

ITAT affirms sanctity of CA certificate; denies to impose penalty for TDS default relying upon such certificate

Summary – The Mumbai ITAT in a recent case of Leighton Welspun Contractors (P.) Ltd., (the Assessee) held that where view adopted by assessee based upon certificate of CA that engineering services availed by it were not technical services, was one of possible views, there was reasonable cause as envisaged under section 273B for not deducting tax at source by assessee and, thus, penalty under section 271C was not to be imposed

Facts

- JDIT passed an order under section 201/201(1A) upon the assessee-company, as it had failed to deduct TDS on the foreign remittances/payments towards engineering and draughting services provided by a UK, based company and, for purchase of shrink wrapped software. Subsequently, the JDIT initiated proceedings under section 271C.
- The assessee-company submitted that it was not liable to deduct TDS on the aforesaid payments and consequently it was not liable for the penalty under section 271C for the reasons that payment to UK company was made for providing engineering and draughting services and these services did not qualify as FTS within meaning of article 13(4)(c) of India-UK Treaty and, shrink wrapped software was a copyrighted article, *i.e.*, goods and hence, it was not liable for taxation in India. It was further submitted by the assessee that in all these cases TDS was not deducted in view of the certificate issued by the CA, in this regard, at the time of making remittances and therefore, penalty should not have been levied for not deducting the TDS.
- But the JDIT did not agree with the submissions of the assessee and he levied the penalty under section 271C.
- The Commissioner (Appeals) deleted the penalty by holding and that applicability of TDS provision was debatable especially when it had accepted the liability to deduct tax by not preferring any appeal against the order of Assessing Officer under section 195.
- on appeal :

Held

- Penalty under section 271C can be levied subject to section 273B. It provides that no penalty shall be imposed on the person or the assessee as the case may be for any failure rendered to in the said provisions if he proves that there was 'reasonable cause' for the said failure. Therefore, if assessee is able to make out that there was a 'reasonable cause' for his failure in deduction of tax at source then position of law is very clear that penalty under section 271C shall not be levied. Thus, before levying the penalty, the concerned authority is required to find out if there was a 'reasonable cause' on the part of the assessee. It has been held in various judgments that 'reasonable cause' as applied to human action is that which would constrain or prevent a person of average intelligence and

ordinary prudence, from taking action which said person would have taken in the normal circumstances, but for the said cause. It can be described as a probable cause, and it means an honest belief founded upon reasonable grounds of the existence of a state of circumstances, which, assuming them to be true would reasonably lead any ordinary prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do.

- What would constitute 'reasonable cause' cannot be laid down with precision and the question as to whether there was a reasonable cause or not for the assessee not to deduct tax at source at all or under some particular provisions then prescribed is a question of fact which is required to be ascertained in the facts and circumstances of each case.
- Not much is required to be deliberated to say that whether a particular service entails 'make available' facility or not; it cannot be decided under the straight jacket formula. There would always be various 'ifs and buts' in deciding this factor and this issue will have to be decided in the given facts and circumstances of the case after a long drawn process. It is further noted that there is huge controversy arising before various courts with respect to these issues. Assessee has pointed to clause 4(c) of article 12 of India-Singapore Treaty, which deal with royalties and fee for technical services. Clause 4(c) provides that the term 'fee for technical services' excludes from its definition any service that does not enable the person acquiring the services to apply the technology contained therein.
- It is further noted that the undisputed fact is that there was a CA's certificate, relying upon which only the assessee took a view that it was not liable to deduct tax at source on the payments made to these two parties.
- Similarly, with regard to payments made to remaining three parties for purchase of shrink wrapped software (*i.e.*, standard computer software), the TDS was not deducted by the assessee for the reason that the impugned payments were for a copyrighted article, *i.e.* they were 'goods' and, therefore, such payments were not in nature of royalties as per the Income-tax Act as well as respective DTAA's. Rather these were to be treated as sale of goods and were treated taxable as business profits.
- The assessee has furnished list of various cases 'for' and 'against' the assessee, on this issue. Apparently, assessee adopted one of the views available.
- Under these circumstances, the stand of the Assessing Officer that - 'no controversy was involved on the obligation of the assessee for deduction of TDS on the impugned payments and that view taken by the assessee was not one of the possible views and was not *bona fide* view, and accordingly there could not have been any reasonable cause for non-deduction of TDS on the impugned payments' could not be accepted. The decision with regard to the obligation of the assessee for deduction of TDS on the aforesaid payments was highly debatable, in the given facts of the case and legal scenario and the view adopted by the assessee based upon the certificate of the CA, was one of the possible views and can be said to be based upon *bona fide* belief of the assessee. Therefore, under

these circumstances, it can be held there was reasonable cause as envisaged under section 273B for not deducting tax at source by the assessee on the aforesaid payments, and therefore, the assessee was not liable for levy of penalty under section 271C, and therefore, the Commissioner (Appeals) has rightly deleted the same.