

**IN THE INCOME TAX APELALTER TIBUNAL
COCHIN BENCH, COCHIN**

BEFORE S/SHRI N.R.S. GANESAN, JM & B. R. BASKARAN, AM

**ITA No.165/Coch/2012
(Asst Year 2005-06)**

Agreenco Fibre Foam (P) Ltd P B NO. 3622 Baliapattam Kannur	Vs	The Income Tax Officer (TDS), Kannur
(Appellant)		(Respondent)

PAN No.	AAECA 5986G
Assessee By	Shri U Mohanan
Revenue By	Smt Susan George Sr DR & Shri M Anil Kumar, CIT
Date of Hearing	6 th June 2013
Date of pronouncement	16 th , Aug 2013

ORDER

PER B.R. BASKARAN, AM:

The appeal filed by the assessee is directed against the order dated 19.4.2012 passed by the Id CIT(A)-III, Kochi and it relates to the AY 2005-06. The assessee is challenging the decision of the Id CIT(A) in confirming the demand raised u/s 201 and interest charged u/s 201(1A) of the I T Act.

2 The facts relating to the issue are stated in brief: The assessee is a Private Limited company. The AO noticed that the assessee had credited interest to the following sister concerns during the year under consideration without deducting tax at source u/s 194A of the Act, the details of which are below:

Sl.,No	Name of the party	Interest credited	Tax deductible
1	Agreenco Rubber Technology P Ltd	1443077	3,01,750
2	Agreenco Videsh (P) Ltd	3523950	7,36,860
3	Agreen Hashco	559057	1,16,900
4	Agreenco soiety	366446	38,310
	Total		11,93,820

Hence, the AO treated the assessee as an 'assessee in default' and raised demand u/s 201 of the Act equal to the amount of tax deductible at source, referred above. The AO has also levied interest u/s 201(1A) of the Act to the tune of Rs. 7,16,290/-. Aggrieved, the assessee carried the matter in appeal before the Id CIT(A), but could not succeed. Hence, the assessee has filed the present appeal before us.

3 The Id counsel for the assessee submitted that all the persons to whom interest was payable are liable to pay tax under the Income Tax Act. He further submitted that the assessee herein cannot be treated as an assessee in default, if the payees have directly paid tax on the above said interest income. In this regard, the Id AR relied on the following decisions:

- 1) Hindustan Coca Cola Beverage P. Ltd. v. CIT -293 ITR 226 (SC)
- 2) CIT vs Adidas (I) Marketing P Ltd (288 ITR 376 (Del)
- 3) Vodafone Essar Ltd vs DCIT (135 TTJ 385 (ITAT Mum)

3.1 The Id AR further submitted that the AO is not entitled to pass any order u/s 201/201(1A) of the act, if no action is initiated under the provisions of the Act in the hands of the payees, who are otherwise liable to pay tax under the I T Act and the time limit for making the assessment u/s 147 has already expired. For this proposition, the Id AR relied the decision of the Mumbai Special Bench in the case of Mahindra & Mahindra Ltd vs DCIT (313 ITR (AT) 263) and also the decision of the Mumbai Benches in the case of Crompton Greaves Ltd vs DCIT 149 TTJ 484. The Id AR further submitted that the assessee has not claimed the above stated interest amount as expenditure in the return of income filed. Since there is no claim under the I T Act, the Id AR contended that the proceedings u/s 201/201(1A) cannot not be initiated against the assessee. For this proposition, he has placed reliance on the decision of the

Mumbai Benches in the case of Pfizer Ltd in ITA No.1667/1765/Mum/2010 order dated 31.10.2012.

4 On the contrary, the Id DR submitted that the assessee has provided the interest amount in its books of account and hence the assessee is liable to deduct tax at source u/s 194A of the Act immediately upon crediting the interest amount to the account of either payee or Suspense Account, if any. Hence, the failure on the part of the assessee to claim the same as expenditure in the return of income, will not exonerate the assessee from TDS liability. Elaborating further the Id DR submitted that the capital expenditure incurred by any assessee will not be claimed as deduction from the total income, but still the assessee would be liable to deduct tax at source from the capital expenditure, if such payments are liable for deduction of tax at source. The Id DR submitted that the assessee here in has accounted for the liability to pay interest in its books of account and hence, it is liable to deduct tax at source u/s 194A of the Act. The Ld D.R submitted that there is no dispute that the payees of interest amount are liable to pay tax under the I T act and hence, the decision rendered in the case of Mahindra & Mahindra (referred supra) is not applicable to the facts of the present case.

5. We have heard the rival contentions and perused the record. Admittedly, the assessee has accounted for the interest liability, which is detailed in the table extracted in paragraph 2 supra, in its books of account. Admittedly, the assessee did not deduct tax at source from the interest amounts so credited. According to Ld A.R, the assessee did not claim the interest amounts, referred supra, as expenditure. Accordingly, it was submitted that the AO was not correct in initiating proceedings u/s 201/201(1A) of the Act and for that proposition, the Ld A.R

placed reliance on the decision rendered by the Mumbai bench of Tribunal in the case of Pfizer Ltd (supra).

5.1 We have carefully considered the decision rendered in the case of Pfizer Ltd (supra). We notice that the assessee therein was having branches at multifarious locations and innumerable transactions and hence it was following the practice of making provision for expenses at the end of the year. The obvious reason was that it could not receive all the bills by the time accounts are finalized. The adhoc provision so made was reversed in the succeeding year, in which the actual expenses were booked under specific heads and the TDS compliance was also made at that point of time. The contention of the assessee was that it did not know the details of payee at the time of making provision for expenses. It was further submitted that the provision so made was disallowed by the assessee itself while computing the total income in terms of sec. 40(a)(ia) of the Act. The Tribunal examined the accounting entries passed by the said assessee and accordingly held that, in the absence of identifiable payee, the provisions of TDS are not applicable and in this regard, it followed the decision rendered by the co-ordinate bench in the case of IDBI Vs. ITO (107 ITD 45)(Mum). Having held so, the Tribunal has expressed the view that the AO should not have subjected the assessee to the provisions of TDS u/s 201 of the Act, since the assessee had disallowed the said expenses u/s 40(a)(ia) of the Act. Thus, it is seen that the Tribunal has given relief on two grounds discussed supra.

5.2 The liability to deduct tax at source on the interest payments is prescribed u/s 194A of the Act. Sub-section (1) of sec. 194A reads as under:-

194A. (1) *Any person, not being an individual or a Hindu Undivided family, who is responsible for paying to a resident any income by way of interest other than income by way of interest on securities, shall, at the time of credit of such income to the account of*

payee or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force."

Explanation:- For the purposes of this section, where any income by way of interest as aforesaid is credited to any account, whether called "Interest payable account" or "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of payee and the provisions of this section shall apply accordingly."

A plain reading of above provision clearly shows that the person responsible to pay the interest is liable to deduct tax at source at the time of credit or payment, whichever is earlier. It is pertinent to note that the section uses the term "any income by way of interest". The interest payment may constitute expenditure in the hands of the person making the payment, while it may constitute income in the hands of the payee/recipient. Since the section uses the term "any income by way of interest", in our view, it should be viewed from the angle of the recipient/payee and not from the angle of the person making the payment. Accordingly, the accounting/tax treatment given by the payer in respect of interest paid by him may not be relevant at all for the purposes of sec. 194A of the Act. So long as the interest amount constitutes "income" in the hands of recipient, the payer shall be liable to deduct tax at source on the interest amount so paid. Accordingly, even if the payer has disallowed the expenditure u/s 40(a)(ia) of the Act or did not claim the same as expenditure at all, he shall still be liable to deduct tax at source u/s 194A of the Act on the interest amount so paid, if the said payment is liable for tax deduction at source. We notice that the Mumbai bench of Tribunal, in the case of Pfizer Ltd (supra) did not consider the express provisions contained in sec. 194A of the Act. Further we notice that the provisions of sec. 40(a)(ia) does not override the provisions of sec. 201 of the Act. We notice that provisions of sec. 40(a)(ia) do not provide for absolute disallowance as in the case of say, sec. 40A(3) of the Act. The amount disallowed u/s 40(a)(ia) in one year can be claimed as deduction in the year in which the TDS provisions are complied

with. Thus, in our view, the provisions of sec. 40(a)(ia) provide only for deferment of the allowance and it does not provide for absolute disallowance. The objective of sec. 40(a)(ia) appears to be to compel the assessee to deduct tax at source in order to claim the relevant expenditure as deduction.

5.3 Section 201 provides for treating an assessee who has failed to deduct or pay the TDS amount as an assessee in default, so that the Government is empowered to collect the said amount from him. However, it is a well settled proposition that the Government shall not be entitled to recover the said amount, if the recipient has declared the said amount as his income in the income tax return filed by him and paid the tax due thereon. Thus, it is seen that the objective of provisions of sec. 201 is only to compensate the Government for the failure of an assessee to deduct or pay the TDS amount.

5.4 Thus, it can be seen that the provisions of sec. 40(a)(ia) and sec. 201 operate on different objectives. We have already noticed that the provisions of sec. 40(a)(ia) do not override the provisions of sec. 201 of the Act. Accordingly, in our view, the assessee is liable to deduct tax at source on interest payments, even if it has not claimed the same as deduction while computing its total income, in which case the revenue is entitled to initiate proceedings u/s 201 of the Act for such failure.

6. The Ld A.R also contended that the department did not take any action in the hands of the recipient of interest and hence the proceedings initiated u/s 201 are not valid and for this proposition, the Ld A.R placed reliance on the decision of Mumbai Special Bench in the case of Mahindra and Mahindra Ltd (referred supra). We have carefully considered the said decision. The issue therein was regarding deduction of tax at source u/s 195 of the Act in respect of

payments made to a **non-resident**, which are chargeable under the provisions of the Act.

After analyzing the provisions relating to tax deduction at source, the Special bench came to the following conclusions (@ page 314 of ITR, para 70):-

"Thus the essence of the provisions of deduction of tax at source is that there is a presumption of liability of the payee to tax on the income. As discussed in an earlier paragraph that if there is no or lower liability of the payee to tax on the income so received without deduction of tax at source, then the payer cannot be treated as the assessee in default for the whole or that part of the amount as the case may be. It is therefore clear that though the duty of deduction of tax at source was there at the time of making the payment or crediting the account of payee, but its failure will not lead to adverse consequences by treating the person paying the income as the assessee in default if eventually either the payee is not liable to tax on such sum or he has already paid the tax due on the amount of income so received....

@ para 72 in page 317, it was observed as under:-

*"... Further these sections do not override section, 195, which in turn, fixes the liability on the person responsible for deducting tax at source only if the sum paid or credited to the account of the non-resident is chargeable to tax. **The question of deducting tax at source will arise only if the sum payable to the non-resident is chargeable to tax in India.** Therefore to argue that the liability to deduct tax at source is de hors the eventual liability of the non-resident and the person responsible for paying or crediting any sum can be treated as the assessee in default even without the possibility of fixing the liability to tax on the non-resident, is fallacious."*

The Special Bench then considered the facts prevailing in that case and noticed that there was no possibility of fixing any tax liability on the non-resident. Under those peculiar set of facts, the Special Bench held that the AO was not justified in initiating the proceedings u/s 201 of the Act.

6.1 In the case of Crompton Greaves Ltd (supra) also, the facts were identical with the facts prevailing in the case of Mahindra and Mahindra Ltd (supra). In the instant case, the Id A.R himself has submitted that all the recipients of interest amount are liable to tax under the Act. Hence, in our view, the assessee cannot derive support from the above said decisions.

7. The Ld A.R further submitted that the assessee herein cannot be treated as an assessee in default, if the payees have directly paid tax on the above said interest income. In this regard, the Id AR relied on the following decisions:

- 1) Hindustan Coca Cola Beverage P. Ltd. v. CIT -293 ITR 226 (SC)
- 2) CIT vs Adidas (I) Marketing P Ltd (288 ITR 376(Del)
- 3) Vodafone Essar Ltd vs DCIT (135 TTJ 385 (ITAT Mum)

We agree with the said legal proposition submitted by the Ld A.R. However, the assessee has failed to adduce any evidence to show that the recipients of interest amounts have declared the same in their income tax returns and paid tax due thereon. Hence, we are unable to apply the above said legal proposition on the facts of the instant case.

8. In view of the foregoing discussions, we do not find any infirmity in the order passed by Ld CIT(A). Accordingly, we uphold his order.

9. In the result, the appeal filed by the assessee is dismissed.

Order pronounced in the open Court on this 16th day of Aug 2013.

Sd/-	Sd/-
(N.R.S. GANESAN)	(B.R. BASKARAN)
Judicial Member	Accountant Member

Cochin: Dated 16th, Aug 2013
Raj*

Copy to:

1. Appellant
2. Respondent
3. CIT(A)
4. CIT, Kannur
5. DR
6. Guard File

By order

Assistant Registrar
ITAT, COCHIN