

**IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'B', NEW DELHI**

**BEFORE SH.R. K. PANDA, ACCOUNTANT MEMBER
AND
MS. SUCHITRA KAMBLE, JUDICIAL MEMBER**

ITA No.4535/DEL/2015 & 4534/DEL/2015
Assessment Year: 2011-12

CJ International Hotels Ltd. 8, Hotels Le Meridian, Windsor Place New Delhi PAN: AAACC0174E	Vs	DCIT Circle - 49 (1) New Delhi
(APPELLANT)		(RESPONDENT)

Appellant by	Shri Tarandeep Singh, Advocate
Respondent by	Smt. Vijay Kumar Jiwani, Sr. DR

Date of hearing:	01/05/2018
Date of Pronouncement:	03/05/2018

ORDER

PER R.K. PANDA, AM:

The above two appeals filed by the assessee are directed against the order dated 30.04.2005 passed by CIT(A)-41, New Delhi confirming the order passed by the Assessing Officer u/s 201 (1) and 201 (1A) of the I. T. Act for the A.Y. 2011-12.

2. Facts of the case, in brief, are that the assessee is a company engaged in the business of running a hotel. During the course of assessment proceedings the Assessing Officer noted that the assessee has not deducted tax from the tips paid to the employees. From the various details furnished by the assessee, he noted that there are three types of tips i.e. (a) one which is added by the customer in the bills (b) One which

is added in the credit card amount and (c) Cash given by the guest to the staff directly. He observed that out of these first two are collected by management and given to Tip In-Charge who further distributes it to the staff on points basis. This distribution is done weekly. According to the Assessing Officer the employees receive tips on account of employment. Since the first two types of tips are received from the employer, he held that it will form part of the salary. He, therefore, asked the assessee to explain as to why the assessee should not be treated as an assessee in default for non reduction of tax from such payment of tips. Rejecting the various explanations given by the assessee and following various decisions including the decision of Hon'ble Delhi High Court in the case of CIT Vs. American Express Bank Limited, the Assessing Officer determined the tax liability u/s 201 (1) at Rs.3,04,765/- and interest u/s. 201 (1A) at Rs.91,430/-.

3. He has also determined the liability u/s 201 & 201 (1A) on account of other defaults. However since these issues are not in appeal, therefore, we are not concerned with the same.

4. In appeal the Ld. CIT (A) upheld the action of the Assessing Officer on the ground that the issue the has been decided against the assessee by the decision of the Jurisdictional High Court in assessee's own case in the order dated 11.05.2011.

3. Aggrieved such order of the CIT (A), the assessee is in appeal before us by raising the following grounds.

ITA No. 4534/Del /2015 :-

- 1. That on facts and in law, the CIT(A) erred in upholding the action of Assessing Officer in holding the appellant to be in default u/s 201(1) of the Act for non compliance u/s 192 of the Act.*

2. *That on facts and in law the CIT(A) erred in upholding that the appellant had a liability to deduct tax u/s 192 on the tips of Rs. 30,47,650/- disbursed by the assessee on behalf of its guests.*
3. *That on facts and in law the order u/s 201(1) dated 26th March, 2013 passed by the Assessing Officer is bad in law and void ab initio.*
4. *That on facts and in law the order of CIT(A) [to the extent it is prejudicial] is bad in law in whole and / or in part.*

ITA No. 4535/Del /2015

1. *That on facts and in law the CIT(A) erred in upholding the action of Assessing Officer in levying interest u/s 201(1 A) of the Act for alleged defaults u/s 192 of the Act.*
2. *That on facts and in law the order u/s 201 (1A) dated 26th March, 2013 passed by the Assessing Officer is bad in law and void ab initio.*
3. *That on facts and in law the order of CIT (A) [to the extent it is prejudicial] is bad in law in whole and / or in part.*

5. The Ld. Counsel for the assessee at the outset filed a copy of the decision the Hon'ble Supreme Court in assessee's own case reported as ITC Ltd. Vs. CIT (TDS) reported in 384 ITR and submitted that the assessee is also a party in the said decision. Referring to para 23 of the said order, the Ld. Counsel for the assessee drew the attention of the Bench to the following observation of Hon'ble Apex Court. We approve of the reasoning contained in this judgment and hold that payments of collected tips made in the manner indicated in paras 7 and 9 above would not be payments made "by or on behalf of" an employer. We agree with the statement of law that there is no ground for saying that these tips ever became the property of the employers. Even if the box were kept in the actual custody of the employer he would have no title to the money as he would hold such money in a fiduciary capacity for and on behalf of his employees. In the said circumstances, it is clear that such payments would be outside the purview of section 15(b) of the Act.

6. So far as levy of interest u/s 201 (1A) of the IT Act as concerned. The Ld. Counsel for the assessee drew the attention of the Bench to para 37 of the order which reads as under :-

“37. A great deal of argument was made by both sides on the nature of interest contained in section 201(1A) of the Act. We find it unnecessary to go into this question for the simple reason that as held in CTT v. Eli Lilly and Co. (India) P. Ltd. [2009] 15 SCC 1 at paragraph 91, interest under section 201(1 A) can only be levied when a person is declared as an assessee-in- default. Having found that the appellants in the present cases are outside section 192 of the Act, the appellants cannot be stated to be assessee-in- default and hence no question of interest therefore arises.”

5. Referring to the decision of the Tribunal in assessee's own case for A. Y. 2010-11 vide ITA No.379 and 380/Del/2014 order dated 11.08.2017, copy of which is placed at pages 59 to 62 of the paper book, he submitted that the Tribunal following the decision of the Hon'ble Apex Court has deleted the tax u/s 201 (1) and interest u/s 201 (1A) which was levied by the Assessing Officer and upheld by the CIT(A). He submitted that since the issue is covered in favour of the assessee therefore, the grounds raised by the assessee should be allowed.

6. The Ld. DR on the other hand while supporting the order of the CIT (A) relied upon the following decisions.

1. Arihant Invest Vs. ITO [2015] 61 taxmann.com 16 (Guwahati – Trib.).

2. CIT v. Meat Products of India Ltd. [1997] 224 ITR 1 (Kerala) / [1996] 136 CTR 210 (Kerala)
3. CIT v. Ramesh Enterprises [1999] 105 Taxman 711 (Madras)/[2001] 250 ITR 464 (Madras)/[2001] 169 CTR 513 (Madras)
4. CIT Vs Chennai Metropolitan Water Supply & Sewerage Board [2011] 14 taxman.com 73 (Madras)/[2011] 202 Taxman 454 (Madras) / [2012] 348 ITR 530 (Madras)/[2012] 246 CTR 402 (Madras)
5. CIT Vs Punjab Infrastructure Dev. Board [2016] 76 taxmann.com 365 (Punjab & Haryana)/[2017] 245 Taxman 183 (Punjab & Haryana)/[2017] 394 ITR 195 (Punjab & Haryana)
6. Nopany Marketing Co. (P.) Ltd. Vs. CIT [2015] 57 taxmann.com 186 (Calcutta)/[2015] 231 Taxman 802 (Calcutta)

7. We have considered the rival arguments made by both the sides and pursued the material available on record. We find the Assessing Officer in the instant case has treated assessee as an assessee in default for non deduction of tax from payment of tips u/s 192 of the IT Act since according to the Assessing Officer such payment of tips amounts to part of the salary. We find the Ld. CIT (A) following the decisions of the Hon'ble Jurisdictional High Court in assessee's own case upheld the action of the

Assessing Officer in treating the assessee as an assessee in default and thereby liable to tax u/s 201(1) and interest u/s 201 (1A) of the Act. We find the issue has now been decided in favour of the assessee by the decision of Hon'ble Apex Court in the case of ITC Vs. CIT reported in 384 ITR 14 (SC) and the name of the assessee also mentioned there in. We find following the decision of the Hon'ble Apex Court, the coordinate bench of the Tribunal in assessee's own case has decided the issue in favour of the assessee by observing as under :-

"3. It is the argument of the Ld. AR that the only question that arises for adjudication in this matter is whether the tips for hotel employees included and paid by credit card by customers and collected by the employer and disburse to the employees, amount to salary or in lieu of salary or payment made "by or on behalf of" the employer. He submitted that in assessee's own case relating to the AY 2005-06 the Hon'ble Supreme Court held that the tips for hotel employees included and paid by credit card by customers and collected by the employer and disburse to the employees do not amount to salary or profit in lieu of salary or payment made by or on behalf of the employer, as such provisions requiring deduction of tax at source are not attracted. We have perused the record and the order of a coordinate Bench of this Tribunal in assessee's own case reported in 158 ITD 287, decision of the Hon'ble jurisdictional High Court in assessee's own case in ita 445/2011 REPORTED IN [2011] 338 itr 598 (Delhi) and the decision of the decision of the Hon'ble Apex Court in assessee's own case in Civil Appeal No.4441 of 2016 reported in [2016] 384 ITR 14 (SC). Facts and questions involved for adjudication are identical. Question to be answered in this matter is no longer resintegra and covered by these decisions. Hence, while respectfully following the decision reported in (2016) 384 ITR 14 (SC), we hold that the tax u/s 201(1) and 201(1A) cannot be sustained. We, accordingly, direct the AO to delete the same."

8. Since the issue has now been decided in favour of the assessee by the Hon'ble Apex Court as well as decision of the Tribunal for the immediately proceeding assessment year, therefore, following the same we set aside the order of the CIT (A) and direct the Assessing Officer to delete the tax levied u/s 201 (1) and interest u/s 201 (1A) of the IT Act. The grounds raised by assessee are accordingly allowed.

9. In the result both the appeals filed by the assessee are allowed.

10. Pronounced in the open court on 03.05.2018.

Sd/-
(SUCHITRA KAMBLE)
JUDICIAL MEMBER

Sd/-
(R.K. PANDA)
ACCOUNTANT MEMBER

NEHA
Date:-03.05.2018

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI

		Date	
1.	Draft dictated on	02.05.2018	PS
2.	Draft placed before author	03.05.2018	PS
3.	Draft proposed & placed before the second member		JM/AM
4.	Draft discussed/approved by Second Member.		JM/AM
5.	Approved Draft comes to the Sr.PS/PS		PS/PS
6.	Kept for pronouncement on	.05.2018	PS
7.	File sent to the Bench Clerk	.05.2018	PS
8.	Date on which file goes to the AR		
9.	Date on which file goes to the Head Clerk.		
10.	Date of dispatch of Order.		