IN THE INCOME TAX APPELLATE TRIBUNAL
VISAKHAPATNAM BENCH, VISAKHAPATNAM

BEFORE SHRI V. DURGA RAO, HON'BLE JUDICIAL MEMBER &
SHRI D.S. SUNDER SINGH, HON'BLE ACCOUNTANT MEMBER

ITA No. 462/VIZ/2017
(Asst. Year : 2013-14)

M/s. Eswar Exports, D.No. 23-14-13, Chinnamvari Street, Visakhapatnam. TAN No. VPNE00441A (Appellant)	vs.	Addl. CIT, Range-6, Visakhapatnam. (Respondent)

Assessee by : Shri Samuel Nagadesi – CA.
Department By : Shri D.K. Sonawal – Sr.DR

Date of hearing : 18/06/2019.
Date of pronouncement : 07/08/2019.

O R D E R

PER V. DURGA RAO, JUDICIAL MEMBER

This appeal by the assessee is directed against the order of Commissioner of Income Tax (Appeals)-2, Visakhapatnam, dated 13/06/2017 for the Assessment Year 2013-14.

2. Facts of the case, in brief, are that the assessee is a firm engaged in the business of export of rough granite slabs. During the course of TDS inspection in the office premises of the assessee-deductor, it was noticed by the AO (TDS) that the deductor had deducted tax at source u/sec. 194C & 194H during

the F.Y. 2012-13, but not remitted the same into the Government account within the stipulated due date, the quantum of such non-remitted TDS was found to be Rs. 6,99,878/-. Hence, the Addl.CIT(TDS) issued a show-cause notice to the assessee-deductor for levy of penalty u/sec. 271C. In response, the assessee vide letter dated 27/02/2014 has submitted that "assessee is in the business of trading of Granite Blocks. The assessee is regularly deducting the tax as and when the payment made to the contractors and commission agents. The assessee generally prepares his books of account on a periodical system the TDS liability, if any, he will be paid immediately after passing the necessary entries in the books of accounts. The assessee has made the payment in late, for which he has paid the interest along with the payment of tax deducted at source but not failed to deduct tax. The penalty u/sec. 271C is not applicable since there is no failure to deduct tax under the Act. During the course of inspection, the statement of the tax deduction has been submitted by the assessee to the inspecting officials and accordingly the tax was paid within the timeframe requested by the assessee on the date of inspection. Hence, requested for not to levy penalty u/sec. 271C of the Act." The Addl. CIT(TDS) has considered the explanation of the assessee and not accepted the same and by

following the decision of the Hon'ble Kerala High Court in the case of *US Technologies International (P) Ltd. Vs. CIT* (195 Taxman 323) noted that once taxes are deducted, the deductor is duty bound to remit the same into the Government account in compliance to section 201(1) of the Act. The Addl. CIT(TDS) also rejected the plea of the assessee that TDS sums would be remitted only after preparation of books. The Addl.CIT (TDS) thus concluded that the assessee–deductor committed default in non-remittance of TDS into Government account within time without any reasonable cause and accordingly levied penalty u/sec. 271C of Rs. 6,99,878/-.

3. On appeal before the ld. CIT(A), it was submitted that the assessee has deducted TDS therefore there is no failure on the part of the assessee to deduct TDS, therefore section 271C has no application. The ld. CIT(A) after considering the explanation of the assessee observed that the assessee-deductor has not given any explanation for the impugned default committed and no reasonable cause was shown. Accordingly, penalty levied by the Addl.CIT (TDS) was confirmed.

4. On appeal before us, ld.AR has submitted that section 271C applies only for non-deduction of TDS and not for remittance to the Government account. He relied on the judgment of the Hon'ble

Bombay High Court in the case of Reliance Industries Vs. CIT & Ors. in Income Tax Reference No. 13/2000, dated 20/17/2015.

5. On the other hand, ld.DR has submitted that the coordinate bench of this Tribunal has already considered the issue and by following the judgment of the Hon'ble Kerala High Court in the case of US Technologies P. Ltd. (supra) has held that the provisions of section 271C are applicable not only for failure to deduct tax but also failure to remit the tax deducted to the Government account and submitted that the same may be followed.

6. We have heard both the parties, perused the material available on record and gone through orders of the authorities below.

7. The only issue involved in this appeal is whether section 271C applies in a case where non-remittance of TDS deducted to the Government account or not. In the present case, the assessee has deducted the TDS, but not remitted to the Government account, for that he has not given any satisfactory explanation either before the Assessing Officer nor before the ld.CIT(A). Even before us, the assessee has not given any satisfactory explanation. We find that similar issue came up before this Tribunal in the case of *M/s. Esskay Shipping Pvt. Ltd.*

Vs. JCIT in ITA No. 631/VIZ/2014, dated 18/10/2017 and the Tribunal by considering the judgment of the Hon'ble Kerala High Court in the case of US Technologies P. Ltd. (supra) has held that the provisions of section 271C are applicable not only failure to deduct tax but also failure to remit the tax deducted to the Government account. The relevant portion of the order is extracted as under:-

> *"10. We have heard both the sides, perused the material available on record and orders of the authorities below.*
>
> *11. A search was conducted in the case of the assessee and it is found that the assessee has deducted TDS of Rs. 1,18,91,009/- but not deposited in the Government account and also noted that the assessee failed to deduct TDS amount of Rs. 18,06,745/- The Assessing Officer after following due procedure, order was passed by raising demand of Rs.1,36,94,034/- under section 201(1) and Rs.11,09,603/- under section 201(1A). Subsequently, the JCIT (TDS) issued a show-cause notice why penalty should not be levied under section 271C of the Act. In response, assessee submitted that due to financial crisis, deducted TDS was not paid to the Government account and so far non-deduction of TDS, it is submitted that due to mistake of the Finance Manager, TDS is not deducted. However, JCIT (TDS) not accepted the explanation given by the assessee and levied penalty under section 271C by following the judgment of the Hon'ble Kerala High Court in the case of US Technologies International P. Ltd., (supra). On appeal, ld. CIT(A) confirmed the order passed by the Assessing Officer by following the decision of the Hon'ble Kerala High Court in the case of US Technologies International P. Ltd., (supra). We find that whether section 271C applies for failure to deduct tax at source or/and failure to deposit the deducted tax in Government account. The Hon'ble Kerala High Court in the above referred to case, has considered and held that both will attract penalty under section 271C of the Act. For the sake of convenience, the relevant portion of the order is extracted as under:-*
>
> > *"2. The first question raised is whether penalty could be levied under section 271C of the Act for non-payment of tax*

deducted at source. The contention of counsel for the appellant is that section 271C provides for penalty only for failure to deduct tax as required under Chapter XVII-B and for non-payment of tax, penalty provided is only for violation of sub-section (2) of section 115-O or section 194B of the Act. In other words, according to him if the assessee has made deduction from source on payments like salary, payment to contractors, payment on rent, etc. under various provisions of Chapter XVII-B, then no penalty could be levied if the assessee failed to remit the recovered tax. According to him failure to remit tax attracts penalty under section 271C only in respect of tax payable under sub-section (2) of section 115-O or section 194B of the Act. Standing counsel for the revenue contended that section 271C provides for penalty both for failure to deduct or to remit recovered tax and for both. In other words, according to him, penalty provided under section 271C also covers the situation where the assessee after deduction at source retains the recovered amount without payment to the department. In our view, the Tribunal while considering the appeal recast the section in its own way completely distorting its meaning. Originally there was no provision for penalty for failure to deduct tax or remit the deducted tax and the provision under section 276B only authorised prosecution for violation. However, section 271C was introduced by the Direct Laws (Amendment) Act, 1987 with effect from 1-4-1989 providing for penalty for failure to deduct or remit tax under Chapter XVII-B, sub-section (2) of section 115-O and section 194B of the Act. For easy reference we extract hereunder section 271C.

"271C. Penalty for failure to deduct tax at source.—(1) If any person fails to—

(a) deduct the whole or any part of the tax as required by or under the provisions of Chapter XVII-B; or

(b) pay the whole or any part of the tax as required by or under—

(i)sub-section (2) of section 115-O; or
(ii)the second proviso to section 194B,

then, such person shall be liable to pay, by way of penalty, a sum equal to the amount of tax which such person failed to deduct or pay as aforesaid.

(2) Any penalty imposable under sub-section (1) shall be imposed by the Joint Commissioner."

3. Counsel for the appellant has drawn a distinction between clauses (a) and (b) of section 271C(1) of the Act. According to him penalty under clause (a) is only for failure to deduct tax as required under any of the provisions of Chapter XVII-B. It is argued that in the survey conducted by the department what was noticed was that deductions have been made and the violation was only delayed remittance of part of the deducted amount and non-remittance of balance amount. However, the contention of counsel for the assessee is that since there is no provision for penalty for non-remittance of tax deducted at source under the provisions of Chapter XVII-B, the levy of penalty is unauthorised. Counsel contended that penalty under section 271C(1) for non-remittance is only of tax, whether recovered or not, under sub-section (2) of section 115-O or second proviso to section 194B of the Act. We are unable to accept this contention because the first part of clause (b) of section 271C(1), i.e., failure to pay whole or any part of tax as required, takes in the tax deducted under clause (a) under any of the provisions of Chapter XVII-B. So much so, in our view, failure to deduct or failure to remit recovered tax, both will attract penalty under section 271C of the Act. So much so, the contention of the appellant fails and we uphold the finding of the Tribunal dismissing the challenge against levy of penalty.

4. The next question to be considered is the quantum of penalty which in this case is above Rs. 1.1 crore. Counsel for the appellant referred to section 273B of the Act authorising the officer to waive or reduce the penalty if the defaulted assessee proves that there was reasonable cause for such failure which attracts penalty. Standing Counsel has referred to the findings on cash flow and the application of funds by assessee for other purposes and contended that there was no reasonable cause justifying the failure on the part of the assessee. He has further contended that even for earlier year assessee had remitted recovered tax with delay. In our view, the Tribunal has not considered challenge against quantum of penalty in so much details probably because in the penalty order it is stated that only minimum penalty is levied. So far as failure on the part of the assessee to remit the tax recovered at source is concerned, we do not think there can be any justifying circumstance for delay in remittance because assessee cannot divert tax recovered for the Government towards working capital or any other purpose. So much so, in our view, defence available under section 273B does not cover failure in payment of recovered tax. However, if there is failure to remit on account of failure to recover for any reason whatsoever, then the case calls for reduction of penalty, if not waiver. Similarly, we feel recovery and remittance of tax, though with delay but with interest, before detection is certainly a

mitigating circumstance for waiver or reduction of penalty. Further, if full amount of tax with interest was paid before levy of penalty, we feel quantum reduction is called for by the Assessing Officer. Therefore, we direct the Assessing Officer to reconsider the quantum of penalty by giving one more opportunity to the assessee to furnish facts in the light of our observations above. The appeal is accordingly, disposed of upholding the order of the Tribunal on the levy of penalty, but with direction to the Assessing Officer to grant further reduction in penalty, if any, new fact or circumstance is brought to the notice of the Assessing Officer based on observations above or otherwise in terms of section 273B of the Act."

11. Therefore, respectfully following the judgment of the Hon'ble Kerala High Court in the above referred to case, we hold that section 271C applies to both the situations where assessee failure to deduct tax at source and failure to remit the recovered tax. Accordingly, the argument advanced by the assessee's representative is rejected.

12. So far as alternative plea raised by the assessee is concerned i.e. mitigating circumstances for non-deduction of tax, the Hon'ble Kerala High Court has held that tax deducted and not remitted to the Government account, there are no justifying circumstances. Therefore, alternative plea raised by the assessee has no application so far as default in respect of failure to remit the tax deducted to the Government account. Insofar as, non-deduction of TDS is concerned, it is submitted that due to mistake of the Finance Manager, TDS was not deducted. In this context, ld. CIT(A) has observed in his order that default committed by the assessee was pointed out during the survey in January, 2013, but assessee did not choose to make payment immediately, some amounts have been paid only after passing of the order under section 201(1) & 201(1A) of the Act on 27/02/2013. Only thereafter in the month of March, further payments have been made. The corresponding interest under section 201(1A) has not been paid till date. The survey was conducted on 22/01/2013, the assessee only paid the amounts in the month of March after passing of the order under section 201(1) & 201(1A) and therefore, it cannot be considered that non-deduction of tax by oversight of the Finance Manager, even it came to the notice of the assessee, it has paid only after two months. Therefore, in our opinion, the observations made by the Hon'ble Kerala High Court have no application to the assessee's case. In view of the above, we find no infirmity in the order passed by the ld. CIT(A) and accordingly interference is not called for. Accordingly, appeal filed by the assessee is dismissed.

8. We find no infirmity in the order passed by the ld. CIT(A). Insofar as judgment relied on by the assessee in the case of Reliance Industries Ltd., (supra) is concerned, facts are entirely different and not related to the issue involved in this appeal, therefore, no application to the present case. Thus, this appeal filed by the assessee is dismissed.

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

Order Pronounced in open Court on this 07th day of August, 2019.

Sd/-	sd/-
(D.S. SUNDER SINGH)	**(V. DURGA RAO)**
Accountant Member	**Judicial Member**

Dated: 07th August, 2019.

vr/-

Copy to:

1. *The Assessee* – M/s. Eswar Exports, D.No. 23-14-13, Chinnamvari Street, Visakhapatnam.
2. *The Revenue – Addl.CIT, Range-6, Visakhapatnam.*
3. *The CIT (TDS), Vijayawada.*
4. *The CIT(A)-2, Visakhapatnam.*
5. *The D.R., Visakhapatnam.*
6. *Guard file.*

By order

(VUKKEM RAMBABU)
Sr. Private Secretary,
ITAT, Visakhapatnam.