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

[Before Hon'ble Shri Aby. T. Varkey, JM & Shri M.Balaganesh, AM]

I.T.A No. 1107/Kol/2014

Assessment Years : 2009-10

M/s Peerless Hospitex Hospital and Research Centre Ltd. -vs- ITO, Ward-11(1), Kolkata
[PAN: AABCP 7225 L]
(Appellant) (Respondent)

For the Appellant : Shri S.K. Tulsiyan, Adv. (AR)

For the Respondent : Shri P. K. Srihari, CIT(DR)

Date of Hearing : 04.07.2018

Date of Pronouncement : 11.07.2018

ORDER

Per M.Balaganesh, AM

1. This appeal by the Assessee arises out of the order of the Learned Commissioner of Income Tax(Appeals)-XII, Kolkata [in short the ld CIT(A)] in Appeal No. 370/XII/11(1)/11-12 dated 04.03.2014 against the order passed by the ITO, Ward-11(1), Kolkata [in short the ld AO] under section 143(3) of the Income Tax Act, 1961 (in short "the Act") dated 28.12.2011 for the Assessment Year 2009-10.

2. The only issue to be decided in this appeal is as to whether the ld CITA was justified in upholding the disallowance u/s 40(a)(ia) of the Act in the facts and circumstances of the case.

3. The brief facts of this issue are that the assessee company is running a hospital and providing treatment to the patients. The assessee company filed its return of income for the Asst Year 2009-10 on 23.9.2009 declaring Nil income. In the same hospital building, M/s National Neuroscience Centre (NNC) also runs a Neuro related clinic. As such , both these organizations are sharing space in the same hospital building owned by the assessee. NNC is a charitable trust registered u/s 12AA of the act. The assessee admits patients fro general ailments in its hospital but occasionally if they require services of Neuro doctors/ surgeons, they are referred to NNC and NNC raises bill on the assessee company. On the other hands, patients of NNC are also admitted in the assessee hospital and as and when these patients require diagnostic investigation or general ailment treatment, they are referred to the doctors of the assessee hospital. Both these organizations referred their patients to each other as and when necessary. Further, since NNC is using the space in the hospital building owned by the assessee, proportionate utility charges are charged by the assessee company on NNC. The bills raised by them on each other were thereafter adjusted and the net amount was paid / payable to the creditor. The position of bills raised by these organizations on each other during the relevant year was as follows:-

Total bills raised by the assessee on NNC (A)	4,01,62,166
Less: Total bills raised by NNC on the assessee (B)	2,70,28,307
Difference (A) – (B)	1,31,33,859
Less: Share of common facility charges	6,00,000
Net amount receivable by the assessee from NNC	1,25,23,682

4. A sum of Rs 1,25,23,682/- was payable by NNC to the assessee. The ld AO noted that the assessee has made payment of Rs 1,25,23,682/- to NNC on account of service / consultancy charges on which tax was not deducted. Accordingly the same was disallowed u/s 40(a)(ia) of the Act. When this anamoly was pointed out by the

assessee before the ld CITA, a remand report was called for from the ld AO. In the remand report, the ld AO submitted that the total claim of NNC on the assessee company was Rs 2,70,28,307/- and therefore the entire sum of Rs 2,70,28,307/- should have been disallowed. Accordingly, the ld CITA issued an enhancement notice to the assessee for disallowing Rs 2,70,28,307/-. In response thereto, the assessee submitted that NNC had filed its return of income for the Asst Year 2009-10 showing Nil icnome and assessment u/s 143(3) of the Act was framed in their hands on 14.12.2011 accepting the income returned by them in the return of income. Accordingly, by placing reliance on the decision of the Hon'ble Supreme Court in the case of Hindustan Coca Cola Beverages (P Ltd vs CIT reported in 293 ITR 226 (SC) , wherein it was held that where the payee had already paid tax on the income on which there was a short-deduction of tax at source, recovery of tax cannot be made once again from the tax deductor. The assessee also submitted a copy of the certificate u/s 197(1) of the Act issued by DCIT (TDS), Circle – 58 , Kolkata in respect of NNC for the financial year 2008-09 relevant to Asst Year 2009-10 wherein the assessee was authorized to make payments to NNC subject to the limit of Rs 90,00,000/- without deduction of tax at source. The ld CITA erroneously considered the said limit at Rs 1,00,00,000/- and observed that the assessee had actually incurred expenditure of Rs 2,70,28,307/- towards NNC and accordingly a sum of Rs 1,70,28,307/- had to be considered for disallowance u/s 40(a)(ia) of the Act as the same was not subject matter of nil deduction certificate issued u/s 197(1) of the Act. Based on these observations, the ld CITA enhanced the disallowance to Rs 1,70,28,307/-.Aggrieved, the assessee is in appeal before us .

5. We have heard the rival submissions. We find that the assessee had made certain payments to NNC without deduction of tax at source. It is not in dispute that the certificate u/s 197(1) of the Act has been obtained for NNC from DCIT(TDS), Kolkata upto a maximum amount of Rs 90,00,000/- but whereas the assessee had made

payments above Rs 90,00,000/- to NNC. It is not in dispute that NNC had duly reflected the subject mentioned transaction of Rs 2.70 crores in its accounts and included the same in the return of income filed by it. It is not in dispute that NNC is a charitable organization registered u/s 12AA of the Act and claiming exemption u/s 11 of the Act. From the perusal of the assessment order passed in the hands of NNC u/s 143(3) of the Act for the Asst Year 2009-10 dated 14.12.2011 which is enclosed in pages 50 to 51 of the paper book filed by us, we find that the ld AO had accepted the claim of exemption u/s 11 of the Act and accordingly there is no tax liability in the hands of NNC. We find that the issue under dispute before us is squarely covered in favour of the assessee by the decision of this tribunal in the case of *Haldia Petrochemicals Ltd vs DCIT reported in (2016) 72 taxmann.com 338 (Kolkata- Trib.) dated 3.8.2016* which was authored by the undersigned. In the said case, it was held as under:-

> ***6.*** *We have heard the rival submissions and perused the materials available on record including the paper book filed by the assessee. The ld AR argued that there was no liability to deduct tax at source on the payments made to its subsidiary company in as much as the subsidiary company had incurred huge losses which is quite evident from the Assessment order of the subsidiary company i.e. M/s Haldia Riverside Estates Ltd u/s 143(3) dated 22.12.2006 for the Asst Year 2004-05. From the said order it could be seen that there would be no resultant tax payable by the subsidiary company. In response to this, the ld DR vehemently supported the orders of the lower authorities. We find that the TDS provisions mandates deduction of tax at source on the payments made by assessee to parties if it falls within the deductible limits prescribed u/s 194I of the Act. The purpose of TDS is to ensure that the Government is not deprived of its due taxes in time. Moreover, recovery of taxes through TDS is one of the tax collection mechanism formulated by the Government. If the payer (assessee herein) fails to deduct tax at source in respect of certain eligible payments , then the payer assessee could be treated as 'assessee in default' and the said tax could be recovered from the payer assessee on behalf of the payee. But in the instant case, there is no resultant tax liability in the hands of the payee due to huge losses. In such circumstances, normally it is expected that the payee should approach the TDS officer by preferring an application in Form No. 13 seeking for lower / nil deduction certificate u/s 197(1) of the Act. In the instant case, section 197(1) certificate has been obtained by the payee only from 1.7.2003 wherein the deductors have been directed to deduct 1% TDS on payments made to payees in respect of payments not exceeding Rs. 409.34 lakhs and hence the ld AO held that the assessee had violated the TDS provisions in respect of payments made upto 30.6.03 and for payments made in excess of Rs. 409.34 lakhs, tax at the rate of*

20% should have been deducted. We hold that mere failure to obtain section 197(1) certificate by the payee for the entire payments and for the entire period would not automatically cast a TDS obligation on the payer and make the payer 'assessee in default' when it is certain from the records in the form of assessment order of the payee that there is no resultant tax liability for the payee.

6.1. *We find that as per section 201 of the Act, the payer assessee could be treated as 'assessee in default' only when there is some tax due to be paid to the exchequer on account of this subject mentioned transaction. It is not in dispute that the payee (subsidiary company) had duly reflected the payments made by the payer (assessee) in its returns and even after that inclusion, the net result is only a loss resulting in nil tax liability. Hence it could be safely concluded that there is no tax that is effectively due to be paid to the Government. Hence the assessee could not be treated as 'assessee in default' in the facts and circumstances of the case. We find that the interest charged in terms of section 201(1A) of the Act is only compensatory in nature and is collected from the payer by treating the payer assessee as 'assessee in default' for depriving the Government of its legitimate dues. We find that this interest is to be calculated from the due date of deduction/payment of expenses warranting TDS till the date of deduction/ payment, as the case may be, at the respective interest rates. Admittedly, this interest is calculated on the tax that is due to be paid. When there is no tax due to be paid , then there cannot be any charging of interest u/s 201(1A) of the Act. We find that section 201(1A) of the Act specifies interest has to be paid "on the amount of such tax" as per section 201(1) of the Act. Such tax specified in section 201(1) of the Act should admittedly be 'tax due to the Government'. As already held that there is no tax due to the Government from the side of the payee (subsidiary company) in view of subsisting losses, the existence of a primary liability of tax payments from the side of the payee is conspicuously absent in the instant case. The revenue had not controverted the fact that the subsidiary company does not have any tax liability pursuant to the assessment framed on it by the income tax department u/s 143(3) of the Act which is also part of the paper book filed by the assessee.*

6.2. *The primary conditions to be satisfied before treating the payer assessee as 'assessee in default' are as below:—*

(a) *There should be a payment made by the payer assessee to the payee which would be treated as income in the hands of the payee.*

In the instant case, the payee had duly shown the amounts received from the payer assessee as its income in its returns.

(b) *The payment made by the payer should fall within the eligible payments warranting deduction of tax at source.*

In the instant case, certain payments definitely fall within the ambit of eligible payments warranting deduction of tax at source but the same has not been fully complied by the payer. In fact the assessee had deducted tax at source and remitted the same to the Central Government for part of the period and for part of the

amounts as stated in the assessment order.

(c) The payee has not paid the taxes on the amounts received from the payer.

In the instant case, the question of payment of tax does not arise in view of subsisting losses of the payee.

(d) The department is not able to recover the taxes due from the payee thereby shifting the onus on the payer by treating the payer as 'assessee in default'.

Hence, the payer assessee could be treated as 'assessee in default' only when there is some tax that is legitimately due to the Government which the department is not able to recover from the payee, and then the payer could be proceeded with for remitting the said tax by treating him as 'assessee in default'.

6.3. *We find that the reliance has been placed by the ld AR on the provisions of section 191 of the Act. For the sake of convenience, the Explanation to said provisions is reproduced below:—*

"191. In the case of income in respect of which provision is not made under this Chapter for deducting income-tax at the time of payment, and in any case where income-tax has not been deducted in accordance with the provisions of this Chapter, income-tax shall be payable by the assessee direct.

[Explanation.—For the removal of doubts, it is hereby declared that if 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 after so deducting fails to pay, or does not pay, the whole or any part of the tax, as required by or under this Act, and where the assessee has also failed to pay such tax directly, then, such person shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default within the meaning of sub-section (1) of section 201, in respect of such tax.]"

Hence, it could be safely concluded from the aforesaid reading of the provisions of section 191 of the Act, that it is only when tax is not paid both by the deductor and the deductee, that the deductor be treated as assessee in default and he shall remain so until the tax is paid either by him or by the deductee. In the instant case, where there was no tax at all payable at any point in time , then the assessee deductor cannot be treated as 'assessee in default' for any period whatsoever and consequently interest u/s 201(1A) of the Act cannot be computed on the assessee. The computation mechanism itself fails in the instant case.

6.4. *We find that the Co-ordinate Bench of this tribunal in the case of Ramakrishna Vedanta Math v. ITO [2012] 24 taxmann.com 29/[2013] 55 SOT 417 (Kol) wherein it was held that :—*

8. The plea is indeed well taken. Learned Counsel is quite right in his submission that, as a result, of the judgement of the Hon'ble Allahabad High Court in Jagran Prakashan Ltd. v. DCIT [2012] 21 taxmann.com 489 (All) and in the absence of anything contrary thereto from Hon'ble Jurisdictional High Court , there is a paradigm shift in the manner in which recovery provisions under section 201(1) can be invoked. As observed by Their Lordships, the provisions of section 201(1) cannot be invoked and the ' tax deductor cannot be treated an assessee in default till it is found that assessee has also failed to pay such tax directly'. Once this finding about the non payment of taxes by the recipient is held to a condition precedent to invoking section 201(1), the onus is on the Assessing Officer to demonstrate that the condition is satisfied. No doubt the assessee has to submit all such information about the recipient as he is obliged to maintain under the law, once this information is submitted, it is for the Assessing Officer to ascertain whether or not the taxes have been paid by the recipient of income. This approach, in our humble understanding, is in consonance with the law laid down by the Hon'ble Allahabad High Court.

9. It is important to bear in mind that the lapse on account of non deduction of tax at source is to be visited with three different consequences - penal provisions, interest provisions and recovery provisions. The penal provisions in respect of such a lapse are set out in section 271C. So far as penal provisions are concerned, the penalty is for lapse on the part of the assessee and it has nothing to do with whether or not the taxes were ultimately recovered through other means. The provisions regarding interest in delay in depositing the taxes are set out in section 201(1A) . These provisions provide that for any delay in recovery of such taxes is to be compensated by the levy of interest. As far as recovery provisions are concerned, these provisions are set out in section 201(1) which seeks to make good any loss to revenue on account of lapse by the assessee tax deductor. However, the question of making good the loss of revenue arises only when there is indeed a loss of revenue and the loss of revenue can be there only when recipient of income has not paid tax. Therefore, recovery provisions under section 201(1) can be invoked only when loss to revenue is established, and that can only be established when it is demonstrated that the recipient of income has not paid due taxes thereon. In the absence of the statutory powers to requisition any information from the recipient of income, the assessee is indeed not always able to obtain the same. The provisions to make good the shortfall in collection of taxes may thus end up being invoked even when there is no shortfall in fact. On the other hand, once assessee furnishes the requisite basic information, the Assessing Officer can very well ascertain the related facts about payment of taxes on income of the recipient directly from the recipients of income. It is not the revenue's case before us that , on the facts of this case, such an exercise by the Assessing Officer is not possible. It does put an additional burden on the Assessing Officer before he can invoke section 201(1) but that's how Hon'ble High Court has visualized the scheme of Act and that's how , therefore, it meets the end of justice."

In the instant case, it is proved beyond doubt that the deductee does not have any liability to pay tax as could be evident from the scrutiny assessment order u/s 143(3) of the Act for

the Asst Year 2004-05 enclosed in pages 50 to 52 of the paper book. This fact was also placed by the assessee before the ld AO and he had also noted the same in the assessment order.

6.5. *We hold in the instant case, there is no tax due to the exchequer and accordingly there is no question of compensating the same by way of interest. We find that this aspect is also dealt by the Hon'ble Supreme Court in the case of CIT v. Eli Lilly & Co. (India) (P.) Ltd. [2009] 312 ITR 225/178 Taxman 505, wherein it was held as below:—*

> *"34. From the above analyses two conclusions flow. Firstly, it cannot be stated as a broad proposition that the TDS provisions which are in the nature of machinery provisions to enable collection and recovery of tax are independent of the charging provisions which determine the assessability in the hands of the employee-assessee. Secondly, whether the home salary payment made by the foreign company in foreign currency abroad can be held to be " deemed to accrue or arise in India" would depend upon the indepth examination of the facts in each case. If the home salary/special allowance payment made by the foreign company abroad is for rendition of services in India and if as in the present case of M/s. Eli Lilly and Company (India) Pvt. Ltd. no work was found to have been performed for M/s. Eli Lilly Inc., Netherlands, then such payment would certainly come under section 192(1) read with section 9(1)(ii). As stated above, the post-survey operations revealed that no work stood performed for the foreign company by the four expatriates to the joint venture company in India and that the total remuneration paid was only for services rendered in India. In such a case the tax-deductor-assessee was statutorily obliged to deduct tax under section 192(1) of the 1961 Act.*
>
> *(iii) On the scope of section 201(1) and section 201(1A)....."*

5.1. In view of the aforesaid findings in the facts and circumstances of the case and by respectfully following the aforesaid judicial precedent, we direct that no disallowance u/s 40(a)(ia) of the Act is warranted in the instant case. We also find that the assessee had brought evidence on record to prove that NNC had also duly reflected the subject mentioned transaction in its returns and had claimed exemption u/s 11 of the Act for the same, which has been granted by its AO in assessment framed u/s 143(3) of the Act. Hence in any case, the second proviso to section 40(a)(ia) of the Act would come to the rescue of the assessee. This proviso has been held to be retrospective in operation by the decision of the Hon'ble Delhi High Court in the case of Ansal Land Mark Township P Ltd reported in 377 ITR 635 (Del). Hence in any case, no disallowance u/s 40(a)(ia)

of the Act could be inflicted in the hands of the assessee payer. Accordingly, the grounds raised by the assessee are allowed.

6. In the result, the appeal of the assessee is allowed.

Order pronounced in the Court on 11.07.2018

Sd/-	Sd/-
[A.T. Varkey]	[M.Balaganesh]
Judicial Member	Accountant Member

Dated : 11 .07.2018

SB, Sr. PS

Copy of the order forwarded to:
1. M/s Peerless Hospitex Hospital & Research Centre Ltd., 360, Pancha Sayar, Kolkata-700084.
2. ITO, Ward-11(1), Kolkata, P-7, Chowringhee Square, Kolkata-700069.
3. C.I.T(A)- 4. C.I.T.- Kolkata.
5. CIT(DR), Kolkata Benches, Kolkata.

True copy

By Order

Senior Private Secretary
Head of Office/D.D.O., ITAT, Kolkata Benches