आयकर अपीलीयअधिकरण, विशाखापटणम पीठ, विशाखापटणम

IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री दुव्वूरु आर एल रेड्डी, न्यायिक सदस्य एवं श्री एस बालाकृष्णन, लेखा सदस्य के समक्ष

BEFORE SHRI DUVVURU RL REDDY, HON'BLE JUDICIAL MEMBER &
SHRI S BALAKRISHNAN, HON'BLE ACCOUNTANT MEMBER

आयकर अपील सं./ I.T.A. No.135/Viz/2021

(निर्धारण वर्ष / Assessment Year :2011-12)

Mr. Adabala Manmohan, Visakhapatnam. PAN: VPNAO 1959 G	Vs.	Income Tax Officer, Ward-International Taxation, Visakhapatnam.
(अपीलार्थी/ Appellant)		(प्रत्यर्थी/ Respondent)
अपीलार्थी की ओर से/ Appellant by	:	Sri C. Subrahmanyam, CA
प्रत्यार्थी की ओर से / Respondent by	:	Sri SPG Mudaliar, Sr. AR
सुनवाई की तारीख / Date of Hearing	:	27/04/2022
घोषणा की तारीख/Date of Pronouncement	:	14/07/2022

O R D E R

PER DUVVURU RL REDDY, Judicial Member :

This appeal is filed by the assessee against the order of the Ld. CIT(A)-10, Hyderabad in DIN & Order No. ITBA/APL/S/250/2020-21/1027771258(1), dated 21/06/2020 passed U/s. 201(1) & 201(1A) of the Act for the AY 2011-12.

2. In this appeal, there is a delay of 296 days in filing the instant appeal before the Tribunal. The assessee has filed condonation petition. However, as per the decision of the Hon'ble Supreme Court in SMW(A) No.3 of 2020, the period of limitation for filing the appeals under general laws and all special laws falling between 15/3/2020 and 28/02/2022 shall be excluded for calculating the delay. Considering the same, we hereby condone the delay of 296 days in filing the present appeal before the Tribunal and proceed to adjudicate the case on merits.

3. Brief facts of the case are that the assessee purchased an immovable property in plot no.9, Block No.45, TS No.1031/2, admeasuring 216.88 sq yds, Waltair Ward, Visakhapatnam from Smt. Davuluri Swapna, non-resident and Sri Kodali Rajendra Prasad, a resident. The AO proposed to treat the assessee as an assessee in default u/s. 201(1) and accordingly issued a letter. There was no response from the assessee. Again a show cause notice dated 20/03/2018 was issued for which also there was no response from the assessee. The AO then treated the assessee as an assessee in default U/s. 201(1) of the Act and passed order U/s. 201(1) of the Act along with the interest U/s. 201(1A) of the Act. Aggrieved by the order of the Ld. AO, the assessee filed an appeal before the Ld. CIT(A), Hyderabad.

4. The Ld. CIT(A) partly allowed the appeal of the assessee. Aggrieved by the order of the Ld. CIT(A), the assessee is in appeal before us. The assessee has raised the following grounds of appeal:

> *"1. That under the facts and circumstances of the case the orders passed U/s. 201/201(1A) of the Act dated 27/3/2018 and partly confirmed by the Ld. CIT(A) vide his order in ITA No. 10005/2018-19 dated 21/8/2020 are against the facts of the case and provisions of law.*
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> *2. The Ld. CIT(A) erred in not appreciating that no time limit was mentioned, U/s 201 of the Act, for default in deduction of tax at source in respect of payments made to non-residents of India, but the judiciary in several cases held that the reasonable time limit of 4 years from the date of payment is applicable. Therefore the Ld. CIT(A) erred in confirming the validity of the time barred order passed by the AO u/s. 201/201(1A) of the Act dated 27/3/2018.*
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> *3. The Ld. CIT(A) erred in not appreciating that as per Article 26 of Double Taxation Avoidance Agreement between India and USA, payments made to the National of USA cannot be subjected to tax deduction at source on transaction of purchase of capital asset, therefore, in this case the seller of the property, the payee, being a national of USA is not subject to TDS.*
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> *4. Without prejudice to the above grounds, Ld. CIT(A) ought to have taken cognizance of the fact that when the said capital gains was assessed and tax demand was raised in the hands of the said NRI payee, under such circumstances, upholding the finding of the AO that the appellant is assessee in default, u/s. 201 of the Act is against the law which otherwise amounts to double taxation not permitted under law.*
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> *5. Without prejudice to the ground no.1 to 3, the Ld. CIT(A), while issuing a direction to the AO by stating that the penalty U/s. 201(1) and interest U/s. 201(1A) has to be reduced to the extent amount of tax was determined in the hands of the payee, has erred in not appreciating the fact that by virtue of section 201(2) of the Act since no tax was deduted by the assessee, no demand in respect of the amount can be raised in the hands of the assessee U/s. 201(1) of the Act.*
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> *6. Without prejudice to the ground no.1 to 3, the Ld. CIT(A) while issuing a direction to the AO by stating that the penalty U/s. 201 and interest U/s. 201(1A) has to be reduced to the extent amount of tax was determined in the hands of the payee, has erred in not appreciating the fact that once tax was determined in the hands of the payee along with interest U/s. 234B of the Act, levy of interest*

U/s. 201(1A) of the Act on the same amount would amount to duplication of interest in respect of the said tax amount, which is not permissible under law.

7. *Without prejudice to the above grounds, the Ld. CIT(A) ought to have known that section 50C of the Act is self-contained and the deeming fiction under this cannot be extended for determining tax liability U/s. 195 of the Act.*

8. *For these and such other ground/grounds, that may be adduced at the time of hearing of subject appeal, the appellant prays before the Hon'ble Tribunal that the order passed U/s. 201/201(1A) of the Act dated 27/3/2018 be quashed or grant such other relief as this authority may deem fit, in the interest of justice."*

5. The assessee also submitted a petition for withdrawal of the grounds no.3, 5 & 6. Since the Grounds no.1 and 8 are general in nature the assessee pressed the Grounds no. 1, 2 and 7 only.

6. The Ld. AR argued that the AO has not given any reasonable time to respond which is against the principles of natural justice. The Ld. AR also contended that various High Courts and Tribunals have held that generally four years was treated as a period of time limit for initiating action U/s. 201(1) / 201(1A) of the Act. The Ld. AR submitted that the notice was issued after expiry of five years and hence not a valid notice. The Ld. AR also pointed out that the payment was made to NRI during the March 2011 and hence the limitation period expires on March 2015. The Ld. AR also submitted that the provisions of section 50C are not applicable in the case of deduction of tax U/s. 195 of the Act. The Ld. AR relied on the orders of the jurisdictional Coordinate Bench of ITAT in the case of (i) Sri Malla Appala Naidu vs. ITO (International Taxation), ITA

No. 547 to 550/Viz/2017 (AY 2008-09), dated 12/10/2019 and (ii) Bheemarasetty Sunitha vs. DDIT (IT & TP), ITA No. 119/Viz/2016, dated 23/6/2017. The Ld. AR also submitted that the NRI has filed her income tax returns declaring the capital gains and the assessment order was passed U/s. 143(3) r.w.s 147 of the Act on 26/12/2019. Hence no need to initiate any proceedings U/s. 201(1A) of the Act. Per contra, the Ld. DR relied on the decision of the Ahmedabad Bench of the Tribunal in the case of ITO vs. Shri Rang Infrastructure (P.) Ltd reported in [2019] 112 taxmann.com 344 (Ahmedabad-Trib.). Ld. DR argued that section 201(3) was amended in the year 2014 w.e.f 1/10/2014 onwards. The Ld. DR pleaded that the order of the Ld. Revenue Authorities be upheld.

7. We have heard both the sides and perused the material available on record. In this case the admitted facts are that the assessee has purchased a property during the FY 2010-11 relevant to the AY 2011-12 on 7/3/2011. The assessee has paid a sum of Rs. 54,22,000/- out of which Rs. 50,39,500/- was paid to the NRI. As per the provisions of section 195 of the Act, the assessee is required to deduct tax at source on payments made to non-residents. In the instant case, the assessee required to deduct the tax at source on the sums chargeable to capital gains. The assessee has failed to deduct the tax at source, therefore the assessee is liable for payment tax and interest U/s. 201(1)/201(1A) of the

Act. The Ld. AO passed order U/s. 201(1)/201(1A) on 27/03/2018 which is after a lapse of five years from the end of the relevant assessment year. There is no time limit provided under the Act for treating the assessee as an assessee in default in respect of payment made to non-resident. As per section 201(3), as rightly pointed out by the Ld. AR it applies to residents and not to non-residents. The identical issue has come up before this Tribunal in the case of Bheemarasetty Sunitha cited supra and this Tribunal after considering the decisions of Hon'ble Delhi High Court in the case of Bharti Airtel Limited & Anr Vs. Union of India & Anr and the decision of NHK Japan Broadcasting Corporation [305 ITR 0137], the decision of Hon'ble Supreme Court in the case of GE India Technology Centre and the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. [365 ITR 0560 (Bom)] held that the reasonable time limit for issue of notice u/s 201(1)/201(1A) is 4 years. In cases, where the notice is issued beyond 4 years, the Coordinate Bench of ITAT held that the same is barred by limitation. For the sake of clarity and convenience, we extract relevant part of the order of this Tribunal in para No.6 to 7 which reads as under :

> *"6. We have heard both the parties and perused the materials placed on record. The relevant provisions of section 201(1A) of the Act is reproduced as under: "201(1A) Without prejudice to the provisions of sub- section (1), if any such person, principal officer or company as is referred to in that subsection does not deduct or after deducting fails to pay the tax as*

required by or under this Act, he or it shall be liable to pay simple interest at 2 fifteen] per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.]"

7. The Hon'ble Delhi High Court while deciding the writ petition in the case of Bharti Airtel& Another rendered the judgement considering the statement of Objects and Reasons of the Finance (No.2) Bill, 2009. In respect of time limit, Hon'ble Bombay High Court has considered the issue in detail and held that 6 years is reasonable period for initiating the action u/s 201 and 201(1A). The Hon'ble Delhi High Court in the decision relied upon by the Assessee considered the issue with regard to the limitation of time for initiating the proceedings u/s 201/201(1A) and held that 4 years is the reasonable time forinitiating proceedings u/s 201/201(1A). While holding so, the Hon'ble High Court has relied on the decision of CIT Vs. NHK Japan Broadcasting Limited [305 ITR 137] and the CIT Vs. Hutchison Essar Telecom. Limited [323 ITR 330], Further, Hon'ble Delhi High Court has considered amendment made to Section 201 of the Act vide Finance Bill, 2009 and viewed that the Parliament did not make any amendment to the time limits for the non residents which indicates that the Parliament has accepted the judicial pronouncements for the limitation period already set out by the courts. The Hon'ble Delhi High Court also considered the decision of Hon'ble Supreme Court in the case of GE India Technology Centre Vs. CIT (2010) (10) SCC 29, wherein, the Hon'ble Supreme Court held that the proceedings should be initiated u/s 201/201(1A) within reasonable period and it cannot extend without limitation. After considering the decision of the Hon'ble Supreme court in GE India Technology and the Vodafone Essar Mobiles Ltd. the Hon'ble Delhi High Court followed its own decision in the case of CIT Vs. NHK Japan Broadcasting Limited (supra) and held that 4 years is the reasonable period for initiating the proceedings u/s 201/201(1A) of IT Act. The Ld. DR relied on the decision of Hon'ble Bombay High Court in the case of Mahindra & Mahindra Ltd. Considering the Hon'ble Supreme court decision in CIT Vs.Vegetable Products Ltd., 88 ITR 192 (SC) and CIT Vs. Karamchand Premchand Ltd (1960) 40 ITR 106, we are also of the view that the decision favourable to the assessee is required to be taken. Accordingly following the decision of Hon'ble Delhi High Court we hold that reasonable period is 4 years for initiating of proceedings u/s 201/201(1A). In the instant case the property was registered on 18.7.2007 and the assessee is liable to deduct the TDS during the F.Y.2007-08 and the 4 years time limit for initiating action u/s 201/201A expires before March 2012. In the instant case, notice u/s 195 treating the assessee as assessee in default was issued on 11.08.2013 beyond the 4 years of the financial year in which the assessee required to deduct tax at source. As held by Hon'ble Delhi High Court, the time limit for initiating the proceedings u/s 201 and 201(1A) is 4 years and it is barred by limitation. Therefore, following the decision of Hon'ble Delhi High Court, we are unable to sustain the orders of the lower authorities. Accordingly, the order passed u/s 201 / 201(1A) is set aside and the appeal of the assessee is allowed."

8. Similarly, the Hon'ble AP High Court in the case of M/ s U.B.Electronic Instruments Limited cited supra held that the 4 years is reasonable time. For ready reference, we extract relevant part of the order of the AP High Court which reads as under :

> *"By and large, four years is treated as the period within which any penal action cat-be initiated against an assessee. Failure to initiate steps within that period would disable the department to proceed against the assessee. The reason is not difficult to be discerned. With each passing year, the assessee is required to adjust his or her own affairs in such a way that the activity undertaken by it goes on smoothly. Incase, liability for the preceding one or two years is fastened, there can be scope for making adjustment thereof in the activities of the subsequent years. However, if fairly long gap intervenes, it becomes difficult for making such adjustments, particularly when the activity is commercial in nature. In the instant case, the assessment years are 1989-90, 1990-91 and 1991-92. It was nearly seven years thereafter that a notice was issued. For an assessee to be required to pay the amount, even if due five or six years preceding the demand, would be a serious problem. Several developments take place over the period, and the nature of relations undergoes change."*

9. In the instant case, Smt. Davuluri Sai Swapna has filed her return of income in response to the notice U/s. 148 of the Act for the AY 2012-13 admitting a total taxable income of Rs. 16,16,878/- and offered capital gains of Rs. 15,22,953/-. The AO of the non-resident ITO, Ward-12(2), Hyderabad passed the assessment order U/s. 143(3) r.w.s 147 of the Act on 12/6/2019 accepting the return filed by the NRI Smt. Davuluri Sai Swapna. Since the non-resident has discharged her obligation with respect to payment of capital gains tax, the assessee cannot be taxed once again for non-deduction of TDS U/s. 195 of the Act. It is also observed that the seller Smt. Davuluri Sai Swapna is a

non-resident from the assessment order passed by AO, Ward-12(2), Hyderabad. Similarly it is also noticed that the AO erred in not adopting the SRO value as prescribed U/s. 50C of the Act while concluding the assessment of the Non-Resident. The reliance placed by the Ld. DR in ITO vs. Shri Rang Infrastructure (P) Ltd (supra) is distinguishable on the fact that the extension of the period of time limit U/s. 201(3) applies only to residents and not to NRIs and hence reliance cannot be placed for the instant case. Respectfully following the judicial precedents as discussed in the earlier paras, we are of the considered view that treating the assessee as an assessee in default U/s. 201 of the Act is not valid in law. We therefore are inclined to quash the order of the Ld. CIT(A). It is ordered accordingly.

10. In the result, appeal of the assessee is allowed.

Pronounced in the open Court on the 14th July, 2022.

Sd/-	Sd/-
(एस बालाकृष्णन)	**(दुव्वूरु आर.एल रेड्डी)**
(S.BALAKRISHNAN)	(DUVVURU RL REDDY)
लेखा सदस्य/ACCOUNTANT MEMBER	**न्यायिकसदस्य**/JUDICIAL MEMBER

Dated :14.07.2022

OKK - SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. निर्धारिती/ The Assessee – Mr. Adabala Manmohan, Flat No.202, Sri Vishnu Apartments, Dasapalla Hills, Visakhapatnam, Andhra Pradesh – 530003.
2. राजस्व/The Revenue – Income Tax Officer, Ward-International Taxation, Visakhapatnam, Andhra Pradesh – 530016.
3. The Commissioner of Income Tax (IT & TP), Hyderabad. (ii) the Chief Commissioner of Income Tax (IT) (SZ), Bengaluru.
4. आयकर आयुक्त (अपील)/ The Commissioner of Income Tax (Appeals)-10, Hyderabad.
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, विशाखापटणम/ DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

Sr. Private Secretary
ITAT, Visakhapatnam