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

\+ **ITA Nos.1397/2008, 1398/2008 and 429/2009**

% **Date of Decision : 28th March, 2011**

THE COMMISSIONER OF INCOME TAX-XVII
AAYAKAR BHAWAN, DISTT. CENTRE,
LAXMI NAGAR,
DELHI **... APPELLANT**

Through : Ms. Rashmi Chopra, Advocate.

Versus

CADBURY INDIA LIMITED,
NORTHERN REGION OFFICE,
C-2, GREEN PARK EXTENSION,
NEW DELHI

... RESPONDENT

Through : Mr. Satyen Sethi and Mr. Arta Trana Panda, Advocates.

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MR. JUSTICE M.L.MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? YES
2. To be referred to Reporter or not? YES
3. Whether the judgment should be reported in the Digest? YES

M.L. MEHTA, J. (ORAL)

1. These three appeals are directed against a common order dated 31st January, 2008 of the Income Tax Appellate Tribunal

(hereinafter, in short referred to as 'ITAT'). Since the facts and issues involved in all these appeals are identical, therefore, we propose to dispose these vide a common order.

2. These appeals arise out of the assessment years 2002-03 (ITA No. 429/2009), 2003-04 (ITA No. 1397/2008) and 2004-05 (ITA No. 1398/2008). The assessee herein is engaged in the business of manufacture and sale of Chocolates, Bournvita, etc. A spot verification under Section 133A of the Income Tax Act (hereinafter, in short referred to as 'the Act') on the premises of the assessee was conducted, which revealed that the assessee had engaged ten Clearing & Forwarding Agents (hereinafter, in short referred to as 'CFA') and was paying rent for the usage of space in warehouse and deducting tax at source under Section 194C of the Act. The assessee was also deducting TDS @2% under Section 194C of the Act on remuneration and reimbursement of expenses and was not deducting any TDS on the payments being made for supply of pilots to the manpower supplying agencies. The Assessing Officer during the course of assessment proceedings in the assessment years held that the assessee was wrongly deducting tax at source under Section 194C of the Act on payment of rent and CFAs remuneration, whereas deduction

was to be made under Section 194I and 194J of the Act, respectively. The Assessing Officer further held that payments made to outside agencies supplying manpower was liable for tax deduction at source @ 2% especially when the assessee itself was deducting the same in this manner with effect from 1st April, 2003. The Assessing Officer held the assessee to be in default under Section 201(1) and 201 (1A) of the Act. A consolidated order in this regard was passed by the Assessing Officer for all the three assessment years whereby the Assessing Officer raised a demand of ₹26,25,828/-. Penalty proceedings were initiated under Section 271C of the Act and consequently penalty of ₹19,72,384/- was levied. The assessee preferred second appeal before the CIT(A) which came to be dismissed. The CIT(A) while dismissing the appeals recorded as under:-

> "4.4. In my opinion the assessee was well aware of its obligation under the various provisions of TDS and has not been able to furnish reasonable explanation as to why the TDS was not made at the prescribed rates. One of the explanations given is that the same was done on the advice of the Professional Advisors being CA, Advocate, etc. However, inspite of specific repeated requests, copy of such opinion was not placed on record. This compels me to infer that this is a misstatement made by the assessee.
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> 4.5. Further, the provision of 194I, 194J and 194C are quite clear and leave no ambiguity. Nor

was there any doubt in the mind of the assessee. The default was a conscious decision to deduct Tax at Source at a lower rate / not deduct Tax at Source at all. And since it was not bonafide, the assessee has to account for the consequences.

3. The CIT(A) referred to various judgments of different High Courts and that of the Supreme Court and dealt with the arguments of both the parties in detail. While allowing the appeal of the assessee, the CIT(A) reasoned as under:-

> "Now the question arises whether the assessee was really under a bonafide belief. There is no dispute to the fact that the assessee was deducting tax u/s 194 C of the Act. If the intention of the assessee would have been different, naturally nothing prevented him even to deduct under the aforementioned section. However, it may be good ground for addition but here we are dealing with the penalty, which is penal in nature, therefore, it should be construed strictly. At the same time, the assessee was deducting as per professional advice. The scope of expression reasonable cause has been deliberated upon by the Hon'ble Madras High Court in the case of Kalakriti vs ITO (2002) 253 ITR 754 (Madras). Since the assessee was deducting under the advice of the Chartered Accountant, therefore, we are of the view, that there is a reasonable cause for such belief, therefore, the penalty is not exigible. Even if this issue is analysed with the angle of levy of penalty due to difference of opinion, still the assessee is having a good case. For this proposition reliance can be placed in the case of ACIT vs Air Canada (88 ITD 545) (Del) wherein the assessee were carrying on their flight operation from various parts of world, entered into an agreement with hotels, whereunder it was agreed that crew

accompanying flights, arriving in India would be accommodated in hotels. While making payment to hotel, assessee did not deduct TDS u/s 194-I. In response to the show cause notice, the assessee claimed that there was a confusion in definition and its applicability of the provisions of 194-I, which was later on clarified by circular No. 715 dated 8.8.95 issued by CBDT. The assessing officer, however, levied penalty u/s 271-C. On appeal it was held that there was a sufficient cause of such short deduction of tax. This view of the ld appellate Commissioner was affirmed by the Tribunal. In the present appeal also the penalty was levied due to difference of opinion. During arguments, plea was also raised on behalf of the revenue, that the quantum appeal has become final and no appeal has been preferred by the assessee, therefore, penalty be also affirmed. We are of the view that quantum and penalty proceedings are altogether different and since penalty proceedings are penal in nature, it should be construed strictly. Circular No. 715 dated 8th Aug 1995, Circular No. 718 dt 22.8.95 and Circular No. 720 dt 30.8.95, issued by CBDT, are very much clear.

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Even otherwise for imposition of penalty, the general presumption is that definite finding about concealment is necessary. The Hon'ble Punjab & Haryana High Court in the case of Hari Gopal Singh vs CIT (258 ITR 85) clearly held that penalty cannot be levied when income has been estimated. The identical ratio will be applicable that no penalty may be imposed when there is a difference of opinion. Even the Hon'ble Apex Court in the case of Anwar Ali (76 ITR 696) (SC) clearly held that finding in the assessment proceedings are not conclusive, therefore, the argument of the ld DR that quantum proceedings has become final, itself is not a good ground for imposition of penalty unless and until any material is brought on record by the revenue to the effect that the assessee deliberately defied the provisions of law. Therefore, keeping in view the totality of facts, circumstances and the judicial

pronouncements, we delete the impugned penalty. Therefore, these appeals of the assessee are allowed"

4. Against the order of the CIT(A), assessee preferred second appeal before the ITAT which came to be allowed. The present appeals are filed by the revenue in the penalty proceedings wherein the impugned order came to be passed by the Tribunal as noted above. So far as the facts of the case are concerned, there is no dispute that the composite agreement was made by the assessee with CFAs for storage, leading, unloading, clearing, forwarding and supply of manpower for the jobs as per requirement of the assessee. There is also no dispute that the assessee had been consistently following the practice of deducting TDS under Section 194C. There is also no dispute that the deductions were required to be made by the assessee under Section 194I and 194J for the payments being made by the assessee under different heads to the CFAs. The learned counsel for the assessee submitted that deductions were being made by the assessee in a consolidated form under Section 194C on the professional advice of the Chartered Accountant etc. On this premise it was submitted that it was under the misconceived professional advice and due to *bona fide* belief thereon by the

employees of the assessee that the TDS was being deducted under Section 194C for all counts from the payments being made to the CFAs. On the other hand, leaned counsel for the Revenue submitted that in the quantum proceedings the assessments have been accepted by the assessee for all these years and the same having become final, the assessee was liable to pay the penalty imposed by the Assessing Officer.

5. With regard to the contention of learned counsel for the Revenue regarding quantum proceedings having become final, it may be noted, that the same was also raised before the Tribunal who dealt with the same relying upon the case of Apex Court in **Anwar Ali** (76 ITR 696) (SC) wherein it was held that since the findings in the assessment proceedings are not conclusive, therefore, that itself is not a good ground for imposition of penalty unless and until any material is brought on record by the Revenue to the effect that the assessee deliberately defied the provision of the law. For the submission of reasonable cause for deducting TDS under Section 194C and not under 194I and 194J, learned counsel for the assessee relied upon the judgments, namely, ***National Panasonic India (P) Ltd. v. DCIT*** (2005) ***3 SOT (Del), Woodward Governor India P. Ltd v. CIT*** (2002) 253 ITR

745 (Del), ***CIT v. Itochu Corporation*** (2004) 268 ITR 172 (Del), ***CIT v. Lurgi Oil Gas Chemie Gmb*** (2004) 141 Taxman 348 (Del), ***CIT v. NHK Japan Broadcasting Corp***., (2006) 284 ITR 357 (Del) ***CIT v. Japan Radio Co. Ltd.*** (2006) 286 ITR 682 (Del) and ***OMEC Engineers v. CIT*** (2007) 294 ITR 599 (Jharkhand).

6. We need not to refer to all the aforecited judgments since the ratio in all of them is similar. However, we may refer to the decision of ***Woodward*** (supra) of the Division Bench of our High Court, wherein the words and phrases 'reasonable cause' in Section 273B of the Act which provides the provision of imposition of penalty in certain cases came to be explained. It was held as under:-

> "Levy of penalty under section 271C is not automatic. Before levying penalty, the concerned officer is required to find out that even if there was any failure referred to in the concerned provision the same was without a reasonable cause. The initial burden is on the assessed to show that there existed reasonable cause which was the reason for the failure referred to in the concerned provision. Thereafter the officer dealing with the matter has to consider whether the Explanationn offered by the assessee or the person, as the case may be, as regards the reason for failure, was on account of reasonable cause. "Reasonable cause" as applied to human action is that which would constrain a person of average intelligence and ordinary prudence. It can be described as a probable cause. It means an honest belief founded upon reasonable grounds,

> of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, the prescribed consequences will follow."

7. It is also a settled law that what would constitute reasonable cause cannot be laid down with precision and that the question as to whether there was reasonable cause or not for the assessee not to deduct tax at source at all or under some particular provision than prescribed was a question of fact which had to be seen in the facts and circumstances of each case.

8. In view of the above principles of law, we see that the assessee had been deducting tax from the payments payable to CFA under Section 194C on a consolidated basis towards different heads. There is no reason to disbelieve the assessee that the same was being done by its employees on misconceived professional advice given by the Chartered Accountants. Since the payment were to be deducted from CFA no benefit was to be derived by the assessee for making lesser or inaccurate deductions. No malafide intention of any kind can be attributed to the assessee for deducting tax under

one provision of law than the other. This was neither the case of malafide intention nor that of negligent intention or want of bonafide, but a case of misconceived belief of applicability of one provision of law. We cannot say judiciously that the assessee has failed to comply with the provision of Section 194I and 194J of the Act without reasonable cause.

9. For all these reasons, we are in entire agreement with the findings as recorded by the Tribunal and since there is no substantial question of law involved, the present appeals are dismissed.

10. Ordered accordingly.

M.L.MEHTA
(JUDGE)

A.K. SIKRI
(JUDGE)

MARCH 28, 2011
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