



IN THE INCOME TAX APPELLATE TRIBUNAL
"A" BENCH, MUMBAI
BEFORE SHRI G.S. PANNU, ACCOUNTANT MEMBER AND
SHRI SAKTIJIT DEY, JUDICIAL MEMBER

ITA no.4335/Mum./2015
(Assessment Year : 2007-08)

Smt. Aishwarya Rai Bachchan
12, La-mer, Mistry Park
Khandeshwar Temple Road
Bandra (W), Mumbai 400 050
PAN – ADLPR3537P

..... Appellant

v/s

Addl. Commissioner of Income Tax
Range-2, Mumbai

..... Respondent

Assessee by : Shri Darshan Gandhi
Revenue by : Shri Lovish Kumar

Date of Hearing – 04.03.2016

Date of Order – 30.03.2016

ORDER

PER SAKTIJIT DEY, J.M.

Aforesaid appeal by the assessee is directed against the order dated 30th March 2015, passed by the learned Commissioner (Appeals)-55, Mumbai, confirming imposition of penalty of ₹ 4,27,910, for the assessment year 2007-08.

2. Briefly stated the facts are, assessee is an individual. On the basis of information received to the effect that assessee had remitted an amount of U.S. \$ 77,500, to Ms. Simone Sheffield, resident of

U.S.A., towards reimbursement of expenses without deduction of tax under section 195 of the Act, the Assessing Officer called upon the assessee to explain why she should not be held as assessee in default under section 201(1) of the Act. As stated, in response to the said letter, it was submitted by the assessee, not only the payment was made outside India but also for services rendered outside India. Hence, the provision of section 195 is not applicable. It was further submitted, the payment made was not towards reimbursement of expenses but for maintenance of website and other allied services rendered to the assessee. The Assessing Officer, however, did not find merit in the submissions of the assessee. He was of the view that the person to whom the payment was made by the assessee was not actually a service provider but a website designer. Thus, Ms. Simone Sheffield, gets commission for designing the contents of the website of the assessee and the balance payment is forwarded to actual service provider. He also observed, assessee has taken a contradictory stand by submitting on one hand that Ms. Simone Sheffield, is resident of U.S.A. and again resorting to DTAA between India and Bulgaria to contend that remittance is not liable to tax. Further, the Assessing Officer observed, website maintenance falls within the meaning of "*fees for technical services*" as provided under section 9(1)(vii) r/w Explanation-2. Thus, on the aforesaid basis, the Assessing Officer

finally concluded that the assessee was required to deduct tax under section 195 of the Act, on the payment made to Ms. Simone Sheffield. As the assessee had not deducted tax at source, the Assessing Officer treated the assessee as an assessee in default under section 201(1) and passed an order demanding tax of ₹ 4,27,910 and interest under section 201(1A) of ₹ 34,233. Though, the assessee challenged the order passed under section 201 in appeal, , ultimately she accepted her liability before the 2nd appellate forum.

3. On the basis of order passed under section 201 / 201(A), the Assessing Officer initiated proceedings for imposition of penalty under section 271C alleging failure to deduct tax at source under section 195, by issuing a show cause notice. In response, it was submitted by the assessee that there was reasonable cause for not deducting tax at source as the assessee was under the bonafide impression that payments made to a non-resident for the services rendered outside India do not attract provisions of section 195. It was also submitted, reasons for entertaining such belief was due to the certificate issued by the Chartered Accountant stating that remittance is exempt from withholding tax at source. The Assessing Officer, after considering the submissions of the assessee and facts on record, found that the assessee before the Tribunal had accepted that she was required to deduct tax at source. Therefore, taking into consideration such

admission of the assessee Assessing Officer held that her explanation that due to a bonafide belief she failed to deduct tax at source is not acceptable. The Assessing Officer observed, once the assessee had accepted her liability under section 195, she cannot turn around and say that tax is not deductible by taking shelter under DTAA between India – U.S.A. and India Bulgaria. Assessing Officer, therefore, holding that assessee has failed to establish existence of reasonable cause for not deducting tax at source imposed penalty of ₹ 4,27,910 under section 271C. Being aggrieved of the penalty order so passed, assessee preferred appeal before the first appellate authority.

4. The learned Commissioner (Appeals) also confirmed imposition of penalty by holding that assessee having failed to deduct tax at source without any reasonable cause, was liable for penalty.

5. Learned Authorised Representative submitted, penalty under section 271C is not automatic but has to be r/w section 273B of the Act. He submitted, if the assessee shows reasonable cause for failure to deduct tax at source, penalty cannot be imposed. Learned Authorised Representative submitted, the Chartered Accountant of the assessee had issued a certificate indicating that the payment of U.S. \$ 77,500, to the non-resident would not attract the provisions of section 195 in view of Article-7 of DTAA between India-U.S.A., therefore, he

advised for non-deduction of tax at source. Referring to the said certificate of the C.A., learned Authorised Representative submitted on the basis of certificate issued by the C.A., assessee was under bonafide belief that tax was not required to be deducted at source on the remittances made to the non-resident. He submitted, that being the case there is a reasonable cause for not deducting tax at source, hence, no penalty is required to be levied. He submitted as proceedings under section 201 and 271C are two separate proceedings, merely because assessee was held liable to deduct tax under section 201, it will automatically not lead to imposition of penalty under section 271C. Learned Authorised Representative submitted, even otherwise also, the penalty order passed is barred by limitation as it is not within the time prescribed under section 275(1) of the Act. Learned Authorised Representative submitted, the order in second appeal was passed by the Tribunal on 3rd May 2012, and was served on the defendant On 13th June 2012, whereas, the Assessing Officer passed the order imposing penalty under section 271C on 21st March 2013, which is beyond the prescribed period of six months. He submitted, for this reason also, penalty order is unsustainable. In support of his submissions, learned Authorised Representative relied upon the following decisions.

- i) ADIT v/s Leighton Welspun Contractors Pvt. Ltd., [2016] 65 Taxmann.com 68 (Mum.);
- ii) CIT v/s Fourways International, [2008] 166 Taxmann.com 461 (Del.);
- iii) Royala Corporation Pvt. Ltd. v/s Union of India, [2008] 161 Taxmann.com 127 (Mad.); and
- iv) CIT v/s Mohair Investment & Trading Co. Pvt. Ltd., [2012] 18 Taxmann.com 239 (Del.).

6. The Learned Departmental Representative relied upon the order of the learned Commissioner (Appeals) and the Assessing Officer.

7. We have considered the submissions of the parties and perused the material available on record. No doubt, in the quantum proceedings before the Tribunal, the assessee has accepted her liability for deduction of tax at source, for whatever reason may be, and as a result the issue was decided against the assessee by the Tribunal by upholding the order passed under section 201(1). However, the issue before us is, merely because assessee was held liable for deduction of tax at source under section 195, whether automatically it will result in imposition of penalty under section 271C. On a careful reading of the provision as contained under section 271C, it is noticed that any person who fails to deduct tax at source, shall be liable to pay by way of penalty a sum equal to the amount of tax which he has failed to deduct. However, imposition of penalty under section 271C is subject to the condition imposed under section 273B. A

reading of section 273B of the Act suggests that where the assessee proves that the failure to deduct tax was for a reasonable cause, no penalty can be imposed. Therefore, from the conjoint reading of section 271C and 273B, it is clearly evident that imposition of penalty under section 271C is neither automatic nor mandatory. The authority concerned is empowered under section 273B not to impose penalty in a deserving case if he is satisfied that there was reasonable cause for failure to comply to statutory requirement. Therefore, confirmation of demand raised under section 201, cannot be the sole criteria for imposing penalty under section 271C. Keeping in view the aforesaid legal principles, it is to be examined whether there was reasonable cause for failure on the part of the assessee to deduct tax at source. On a perusal of the relevant facts on record, it is observed, the payment of U.S. \$ 77,500 was made to a non-resident for development of website and other allied works. Therefore, question is whether such payment attracts deduction of tax under section 195. As is evident, assessee's C.A., had issued a certificate opining that tax is not required to be deducted at source on the remittances to Ms. Simone Sheffield, as the payment is made to a non-resident having no P.E. in India that too, for services rendered outside India. It is a well accepted fact that every citizen of the country is neither fully aware of nor is expected to know the technicalities of the Income Tax Act.

Therefore, for discharging their statutory duties and obligations, they take assistance and advise of professionals who are well acquainted with the statutory provisions. In the present case also, assessee has engaged a chartered accountant to guide her in complying to statutory requirements. Therefore, when the C.A. issued a certificate opining that there is no requirement for deduction of tax at source, assessee under a bonafide belief that withholding of tax is not required did not deduct tax at source on the remittances made. Though, this fact was brought to the notice of the Departmental Authorities in course of the penalty proceedings but due weightage has not been given to such contention of the assessee. In our view, the explanation submitted by the assessee is a valid explanation and cannot be brushed aside with some general observations. Only because the assessee before the Tribunal had accepted her liability for deduction of tax at source, cannot be the sole basis for imposition of penalty completely ignoring the primary and fundamental reason shown by the assessee for failure to deduct such tax. Proceedings under sections 201 and 271C, are two independent and separate proceedings. While imposing penalty, the authority concerned is duty bound to examine assessee's explanation to find out whether there was reasonable cause for failure to deduct tax at source. As is evident, the assessee being advised by a professional well acquainted with provisions of the Act had not

deducted tax at source. Therefore, no malafide intention can be imputed to the assessee for failure to deduct tax. More so, when the issue whether tax was required to be deducted at source, on payments to a non-resident for services rendered is a complex and debatable issue requiring interpretation of statutory provisions vis-a-vis relevant DTAA between the countries. Therefore, in our considered opinion, failure on the part of the assessee to deduct tax at source was due to a reasonable cause. The decisions relied upon by the learned Authorised Representative also support this view. Accordingly, we delete the penalty imposed under section 271C.

8. As we have deleted penalty imposed on the reasons stated above, we refrain from adjudicating the alternative contention raised by the learned Authorised Representative on limitation.

9. In the result, appeal stands allowed.

Order pronounced in the open Court on 30.03.2016

Sd/-
G.S. PANNU
ACCOUNTANT MEMBER

Sd/-
SAKTIJIT DEY
JUDICIAL MEMBER

MUMBAI, DATED: 30.03.2016

Smt. Aishwarya Rai Bachchan

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The CIT(A);*
- (4) *The CIT, Mumbai City concerned;*
- (5) *The DR, ITAT, Mumbai;*
- (6) *Guard file.*

Pradeep J. Chowdhury
Sr. Private Secretary

By Order

(Dy./Asstt. Registrar)
ITAT, Mumbai