1% plus surcharge and education cess thereon. Similar certificate has been issued in the case of M/s. MKJ Enterprises Ltd.. It was contended by him that the aforesaid certificate is only with reference to the person by whom income is payable and mention of the quantum of income in the annexure to the certificate will not in any way enhance the liability of the assessee for deduction of tax at source at the higher rate in so far as it relates to the income paid over and above the amount specified in the annexure to the certificate u/s 197 of the Act. In other words it was contended that the certificate u/s 197(1) of the Act is “person specific” and is not with reference to any sum on which TDS has to be made at a lower rates. It was further submitted that it was the person to whom the payment is made i.e., the payee who has to obtain a certificate u/s.197 of

the Act. Before issue of a certificate u/s.197 of the Act, the payee has to make an application to the AO in Form No.13. Form No.13 amongst other details also requires the details of income of the assessee for the last three years and payment of tax for the last three years. Though the amount in respect of which tax is to be deducted at source a lesser rate is also required to be given in Form No.13, yet it was only a procedural matter and in any event cannot override the specific provisions of section 197(2) of the Act. Our attention was also drawn to Rule 28AA(4) of the IT Rules 1962 which clearly lays down that certificate will be valid with regard to the person responsible for deducting the tax and whose name is mentioned in such certificate. It was thus contended that neither in the Act nor in the Rules is there a bar for deducting tax at lesser rate on the sums paid over and above the sums specified in certificate u/s 197(1) of the Act. Our attention was also drawn to the decision of the Hon'ble Punjab and Haryana High Court in the case of CIT vs Parle Biscuits Pvt. Ltd. 351 ITR 138 (P&H). In the aforesaid case there were two units of the person deducting tax at source at Mumbai and Bahadurgarh. Certificate u/s 197 was issued in the name of Mumbai unit for short deduction of tax. The person making payment namely Bahadurgarh unit also deducted tax at source at a lesser rate. Proceedings were initiated for short deduction of tax against the Bahadurgarh Unit. The Hon'ble Punjab and Haryana High Court held that there was no short deduction of tax at source and the certificate u/s 197 of the Act was valid for both the units of the person making payment. Our attention was also drawn to the decision of the Hon'ble Supreme Court in the case of GE India Technology Centre P.Ltd. vs CIT 327 ITR 456 (SC) wherein it was held that in case where the AO himself had inferred a lower rate, there is no justification whatsoever for the AO to infer short deduction in respect of similar payments not covered by the certificate.

11. The ld. DR reiterated the stand of the revenue as reflected in the orders of the revenue authorities.

12. We have given a careful consideration to the rival submissions. Sec.197 of the Income Tax Act, 1961 (Act) and Rule 28AA of the Income Tax Rules, 1962 (Rules), in so far as it relevant to the present appeal, reads thus:

“Certificate for deduction at lower rate.

197. (1) [Subject to rules made under sub-section (2A), [where, in the case of any income of any person [or sum payable to any person], income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, [194,] 194A, [194C,] 194D, [194G] [, 194H] [, 194-I] [, 194J] [, 194K], 194LA] and 195, the Assessing Officer is satisfied] that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax , as the case may be, the [Assessing] Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.

(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the [Assessing] Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be.”

Rule 28AA, as amended by the IT (Twenty-fourth Amdt.) Rules, 2003, w.e.f. 1-10-2003, IT (Tenth Amdt.) Rules, 1993, w.e.f. 16-6-1993, IT (Twentieth Amdt.) Rules, 1992, w.e.f. 23-12-1992 and IT (Third Amdt.) Rules, 1988, w.e.f. 9-6-1988, prior to its substitution by the IT (Second Amdt.) Rules, 2011, w.e.f. 1-4-2011 read as under :

"28AA. *Certificate of no deduction of tax or deduction at lower rates from income other than dividends.*—(1) The Assessing Officer, on an application made by a person under sub-rule (1) of rule 28, may issue a certificate in accordance with the provisions of sub-section (1) of section 197 for deduction of tax at source at the rate or rates calculated in the manner specified below :

- (i) at such average rate of tax as determined by the total tax payable on estimated income, as reduced by the sum of advance tax already paid and tax already deducted at source, as a percentage of the payment referred to in section 197 for which the application under sub-rule (1) of rule 28 has been made; or
- (ii) at the average of the average rates of tax paid by the assessee in the last three years;

whichever is higher.

(2) The certificate shall be valid for the assessment year to be specified in the certificate, unless it is cancelled by him at any time before the expiry of the specified period. An application for a fresh certificate may be made, if required, after the expiry of the period of validity of the earlier certificate.

(3) The certificate shall be valid only for the person named therein.

(4) The certificate shall be issued direct to the person responsible for paying the income under advice to the applicant.

13. Section 201(1) & (1A) of the Act reads thus:

“Consequences of failure to deduct or pay.

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 prescribed⁷¹:

Provided further that no penalty shall be charged under [section 221](#) from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay 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](#):

Provided that in case any person, including the principal officer of a company 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 but is not deemed to be an assessee in default under the first proviso to sub-section (1), the interest under clause (i) shall be payable from the date on which such tax was deductible to the date of furnishing of return of income by such resident.”

14. A perusal of the provision of section 197(1) of the Act shows that the recipient of the payment has to satisfy the AO that the total income of the recipient justifies deduction of tax at source at lower rate or no deduction of income tax. A reading of

section 197(2) of the Act shows that once the AO issues a certificate for deduction of tax at a lower rate or no deduction of income tax then the person making the payment is at liberty to deduct tax at rates specified in the certificate or deduct no tax as the case may be. In our view the provision of section 197(2) of the Act does not make any reference to any income specified in such certificate. A perusal of Rule 28AA(2) of the Rules also shows that the certificate issued u/s 197 of the Act will be valid for the assessment year specified in the certificate. Even in the rules there is no reference to the payment without TDS or at lesser rate should be on the sums specified as payable in the certificate. It is therefore clear in the statutory provision of deduction of tax at source at lower rate is “person specific” and cannot be extended to the amounts specified by the recipient of the payment while making an application for grant of certificate u/s 197 of the Act in Form No.13. The AO has annexed the details in Schedule-II of Form No.13 to the certificate issued u/s.197 of the Act. By doing so, the AO cannot treat the assessee as a person who has not deducted tax at source to the extent of the payments made by the assessee over and above the sum specified in the certificate u/s 197 of the Act. We therefore agree with the arguments of the Id. Counsel for the assessee that certificate u/s 197 of the Act is with reference to the person to whom the income is paid and is not with reference to any sum as may be specified in the certificate. We are therefore of the view that the assessee cannot be treated as a person who has not deducted tax at source on the difference between the amounts specified in the certificate issued u/s 197 of the Act and the amounts actually paid by the assessee. Consequently the levy of interest u/s 201(1A) of the Act cannot be sustained and the same is directed to be deleted.

15. In the result both the appeals are allowed.

Order pronounced in the Court on 03.02.2017.

Sd/-
[Waseem Ahmed]
Accountant Member

Sd/-
[N.V.Vasudevan]
Judicial Member

Dated : 03.02.2017.

[RG PS]

Copy of the order forwarded to:

1. M/s. Twenty First Century Securities Ltd., 2, Clive Ghat Street, 3rd Floor, Kolkata-700001.
2. I.T.O., Ward-59(4) (TDS), Kolkata.
3. CIT(A)-I, Kolkata
4. CIT – (TDS)Kolkata.
- 5..CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Asstt. Registrar Kolkata Benches