

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE MR. JUSTICE SHAJI PCHALY

THURSDAY, THE 21ST DAY OF MAY 2015/31ST VAISAKHA, 1937

I.T.A.No. 90 of 2015

AGAINST THE ORDER IN ITA 470/2014 of I.T.A.TRIBUNAL,COCHIN BENCH DATED 09-01-2015

APPELLANT/APPELLANT/ASSESSEE:

M/S.CLASSIC CONCEPTS HOME INDIA PVT. LTD
VI/565, IDA, EDAYAR
BINANIPURAM P.O, EDAYAR
ALUVA-683 502
REPRESENTED BY ITS MANAGEER (HR)
SHRI VINOD KUMAR SINGH

BY ADVS.SRI.T.M.SREEDHARAN (SR.)
SRI.V.P.NARAYANAN
SMT.DIVYA RAVINDRAN

RESPONDENT/REVENUE:

THE COMMISSIONER OF INCOME TAX ERNAKULAM
CENTRAL REVENUE BUILDING, I.S PRESS ROAD
KOCHI 682 018

R BY P.K.R.MENON (SR.)
R BY SRI.JOSE JOSEPH, SC, FOR INCOME TAX

THIS INCOME TAX APPEAL HAVING COME UP FOR ADMISSION ON 21-05-2015,
ALONG WITH ITA 89/15 AND CONNECTED CASES THE COURT ON THE SAME DAY
DELIVERED THE FOLLOWING:

I.T.A.No. 90 of 2015

APPENDIX

PETITIONER'S ANNEXURES:

ANNEXURE A: TRUE COPY OF THE ORDER DATED 15.11.2013 ISSUED BY THE ADDL. COMMISSIONER OF INCOME TAX (TDS), ERNAKULAM ALONG WITH DEMAND NOTICE FOR AY 2010-2011.

ANNEXURE B: TRUE COPY OF THE APPELLATE ORDER DATED 28.8.2014 IN ITA NO.18/TDS/EKM/CIT(A)-III/13-14 OF THE CIT(A), KOCHI FOR AY 2010-11.

ANNEXURE C: TRUE COPY OF THE COMMON ORDER IN I.T.A.NO.470/COCH/2014 AND CONNECTED APPEALS DATED 9.1.2015 OF THE ITAT,COCHIN BENCH FOR AY 2010-11.

// True Copy //

P.A To Judge

ANTONY DOMINIC & SHAJI P.CHALY, JJ.

I.T.ANos.89, 90, 91 & 92 of 2015

Dated this the 21st day of May, 2015

JUDGMENT

Antony Dominic, J.

These appeals are filed by the appellant challenging the orders concurrently passed by the authorities under the Income Tax Act including the Tribunal upholding levy of penalty under Section 271C of the Income Tax Act. In this background, the appellant has raised the following questions of law under Section 260A of the Income Tax Act, 1961 for consideration of this Court:

“i) did not the Appellate Tribunal err in law in proceeding on the assumption that there was continuous delay of four years and the belated deposit of deducted amount every year showed the assessee as a willful defaulter.

ii) in the facts and circumstances of the case, should not the Statutory Authorities and the Appellate Tribunal has found that there was reasonable cause for the delay in remitting the tax and that no penalty was exigible u/S 271C since the entire tax along with interest was remitted long before the initiation of penalty proceedings?

iii) is not the order Annexure A barred by limitation on account of inordinate delay?

iv) should not the Appellate Tribunal have found that the judgment in the case of M/S U.S.Technologies International (P) Ltd.'s case no penalty is exigible u/s 271C when the entire

TDS amount and interest was remitted before initiation of penalty proceedings?

v) did not the Appellate Tribunal err in law in failing to consider the financial hardship urged before the Statutory Authority and the Appellate Tribunal and consider the reasonable cause urged before it?

vi) did not the Appellate Tribunal err in law in failing to appreciate that mere delay in remittance of TDS amount resulted in warranting levy of penalty when there was reasonable cause for the delay?

vii) is not the order Annexure A erroneous and unsustainable in law for failure to apply the correct principles of law in regard to the levy of penalty?

2. We heard the Senior Counsel for the appellant and the Standing Counsel appearing for the respondent.

3. Admittedly, it is the case where tax was deducted at source and was remitted belatedly. It was in such a factual background that proceedings were initiated and penalty was levied under Section 271C of the Income Tax Act. In order to sustain the appeals filed, the learned Senior Counsel for the appellant referred us to the provisions of Section 271C and contented that there was no willful or deliberate delay attracting the penalty provisions under Section 271C. He also placed

reliance on the judgment of this Court in *U.S. Technologies International (P) Limited v. Commissioner of Income Tax [(2010) 195 TAXMAN 323 (Ker)]*. Learned counsel also placed reliance on Section 276B and Circular No.551 dated 23.1.1990.

4. Having considered the submissions made, we confess our inability to accept the case of the appellant. As we have already noticed, it is the admitted case of the parties that the tax was deducted at source and the same was remitted belatedly, though with interest. In such a case, the provisions of Section 271C of the Income Tax Act are fully applicable. In so far as the judgment of this Court in the *U.S. Technologies International Private Limited (supra)* is concerned, what is relevant is paragraph 4 thereof which reads thus:

"The next question to be considered is the quantum of penalty which in this case is above Rs.1.1 crore. Counsel for the appellant referred to Section 273B of the Act authorising the officer to waive or reduce the penalty if the defaulted assessee proves that there was reasonable cause for such failure which attracts penalty. Standing Counsel has referred to the findings on cash flow and the application of funds by assessee for other purposes and contended that there was no reasonable cause justifying the failure on the part of the assessee. He has further contended that even for earlier year assessee had remitted recovered tax with delay. In our view, the

Tribunal has not considered challenge against quantum of penalty in so much details probably because in the penalty order it is stated that only minimum penalty is levied. So far as failure on the part of the assessee to remit the tax recovered at source is concerned, we do not think there can be any justifying circumstance for delay in remittance because assessee cannot divert tax recovered for the Government towards working capital or any other purpose. So much so, in our view, defence available under Section 273B does not cover failure in payment of recovered tax. However, if there is failure to remit on account of failure to recover for any reason whatsoever, then the case calls for reduction of penalty, if not waiver. Similarly, we feel recovery and remittance of tax, though with delay but with interest, before detection is certainly a mitigating circumstance for waiver or reduction of penalty. Further, if full amount of tax with interest was paid before levy of penalty, we feel quantum reduction is called for by the AO. Therefore, we direct the AO to reconsider the quantum of penalty by giving one more opportunity to the assessee to furnish facts in the light of our observations above. The appeal is accordingly disposed of upholding the order of the Tribunal on the levy of penalty, but with direction to the AO to grant further reduction in penalty, if any new fact or circumstance is brought to the notice of the AO based on observations above or otherwise in terms of Section 273B of the Act."

5. Reading of the above paragraph shows that even Section 273B, providing for waiver or reduction of penalty is not attracted in a case where tax is deducted and not remitted to the revenue. Therefore, the

judgment in *U.S. Technologies International Private Limited (supra)*, in our view, does not support the case of the appellant in any manner.

6. In so far as paragraph 16.5 of the Circular 551 relied on by the learned counsel for the appellant is concerned, the relevant paragraph reads thus:

16.5 Insertion of a new Section 271C to provide for levy of penalty for failure to deduct tax at source--Under the old provisions of Chapter XXI of the Income Tax Act no penalty was provided for failure to deduct tax at source. This default, however, attracted prosecution under the provisions of Section 276B, which prescribed punishment for failure to deduct tax at source or after deducting, failure to pay the same to the Govt. It was decided that the first part of the default, i.e. failure to deduct tax at source should be made liable to liable to levy of penalty, while the second part of the default, i.e., failure to pay the tax deducted at source to the Govt. which is a more serious offence, should continue to attract prosecution. The Amending Act, 1987 has accordingly inserted a new section 271C to provide for imposition of penalty on any person who fails to deduct tax at source as required under the provisions of Chapter XVIIIB of the Act. The penalty is of a sum equal to the amount of tax which should have been deducted at source.

7. Reading of this paragraph also shows that the provisions thereof have no relevance in so far as the case of the appellant is concerned.

8. In our view, the authorities were fully justified in levying penalty under Section 271C and in the facts and circumstances of the case, we do not find any question of law arising in these appeals to be considered by this Court under Section 260A of the Income Tax Act.

Appeals are dismissed.

Sd/-
ANTONY DOMINIC
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

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