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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

R-12.

+ **ITA 194/2004**

HINDUSTAN COCA COLA BEVERAGES PVT. LTD.

..... Appellant

Through: Mr. Ajay Vohra, Senior Advocate with
Ms. Kavita Jha and Mr. Vaibhav Kulkarni,
Advocates.

versus

JT. COMMISSIONER OF INCOME TAX

..... Respondent

Through: Mr. Raghvendra Singh, Advocates.

CORAM:

JUSTICE S. MURALIDHAR

JUSTICE NAJMI WAZIRI

ORDER

01.08.2016

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Dr. S. Muralidhar, J.:

1. This appeal by Hindustan Coca Cola Beverages Pvt. Ltd. is directed against the order dated 24th March 2004 passed by the Income Tax Appellate Tribunal ('ITAT') in ITA Nos. 649 & 650/Del/2002 with respect to Financial Years ('FYs') 1998-99 and 1999-2000.

2. By an order dated 5th September 2005, while admitting the appeal, the following question was framed for consideration:

“Whether in the facts and circumstances of the case and in particular

clauses 11 and 12 of the agreement executed between the assessee and Pradeep Oil Corporation, the ITAT was justified in holding that the penalty was rightly levied upon the assessee u/s 271 C of the Income Tax Act, 1961?”

3. For the reasons explained hereafter the Court is of the view that the above question requires to be reframed.

Background facts

4. The background facts require to be narrated. The Appellant is engaged in the business of manufacture and sale of soft drinks. On 11th November 1998 it entered into an agreement with M/s Pradeep Oil Corporation (‘POC’) for warehousing services. In terms of the said agreement, a copy of which has been placed on record, POC was described as 'warehouser' i.e. a licensee in respect of the railway land of 96750 sq. ft at 13 km, Rohtak Road, Shakur Basti, Delhi on which POC had constructed a warehouse of constructed area of 47000 sq. ft. The agreement was for a period of three years with a renewal clause at the option of the Appellant.

5. In terms of the agreement, the POC agreed to warehouse the products of the Appellant either owned by the Appellant or its authorized representatives/dealers. During the period of agreement the Appellant’s trucks not less than 300 trucks per day were to be handled by POC, for which the Appellant was to pay warehousing service charges to POC at a minimum rate of Rs. 37,000 per day irrespective of the actual number of trucks carrying the products for handling products up to 300 trucks a day.

6. At the time of the entering into agreement, the Appellant was to pay POC

Rs. 1.35 crores which was to be adjusted in equal amounts in the bills over a period of first thirty months of the agreement. The Appellant was to further pay POC a sum of Rs.67.50 lakhs which was to be refunded without interest by POC to the Appellant upon the expiry of the agreement. Clause 11 of the agreement stated that the said agreement should not be construed to be “assignment, mortgage, sublet, lease, licence or transfer otherwise, the warehouse belonging to the warehouser and/or any privileges and facilities connected thereto; and the possession of the warehouse and the privileges and facilities connected thereto shall always remain with the warehouser”. Under Clause 12 both the Appellant and POC were to indemnify the other party against any loss or damages caused due to the negligence of their respective representatives, servants and agents etc.

7. The Appellant treated the payments made to the POC under the above agreement as payments made, in terms of Section 194-C of the Income Tax Act, 1961 ('Act'), for carrying out work in pursuance of the contract, and deducted 2% from such payment, as tax deducted at source ('TDS').

Quantum proceedings

8. The Assessing Officer ('AO') passed an order under Section 201(1) read with Section 201(1A) of the Act on 31st March 2001 holding that the payments made by the Appellant to POC were in the nature of rent from which TDS ought to have been deducted @ 20% under Section 194-I of the Act. A demand was accordingly raised on the Appellant for the alleged short deduction together with interest thereon.

9. In the appeal filed by the Appellant, the Commissioner of Income Tax (Appeals) [CIT (A)] by order dated 15th January 2002 directed the Appellant to provide necessary evidence to the AO to ascertain whether the POC had paid taxes on the payments received from the Appellant. Thereafter credit for the said payments was to be given to the Appellant. The interest levied under Section 201(1A) was not interfered with by the CIT(A)

10. The further appeal filed by the Appellant in the ITAT against the aforementioned order of the CIT(A) came to be dismissed by the ITAT by an order dated 12th July 2002. The ITAT, *inter alia*, held that in terms of Circular No 718 dated 22nd August, 1995 the Appellant ought to have deducted TDS under Section 194-I of the Act and that there was no *bona fide* plea/reasonable cause for the Appellant to deduct TDS under Section 194-C of the Act.

11. The above order of the ITAT dated 12th July 2002 was affirmed by this Court by order dated 21st May 2004 in ITA No. 282 of 2002. The Court was of the view that no substantial question of law arose from the impugned order dated 12th July 2002 of the ITAT. However, the Court clarified that the ITAT was not required to give findings on the issue relating to bonafide belief/reasonable cause and therefore the said observations were of no consequence.

12. With the above order of this Court dated 21st May 2004, the litigation concerning the quantum proceedings came to an end.

Appellant 's application under Section 254 (2)

13. On 17th August 2004, the Appellant filed an application, being Misc. A No. 287/Del/2004, under Section 254(2) of the Act before the ITAT. The application was purportedly for “rectification of mistake apparent from the record” in the ITAT’s order dated 12th July 2002. The Appellant contended that the ITAT had in its order failed to consider its alternative plea that POC had already paid taxes on the payment received from the Appellant, and had in fact received refunds from the Revenue, and therefore the Revenue could not once again seek to recover the tax from the Appellant.

14. The above application Misc. A No. 287/Del/2004 was disposed of by the ITAT by an order dated 13th September 2004. Para 3 of the said order, which is important for the purposes for the present appeal, reads as under:

“3. By way of present application, it is contended by the learned counsel that the assessee is not disputing the fact that it is an assessee in default. It is also not disputing that interest levied under Sec.201(1A) has to be recovered from the assessee. However, the grievance is that the assessee’s alternate contention has not been considered by the Tribunal. The alternate contention is stated to be that the warehouser has been assessed on its income and due tax has been recovered from it by the department. Since tax has already been recovered by the department on the income paid by the assessee, no further tax should be recovered from the assessee on the same income. In support of this contention, the learned counsel drew our attention to the statement of facts filed before the CIT(Appeals) in which this fact has been clearly mentioned. Our attention was also drawn to ground No.7 taken before the Tribunal in which the action of the department recovering the tax on the same income twice was challenged. It was contended that this ground has not been considered by the Tribunal and hence to that extent the order of the Tribunal suffered from a mistake apparent on record. The provisions of Section 191 were also referred to in support of the contention.”

15. The ITAT in the said order dated 13th September 2004 agreed with the Appellant that the above plea regarding the tax paid by POC had been missed by it while disposing of the appeal. Accordingly the ITAT recalled its order dated 12th July 2002 for the limited purpose of adjudicating the above ground.

16. Aggrieved by the order dated 13th September 2004, the Revenue filed ITA No.478 of 2005 in this Court. The said appeal came to be allowed by this Court in *Hindustan Coco-cola Beverages Pvt. Ltd v. JCIT (2007) 293 ITR 163 (Del)*. The Court noted, *inter alia*, that in the first round itself the ITAT considered the above plea of the Appellant raised in Ground No.7 and gave a decision thereon. The Court held that “the conclusion reached by the subsequent Bench of the Tribunal, different from the one that passed the first order, to the effect that the Tribunal had failed to deal with this aspect is, in our view, based on an incorrect reading of the first order. Certainly, this cannot be characterised as a mistake, much less a mistake apparent from the record justifying a ‘rectification’ of the first order.” The order dated 13th September 2004 passed by the ITAT was set aside.

17. Aggrieved by the above order of this Court, the Appellant went in appeal to the Supreme Court by filing Civil Appeal No. 3765 of 2007.

18. In the meanwhile, on 18th January 2005, the ITAT modified its order dated 12th July 2002, as regards Ground No.7 and held that since POC had already paid taxes on the amounts received from the Appellant, no tax could be recovered from the Appellant under Section 201(1) of the Act.

Supreme Court's order

19. Civil Appeal No. 3765 of 2007 filed by the Appellant against the order dated 11th October 2006 passed by this Court was allowed by the Supreme Court in ***Hindustan Coco Cola Beverage (P) Ltd. v. Commissioner of Income Tax (2007) 293 ITR 226 (SC)***. The Supreme Court referred to Circular No.275/201/95-IT(B) dated 29th January 1997 issued by the Central Board of Direct Taxes ('CBDT'), which declared that no demand under Section 201(1) of the Act should be enforced after the tax deductor has satisfied the officer-in-charge of TDS that taxes due have been paid by the deductee-assessee. However, this did not alter the liability to charge interest under Section 201(1A) till the date of payment of taxes by the deductee/assessee or the liability for penalty under Section 271C. The Supreme Court held that since the Appellant had paid interest under Section 201(1A) and that there was no dispute that the tax had been paid by POC, the above circular applied to the facts on hand.

20. In coming to the above conclusion, the Supreme Court proceeded on the basis that the Revenue had not challenged the order dated 13th September 2004 of the ITAT recalling the earlier order dated 12th July 2002 to the extent of not considering the ground No. 7. In fact, as noted hereinbefore, the Revenue did challenge the order dated 13th September 2004 of the ITAT. Be that as it may, the judgment dated 11th October 2006 passed by this Court was set aside by the Supreme Court.

Penalty proceedings

21. As far as the penalty proceedings were concerned, a show cause notice

(‘SCN’) was issued to the Appellant on 10th April 2001 and 8th/9th October 2001, asking it to show cause as to why an order imposing penalty should not be passed against it under Section 271-C for failure to deduct TDS under Section 194-I of the Act. The Appellant replied to the SCN on 29th October 2001. On 31st October 2001, a penalty order was passed by the Assessing Officer (AO) under Section 271-C of the Act, imposing a penalty of Rs. 48,86,450 being 100% of the short deduction of tax by the Appellant. The said order was affirmed in appeal by the CIT(A) by an order dated 1st February 2002. The further appeal to the ITAT was dismissed on 24th March 2004 with the ITAT observing that the Appellant had not been able to establish reasonable cause against the imposition of penalty. It is against the above order dated 24th March 2004 in the penalty proceedings that the present appeal was filed by the Appellant in which the above question was framed by this Court by the order dated 5th September 2005.

22. With the Appellant having accepted the finality of the order of this Court in the quantum proceedings as regards the Appellant’s obligation to deduct TDS under Section 194-I, as against Section 194-C of the Act, it was not open to the Appellant to re-agitate that issue in the penalty proceedings. However, the question framed by the Court gives the Appellant a second shot at the same question with reference to Clauses 11 and 12 of the warehousing agreement entered into between the Appellant and POC. This was perhaps premised on the decision of the Supreme Court in *CIT v. Anwar Ali (1970) 76 ITR 696 (SC)*, where it was held that the finding given in the assessment proceedings for determining or computing tax could not said to be conclusive as far as the penalty proceedings were concerned.

However, it was good evidence. It was observed that before penalty could be imposed, the entirety of circumstances must reasonably point to the conclusion that the disputed amount represented income and that the assessee had consciously concealed the particulars of his income or had deliberately furnished inaccurate particulars.

Why the question in this appeal needs to be re-framed

23. However, as far as the present case is concerned, the question whether the Appellant was justified in deducting TDS under Section 194-C rather than Section 194-I of the Act could not have been permitted to be agitated in the penalty proceedings, particularly in view of the order dated 13th September 2004 passed by the ITAT. In para 3 of the said order which has been extracted hereinbefore, the ITAT specifically recorded that the Appellant was not disputing any longer its liability to deduct TDS under Section 194-I of the Act. Therefore, as far as the Appellant was concerned, it had accepted the order dated 21st May 2004 of this Court in the quantum proceedings which imparted finality to the decision of the ITAT on the above question. The Appellant again went before the ITAT with an application in which the above order dated 13th September 2004 was passed recording the above categorical stand of the Appellant. The only issue that remained was regarding the extent of tax if any the Assessee should be asked to pay under Section 201 (1) of the Act. No further opportunity could thereafter had been given to the Appellant to re-agitate the issue whether it was justified in deducting TDS under Section 194-C of the Act. In other words, this Court could not have permitted the Appellant to invite it to again examine whether in terms of Clauses 11 and 12 of the warehousing

agreement, the payments attracted TDS under Section 194-C and not Section 194-I of the Act.

24. There is another reason as to why such a question cannot be examined again. There is a distinction in the wording of Section 271(1) (c) of the Act and Section 271-C of the Act. The penalty imposed in the present case is under Section 271-C of the Act and not Section 271(1)(c) of the Act. When the Court in *CIT v. Anwar Ali (supra)* talked of the findings in the assessment proceedings not being conclusive for the purposes of penalty, it was dealing with Section 28 (1) (c) of the Income Tax Act 1922, which corresponded to Section 271 (1) (c) of the Act. Indeed, Section 271 (1) (c) of the Act provides that the Commissioner may direct payment of penalty by a person who has “concealed the particular of income or furnished inaccurate particulars of such income”. This is usually after the assessment is complete. As far as Section 271-C is concerned, the penalty is attracted when there is a failure to deduct TDS or deposit TDS that has been deducted. The said provision reads as under:

“271-C. 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) sub-section (2) of section 115-O; or

(ii) the 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 sub-section (1) shall be imposed by the Joint Commissioner.”

25. The order passed under Section 201 (1) is not an assessment order. The order is directed against a person who fails to deduct TDS and is deemed to be an 'Assessee in default'. Correspondingly, the penalty under Section 271-C of the Act is attracted where the person has failed to deduct the whole or any part of the TDS “as required by or under the provisions of Chapter XVII-B”. It is like a no-fault liability. The AO is not in such event required to examine, as he would under Section 271(1)(c) of the Act, whether the Assessee had concealed the particulars of income or furnished inaccurate particulars. The nature and scope of the Section 271-C is such that the question of permitting an assessee to again agitate in the penalty proceedings the question that arose in the quantum proceedings, viz., whether TDS ought to have been deducted under a particular provision cannot arise particularly where an assessee, as in this case, accepts the finality of the order passed in that regard in the quantum proceedings.

26. For all of the aforementioned, the Court considers it necessary therefore to re-cast the question that has been framed on 5th September 2005.

Analysis of Section 271-C

27. At this stage, it is important to note that the other questions urged by the Appellant are:

(a) Whether the penalty under Section 271-C of the Act was attracted

in the facts of the case?

(b) Even assuming the penalty under Section 271-C of the Act was attracted, whether the Assessee has been able to show that its failure to do so was occasioned by 'reasonable cause' in terms of Section 273-B of the Act?

28. It was urged by Mr. Ajay Vohra, learned Senior Advocate appearing for the Appellant that there was no failure to deduct TDS in terms of Section 271-C of the Act, since according to the Appellant it *bona fide* believed that the TDS was deductible only under Section 194-C of the Act and in fact the whole of the TDS at 2% was deducted. Therefore, according to Mr. Vohra, there was no failure to "deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B of the Act".

29. The Court is unable to agree with the above submission. The penalty under Section 271-C of the Act is attracted where a person fails to deduct the whole or any part of the tax as required by or under the provisions of Act. Here it has been conclusively established that TDS ought to have been deducted only under Section 194-I of the Act and not under Section 194-C of the Act. TDS was deducted by the Appellant @20% under Section 194-I of the Act was on the erroneous premise that Section 194C stood attracted. Therefore, the Appellant failed to deduct a substantial portion of the tax that ought to have been deducted under Section 194-I of the Act. Therefore, Section 271-C stood straightway attracted.

30. The only question, therefore, that arises is whether for the purposes of

Section 273- B of the Act, it could be said that the Assessee had been able to show reasonable cause for the failure to deduct TDS under Section 194-I of the Act. Accordingly, the question framed by this Court by its order dated 5th September 2005 is re-framed as under:

“Whether in the facts and circumstances of the case, the Appellant has been able to show, for the purposes of Section 271C read with Section 273B of the Act that there was reasonable cause for the failure to deduct TDS under Section 194-I of the Act?”

Submissions of counsel

31. Mr. Vohra submitted that the issue whether the TDS had to be deducted from the warehouse charges under Section 194-C or Section 194-I of the Act was a debatable one. He referred to Circular No. 736 dated 13th February 1996 issued by the CBDT clarifying that Section 194-I would not be attracted to the sharing of the proceedings of a film between a film distributor and a film exhibitor owning a cinema theatre. It was clarified that the distributor did not take the building on lease, sub-tenancy or under any agreement of similar nature. Mr. Vohra also referred to Circular No. 1/2008 dated 10th January 2008 regarding applicability of Section 194-I to payments made by the customers on account of cooling charges to the cold storage owners. It was clarified by the CBDT that only Section 194-C of the Act would be applicable to the amounts paid to cooling charges by the customers of the cold storage. Mr Vohra pointed out that the decision of this Court in ***United Airlines v. CIT (2006) 287 ITR 281 (Del)*** which held that the landing and parking charges paid by the airlines to the airport authorities partook the character of rent and attracted TDS under Section 194-I of the Act was reversed by the Supreme Court in ***Japan Airlines Co. Ltd. v. CIT***

(2015) 377 ITR 372 (SC). He further submitted that in the present case POC had paid the full tax on the monies received by it from the Appellant towards warehouse charges and therefore there was no loss of the Revenue whatsoever. The Appellant did not gain anything by not deducting TDS under Section 194-I of the Act. No part of the amount payable either to the exchequer or POC was retained by the Appellant. Mr Vohra He referred to the decisions in ***CIT v. Eli Lily & Co.(India) (P) Ltd. (2009)312 ITR 225 (SC)***, ***CIT v. Canon India Ltd. (2009) 2 taxmann.com 32 (Del)*** and ***CIT v. Cadbury India Ltd (2011) 11 taxmann.com 66(Del)*** and submitted that there was reasonable cause for the Appellant's failure to deduct TDS under Section 194-I of the Act.

32. Mr. Raghvendra Singh, learned counsel for the Revenue, first submitted that the conduct of the Assessee did not entitle it to any relief in terms of Section 273-B of the Act. He sought to suggest that the Appellant ought to have brought to the notice of the Supreme Court the error in its order dated 16th August 2007 that the Revenue had not challenged the order dated 13th September 2004 of the ITAT, when in fact it had. He then referred to the CBDT Circular Nos. 715 dated 8th August 1995 and 718 dated 22nd August 1995 which clarified that the warehouse charges would attract TDS under Section 194-I of the Act. According to Mr. Singh, the agreement itself was entered into more than three years thereafter and with the Appellant having a full complement of legal advisers there was no excuse for not heeding the CBDT circulars which clarified the legal position. According to Mr. Singh, there was no perversity in the impugned order of the ITAT that called for interference. He submitted that in any event the scope of interference in

penalty proceedings was limited. Reference was made to the decisions in *CIT v. Mitsui & Co. Ltd. (2005) 272 ITR 545 (Del)* and *Azadi Bachao Andolan v. Union of India (2001) 252 ITR 471 (Del)*.

Discussion and Reasons

33. Under Section 273-B of the Act, no penalty under Section 271-C of the Act "shall be imposable on the person or the assessee, as the case may be, for any failure referred to in the said provision if he proves that there was reasonable cause for the said failure." A perusal of the impugned orders of the CIT(A) and the ITAT in the penalty proceedings reveals that neither of the said authorities considered the issue whether in fact there was reasonable cause for the Appellant to not have deducted TDS under Section 194-I of the Act. The ITAT on its part appears to have relied on the order passed by it on 12th July 2002 in the quantum proceedings, where it commented on the lack of *bona fide* plea/reasonable cause for the Appellant to deduct TDS under Section 194-C of the Act. This part of the order of the ITAT was in fact commented upon by this Court in its order dated 21st May 2004 while declining to frame a question of law in the appeal filed by the Assessee. The Court, however, clarified that the observations of the ITAT relating to bona fide belief/reasonable cause was of no consequence.

34. The Court is unable to agree with the submission of Mr. Singh that the Assessee could not plead ignorance of law in view of the CBDT Circulars dated 8th August and 22nd August 1995. The CBDT's circulars were at best the opinion of the CBDT and to the extent they were adverse to the Appellant, they were not binding on the Appellant. However, they were

binding on the Revenue. As far as the Appellant was concerned, it was entitled to challenge the CBDT's circulars which did not support its case. In fact that is what the Appellant did in the present case. It questioned the order of the AO under Section 201(1) and 201(1A) of the Act before the CIT(A), then before the ITAT and ultimately this Court. Therefore, it cannot be said that there was a deliberate failure on the part of the Appellant to deduct the TDS under Section 194-I of the Act.

35. The facts remains that at the stage when the TDS had to be deducted the question whether TDS had to be deducted under Section 194-C or 194-I of the Act was not a settled one. This explains why the CBDT itself had to issue circulars clarifying the position. Even this Court was persuaded to again frame a question on the issue in its order dated 5th September 2005.

36. For all of the above reasons, the Court is inclined to accept the plea of the Appellant that since the issue whether the TDS was to be deducted from warehouse charges under Section 194-C or 194-I of the Act was a debatable one, there was a reasonable cause for the failure of the Appellant to deduct TDS under Section 194-I of the Act at the time such deduction had to be made.

37. The Court accordingly answers the question that has been re-framed in the affirmative i.e. in favour of the Appellant and against the Revenue.

38. In view of the finding that there was a reasonable cause for the failure by the Appellant to deduct TDS under Section 194-I of the Act, the penalty imposed upon the Appellant under Section 271-C of the Act by the AO by

order dated 31st October 2001 is hereby set aside. The further orders dated 1st February 2002 of the CIT (A) and 24th March 2004 of the ITAT upholding the above penalty are also hereby set aside.

39. The appeal is allowed in the above terms, but in the circumstances, with no orders as to costs.

S. MURALIDHAR, J

NAJMI WAZIRI, J

AUGUST 01, 2016

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