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AO couldn't treat payer as assessee-in-default without establishing that payee didn't pay tax on income

Summary – The Agra ITAT in a recent case of Aligarh Muslim University., (the Assessee) held that ITO (TDS) had not ascertained as to whether taxes had been paid or not by recipient of income, he could not initiate proceedings to declare deductor as assessee-in-default

Facts

- The assessee university paid salary to its employees after deducting tax under section 192.
- The ITO (TDS) observed that the assessee was allowing exemption under section 10(10AA)(*i*) on the payment of leave salary at the time of retirement/superannuation to its employees, considering them as Central Government employees.
- The Assessing Officer treated the assessee as an assessee in default under section 201/201(1A) for short deduction of tax due to allowing the exemption under section 10(10AA)(i) beyond the maximum limit of Rs. 3 lacs.
- On appeal, the Commissioner (Appeals) remitted the matter to the ITO(TDS) to allow opportunity to the assessee to lead evidence the fact that the deductees had themselves paid due tax on their leave salary and thereafter, recomputed the amounts in respect of the liability of the university concerning default under sections 201(1) and 201(1A).
- On further appeal to the Tribunal, the assessee contended that it is only after finding that the payee had failed to pay tax directly, that the deductor could be deemed to be an assessee in default in respect of such tax.

Held

- The *Explanation* to section 191 itself makes it clear that it is only when the employer fails to deduct the tax and the assessee has also failed to pay tax directly, that the employer can be deemed to be an assessee in default. In other words, in order to treat the employer as an assessee in default, it is a pre-requisite that it to be ascertained that the assessee/ employee has also not paid the tax due. The reason for this obviously is that under the procedure for collection and recovery by way of deduction of tax at source, under Chapter XVII, the Government intends to ensure such deduction of tax at source and, thereby, collection and recovery of tax. It is for this reason that in the *Explanation* to section 191, it has been provided to ensure payment of due taxes, by the deductor, in case the same have not been paid by the deductee.
- From the above, it becomes abundantly clear that before treating the deductor to be an assessee in default under section 201(1), it is the bounden duty of the ITO (TDS) to ascertain and ensure that the assessee has also not paid due tax, for which, the assessee has to provide the requisite details to the ITO (TDS).

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- In the present case, the Commissioner (Appeals) has stated that before him, no evidence was produced to show as to which of the employees of the University had paid due taxes in respect of leave salary income on which TDS was not made properly and that he was unable to quantify the relief that can be allowed in respect of such employees. However, while observing thus, the Commissioner (Appeals) has remained oblivious of *"Jagran Prakashan Ltd."* v. *Dy. CIT* [2012] 345 ITR 288/209 Taxman 92/21 taxmann.com 489 (All.), though it was specifically cited before him in the written submissions filed by the assessee University before the Commissioner (Appeals).
- It is not within the purview of the Commissioner (Appeals) to fill in the lacuna of the ITO (TDS). In fact, it was for the ITO (TDS) to ascertain the position, as prescribed by the *Explanation* to section 191, that is, as to whether the assessee had failed to pay the due tax directly, and only thereafter to initiate proceedings to deem the assessee as an assessee in default under section 201(1). As observed this is a foundational and jurisdictional matter and therefore, the Appellate Authorities cannot place themselves in the position of the ITO (TDS) to ratify a jurisdiction wrongly assumed.
- The only prerequisite was that the details of the persons to whom payments were made, be on record. And once that is so, *i.e.*, the assessee has submitted the requisite details to the ITO (TDS), it is for the ITO (TDS), to ascertain, prior to invoking section 201(1), as to whether or not the due taxes have been paid by the recipient of the income.
- In the present case, the assessment order shows that it contains a chart, comprising the details of the employees to whom, leave salary was paid more than Rs. 3 lacs by the University during financial year 2014-15, relevant to the year under consideration.
- Further, in the assessment order, it finds incorporated that the show cause notice issued to the University contains the names of 237 persons with full details of payments made to them by the University.
- Therefore, it is amply clear that at the time of issuance of notice, under section 201/201(1A) to the University, the ITO (TDS) was in possession of the requisite details of the recipients of the income. As such, the legislative mandate of the *Explanation* to section 191 was violated by the ITO (TDS), by not requisitioning, before issuing the show cause notice to the University, information from the recipients of the income, as to whether or not the taxes had been paid by them, nor seeking such information from the concerned Income Tax Authorities.
- As observed, this is a foundational jurisdictional defect going to the root of the matter. Violation of the mandate of the *Explanation* to section 191 is prejudicial to the invocation of the jurisdiction of the ITO (TDS) under section 201/201(1A). In absence of such compliance, the invocation of the jurisdiction is *null* and *void ab initio*. Such invocation of jurisdiction is, accordingly, cancelled.

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