



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

Dated this the 2nd day of December, 2015

Present

THE HON'BLE MR JUSTICE VINEET SARAN

&

THE HON'BLE MRS JUSTICE S SUJATHA

Income Tax Appeal 393 / 2009

Between

1 Commissioner of Income Tax TDS
HMT Bhavan, Ganganagar
Bangalore

2 Tax Recovery Officer (TDS)
Range 18, HMT Bhavan
Ganganagar, Bangalore

Appellants

(By Sri K V Aravind, Adv.)

And

M/s Bharat Hotels Limited
(Unit: The Grand Ashoka, Bangalore)
Kumarakrupa, High Grounds
Bangalore

Respondent

(By Sri Rupesh Jain for Sri D Prashanth Kumar, Adv.)

Appeal is filed under S.260 A of the Income Tax Act
praying to allow the appeal and set aside the order passed
by the ITAT in ITA 1084/Bang/2008 on 27.2.2009, etc.

Appeal coming on for hearing this day, **Vineet Saran J**, delivered the following:

JUDGMENT

The present appeal relates to the assessment year 2002-03 and has been filed by the Revenue challenging the order of the Tribunal dated 27.2.2009.

Facts in brief are that the respondent assessee M/s Bharat Hotels Ltd, has a unit known as M/s Grand Ashok, Bangalore, which was taken over by the assessee from Kumarakrupa Frontier Hotels (Pvt) Ltd (for short KKFHPL) on lease for a period of thirty years, starting from November, 2001. Since this appeal relates to the assessment year 2002-03 i.e., financial year 2001-02, the period relevant for the purpose of this appeal would be four months from 1st December, 2001 to 31st March, 2002.

The admitted facts are that under an agreement between the respondent-assessee Bharat Hotels Ltd and KKFHPL, a license fee of Rs.4.11 crores per annum was to be paid as a minimum guarantee payment to KKFHPL. The dispute in the present appeal is with regard to the

assessee not having deducted the tax at source (TDS), as was required under Section 194 I of the Income Tax Act, 1961 (for short 'Act'). The assessee was thus held liable for the consequences for failure of deduction of TDS provided under Section 201 of the Act. It is not disputed that the assessee has been filing its return in the prescribed format provided under Section 206 of the Act with regard to deduction of tax made at source. For the relevant assessment period, although certain other tax deductions made at source were declared, but neither tax deduction at source (TDS) was made with regard to said payment by the assessee to KKFHPL, nor was any such declaration made in its return. The payment of licence fee made by the assessee to KKFHPL, under the lease agreement for the relevant period, amounted to Rs.1.37 crores; plus Rs. 24.90 crores, which was further paid by the assessee as upfront fee to the KKFHPL (hereinafter also referred as Recipient) on which the Revenue claims that tax was to be deducted at source, which was not done.

Thus, the admitted position is that on the said amount, neither any tax was deducted at source, nor the same was reflected in the return filed by the assessee under Section 206 of the Act. The assessment of the Recipient company for the relevant assessment year 2002-03 was completed under Section 143(3) of the Act on 28.2.2005, which was within the period prescribed under Section 153 of the Act. Besides this, the return of income of the assessee for the relevant assessment year 2002-03 was also filed and accepted by the Revenue, in which the aforesaid payments to KKFHPL were reflected. At no stage the question of deduction of tax for the payment so made by the assessee to the Recipient KKFHPL was ever raised. It was only when a survey was conducted in the premises of the assessee on 19.9.2007, that proceedings for failure to deduct tax at source (TDS) during the assessment year 2002-03 was raised and consequently, notice was given to the assessee. Then by order dated 28.1.2008 passed by the Assessing Officer under Section 201(1) and 201(1A) of the Act, assessee was treated as in default in respect of non deduction of TDS of licence fees and upfront fees

under sub-section (1), and the amount of interest payable under sub-section (1A) of Section 201 of the Act was quantified.

The appeal filed by the assessee was allowed by the Appellate Commissioner on 30.5.2008, holding that the order passed by the Assessing Officer was time barred. However, by subsequent order dated 30.9.2008 passed under Section 154 of the Act, which provides for rectification of mistake, the Appellate Commissioner corrected its order and held that the impugned order passed by the Assessing Officer was within limitation. However, a finding was also recorded that the amount paid by the assessee to the Recipient was not towards rent and hence the provisions of Section 194 I of the Act were not attracted. Consequently it was held that, there was no failure to deduct tax and hence the provisions of Section 201 of the Act were not attracted.

Challenging the said order of the Appellate Commissioner, the Revenue as well as the assessee, filed

separate appeals. By order dated 27.2.2009, the Tribunal held that the order passed under sub-sections (1) and (1A) of Section 201 of the Act, was barred by limitation. The Tribunal, even after holding that the proceedings were time barred, yet proceeded to decide the issue on merits by stating that in case its finding in respect of limitation was reversed, the matter on merits stood decided. The Tribunal, on merits, thus held that *“If the deductee assessee has paid advance tax after considering the licence fee then no interest u/s 201(1A) will be chargeable, as the Board Circular has mentioned that interest u/s 201(1A) is to be charged till the date of payment of tax by the deductee-assessee. Hence, the issue of computation of interest u/s 201(1A) for the asst. year 2002-03 will have to be worked again by the Assessing Officer in respect of licence fee. Since we have held that the assessee was required to deduct tax at source from the upfront amount and therefore, the Assessing Officer was right in raising demand u/s 201 and 201(1A). However, this is without prejudice to our earlier finding that the order for the asst. years 2002-03 and 2003-04 are barred by limitation.”*

Challenging the said order of the Tribunal, this appeal has been filed by the Revenue. Though the appeal has been admitted on the questions of law, as mentioned in the order dated 2.6.2010, but by consent of learned counsel for the parties, the questions of law to be considered have been reframed, as follows:

1 *Whether the Tribunal was correct in holding that the order passed under Section 201(1) and 201(iA) of the Act dated 28.1.2008 for the assessment year 2002-03 is barred by limitation?*

2 *Whether the Tribunal was correct in holding that the assessee was liable to pay interest under Section 201(1A) of the Act for not deducting TDS, from the date when the payment was made by the assessee to the Recipient, till the date the tax was deposited by the Recipient.*

We have heard Sri K V Aravind, learned counsel for the Revenue as well as Sri Rupesh Jain, learned counsel

appearing with Sri D Prasanth Kumar for the respondent assessee, and have perused the record.

Question No.1:

The first question relates to limitation for initiating action for failure to deduct and pay the tax deducted at source (TDS). For the relevant assessment year (and up to 1.4.2010), there was admittedly no limitation provided under Section 201 of the Act for initiating action for failure to deduct TDS. It was only by the Finance Act, 2009 that sub-section (3) was inserted, initially providing for a period of limitation of two years from the end of the financial year in which the statement is filed; and four years from the end of the financial year in which the payment is made or credit is given. A proviso was also inserted in the said sub-section (3) providing that for financial year commencing on or before 1.4.2007, orders may be passed at any time on or before 30.1.2011. The relevant sub-section (1) and sub-section (1A) of Section 201, as it stood at the time relevant for the assessment year 2002-03, is reproduced below:

201: Consequences of failure to deduct or pay

(1) Where any person, including the principal officer of a company -

(a) who is required to deduct any sum in accordance with the provisions of this Act; or

(b) referred to in sub-section (1A) of Section 192, being an employer, does not deduct, or does not pay, or after so deducting fails to pay, the whole or any part of the tax, as required by or under this Act, then, such person, shall, without prejudice to any other consequences which he may incur, be deemed to be an assessee in default in respect of such tax:

Provided that no penalty shall be charged under Section 221 from such person, unless the Assessing Officer is satisfied that such person, without good and sufficient reasons, has failed to deduct and pay such tax.

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax 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 –

- (i) *at one percent for every month or part of a month on the amount of such tax from the date on which such tax was deductible to the date on which such tax is deducted and*
- (ii) *at one and one-half percent for every month or part of a month on the amount of such tax from the date on which such tax was deducted to the date on which such tax is actually paid,*

and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of Section 200.

Sub-section (3) as it was inserted by Finance (No.2) Act, 2009 with effect from 1.4.2010 is also reproduced below:

(3) *No order shall be made under sub-section (1) deeming a person to be an assessee in default for failure to deduct the whole or any part of the tax from a person resident in India, at any time after the expiry of –*

- (i) *Two years from the end of the financial year in which the statement is filed in a case where the statement referred to in Section 200 has been filed;*

- (ii) *Four years from the end of the financial year in which payment is made or credit is given, in any other case:*

Provided that such order for a financial year commencing on or before the 1st day of April, 2007 may be passed at any time on or before the 31st day of March, 2011.

Then by Finance Act, 2012, the period of '4 years' mentioned in clause (ii) of sub-section (3) was amended as '6 years' to be given effect from 1.4.2010. It may be noted, by Finance (No.2) Act, 2014, sub-section (3) has further undergone an amendment with effect from 1.10.2014, whereby limitation of 7 years period from the end of the financial year has been provided. Such is the provision of law which we have to consider while deciding the first question.

Admittedly, at the relevant time relating to assessment year 2002-03, there was no limitation provided for initiating proceedings under Section 201. The Tribunal has, after considering the various decisions of the Apex

Court, as well as the Delhi, Kerala, Punjab & Haryana High Courts, held that the proceedings having been initiated by the Revenue beyond the period of four years from the end of the relevant financial year, would be barred by limitation. Challenging the same, Sri K V Aravind, learned counsel for the Revenue has vehemently argued that when there is no limitation provided under the Act, proceedings can be initiated at any stage and at any time. In the alternative, he submitted that even if it is held that proceedings are to be initiated within a reasonable time, then too, the period of seven years from the end of the financial year, as has been provided for by the Finance Act, 2014, would be the reasonable time. He has submitted that Section 153 of the Act provides for time for completion of assessments and reassessments. Sub-section (1) of the said Section provides for assessment to be completed within two years from the end of the assessment year and one year from the end of the financial year in which the return was filed. He relies on sub-section (2) of Section 153 which provides that no order of assessment, reassessment or recomputation shall be made

under Section 147 after expiry of one year from the end of the financial year in which notice under Section 148 was served. According to him, Section 147 of the Act would apply for computing the reasonable period and not Section 153(1) of the Act, and since notice under Section 148 could be served up to six years from the end of the relevant assessment year (in cases where the amount involved is more than Rs.1 lakh) coupled with Section 153(2) of the Act providing one year time for passing the order of assessment, reassessment or recomputation in which the notice under Section 148 was served, the same would amount to seven years from the end of the financial year and he thus contends that reasonable period of limitation under Section 201 of the Act should also be seven years from the end of the relevant financial year.

Learned counsel has also relied on the proviso to sub-section (3) of Section 201 of the Act which provides that such order for financial year commencing on or before 1.4.2007 may be passed at any time on or before 31.3.2011. He thus contends that in any case, for

initiating proceedings for the assessment year 2002-03 (which falls before 1.4.2007), the proceedings could be completed on or before 31.3.2011.

Per contra, Sri Rupesh Jain, learned counsel for respondent assessee has submitted that when no limitation is provided, limitation would be a reasonable period and not unlimited period. According to him, reasonable period would be as provided under Section 153(1) of the Act, which is two years from the end of the assessment year in which the income was first assessable, that is, three years from the end of the financial year in question. Accordingly, he submitted that two years period from the end of assessment year 2002-03 or three years from the end of the financial year would, in the present case, be 31.3.2005 and any proceedings initiated after such date, would be beyond limitation. He contends that since sub-section (3) which was first inserted in Section 201 of the Act, was with effect from 1.4.2010, as such, the same would not be applicable in the present case. He, however, submitted that initially the period of limitation

provided under the said sub-section was also the same as provided under Section 153(1) and thus, he contends that the same should be considered as the reasonable period of limitation for initiating proceedings under Section 201 for the assessment year 2002-03.

Sri Rupesh Jain, learned counsel for the respondent assessee has further submitted that the proviso to sub-section (3) of Section 201 would not be applicable to the case at hand, as it relates to pending cases and not cases which have already been decided, regarding which reliance has been placed by him on CBDT Circular dated 3.6.2010, as well as the Memo issued with the Finance (No.2) Bill 2009.

It is settled law that where there is no limitation provided under the Act, limitation for initiating any action would then be a reasonable period. The Apex Court in the case of ***State of Punjab & Ors Vs Bhatinda District Co-operative Milk Producers Union Ltd*** (2007) 11 SCC 360 has held that “*it is trite that if no period of limitation has*

*been prescribed, statutory authority must exercise its jurisdiction within a reasonable period. What, however, shall be the reasonable period would depend on the nature of the Statute, rights and liabilities there under and other relevant factors". In the case of **Santoshkumar Shivgonda Patil Vs Balasaheb Tukaram Shevale & Ors** (2009) SCC 352, the Apex Court has held:*

"It seems to be fairly settled that if a statute does not prescribe the time limit for exercise of revisional power, it does not mean that such power can be exercised at any time; rather it should be exercised within a reasonable time. It is so because the law does not expect a settled thing to be unsettled after a long lapse of time. Where the legislature does not provide for any length of time within which the power of revision is to be exercised by the authority, suo motu or otherwise, it is plain that exercise of such power within reasonable time is inherent therein"

As early as in the year 1969, the Apex Court, in the case of **State of Gujarat Vs Patel Raghav Natha & Ors** AIR

1969 SC 1297, has held that where there is no period of limitation prescribed, the same should be done within a reasonable time, and the length of reasonable time must be determined on the facts of the case. Then, in the year 1989, again the Apex Court in the case of **Government of India Vs Citadel Fine Pharmaceuticals & Ors** (1990) 184 ITR 467, while dealing with the case relating to excise duty, has held that *'in the absence of any period of limitation, it is settled that every authority is to exercise the power within a reasonable time..... What would be the reasonable time would depend on the facts of each case'*.

Thus, we can safely say that the law is well settled that when there is no period of limitation prescribed for taking action under any provision of law, the same should be taken within a reasonable period, which would depend upon the facts of the case and the provisions of the Act under which action has to be taken. This is necessary, also because if any right has accrued in favour of a person or party by passage of time, same cannot be unsettled by a

statutory authority at any time or after an indefinite period, as the same would amount to unsettling a settled position, which can only be done within a reasonable period, and not at any time in the future after an unlimited period.

Now what we have to consider is, what would be the reasonable period within which proceedings under Section 201 of the Act could be initiated in the present case. The Delhi High Court in the case of **Commissioner of Income Tax Vs NHK Japan Broadcasting Corporation (2008) 305 ITR 137**, was dealing with a similar case under Section 201 of the Income Tax Act. After considering the case of **Bhatinda District Cooperative Milk Producers Union Ltd** (supra) and other relevant cases on the subject, it has held in paragraphs 18 and 19 of the said judgment as under:

18. *In so far as the Income tax Act is concerned, our attention has been drawn to S.153(1)(a) thereof which prescribes the time limit for completing the assessment, which is two years from the end of the assessment year*

in which the income was first assessable. It is well known that the assessment year follows the previous year and, therefore, the time limit would be three years from the end of the financial years. This seems to be a reasonable period as accepted under S.153 of the Act, though for completion of assessment proceedings. The provisions of reassessment are under Ss.147 and 148 of the Act and they are on a completely differing footing and, therefore, do no merit consideration for the purpose of this case.

19. *Even though the period of three years would be a reasonable period as prescribed by S.153 of the Act for completion of proceedings, we have been told that the Income tax Appellate Tribunal has, in a series of decisions, some of which have been mentioned in the order which is under challenge before us, taken the view that four years would be a reasonable period of time for initiating action, in a case where no limitation is prescribed.*

The Tribunal has relied on the said judgment and thus held that four years period would be a reasonable period of time for initiating action.

Though learned counsel for the appellants / Revenue has vehemently argued that in view of the decision of the Apex Court in the case of **Uttam Namdeo Mahale Vs Vithal Deo & Ors** AIR 1997 SC 2695, when no period is prescribed in a Statute, then by necessary implication, action could be taken at any time, we are, however, of the view that the said case is distinguishable on facts, as the case before the Apex Court was a case of execution of an order of ejectment, whereas the case before us is one under the Income Tax Act, where action has to be taken for TDS having not been deducted and deposited. The law in this regard is well settled that where no limitation is provided, then the period of limitation would be a reasonable period of time, depending upon the facts of each case.

The facts of the case before the Apex Court in the case of **Uttam Namdeo Mahale** (supra) were different from the facts of the case in hand. The provision for tax deduction at source is only a mechanism for collection of tax, which is to be actually paid by the Recipient of the

money, and not by the payer. It is thus the liability of the Recipient and not the payer. However, under the Income Tax Act, a provision has been made requiring the payer to deduct the tax from the account of the Recipient and deposit the same with the Department. In the present case, what we notice is that the respondent assessee had not deducted any tax at source at the time of making payment to the Recipient-KKFHPL. As such, the respondent assessee also did not disclose the same in its return of income filed under Section 206 of the Act.

It is also noteworthy that in the case of the Recipient-KKFHPL, the assessment for the relevant assessment year 2002-03 was completed under Section 143(3) of the Act on 28.2.2005, where the receipt of the amount from the respondent assessee had been disclosed and the requisite tax had presumably been paid by the Recipient. The question of deduction of tax at source or payment of the same, was not raised by the Revenue at that time. In the case of the respondent assessee also, the assessment proceedings for the assessment year 2002-03

had again been completed, in which the payments made to the Recipient-KKFHPL had been disclosed. The question of not having deducted TDS and deposited the same with the Department, was also not raised at that stage.

The law provides for time limit for completion of assessments and reassessments (Section 153) which is two years from the end of the assessment year (or three years from the end of the financial year). As such, if at all the proceedings for failure to deduct or pay TDS were to be initiated, it ought to have been reasonably done within the limitation provided for completion of assessment under Section 153 of the Act. The period for assessment or reassessment under Section 147 of the Act would be a different case, as it relates to income escaping assessment and not a normal, regular assessment. It would, thus, be a special provision and would not be a guiding factor for considering reasonable period of limitation under Section 201.

The Delhi High Court in the case of **NHK Japan Broadcasting Corporation (supra)** has considered all these aspects and then come to a conclusion, in paragraph 18 of the judgment, that three years from the end of the financial year would be a reasonable period for initiating proceedings under Section 201 of the Act. It was also held that the provisions for reassessment under Sections 147 and 148 of the Act would be on a completely different footing, and therefore, would not merit consideration. However, keeping in view the fact that the Tribunal, in various decisions, had taken the view that four years period would be a reasonable period of time to initiate action, the Delhi High Court held that where no limitation was prescribed (as under Section 201 of the Act), reasonable period would be four years. Following such decision of the Delhi High Court, the Tribunal also held that four years period would be a reasonable period for initiating action under Section 201 of the Act.

Much reliance was placed by the learned counsel for the Revenue on the proviso added to sub-section (3) of

Section 201 of the Act, which provides that such order for a financial year commencing on or before 1.4.2007 may be passed at any time on or before 31.3.2011. It is noteworthy that the words used in the said proviso are 'may be passed', which means, it relates to something to be done in future, and not what has already been done, in which case, the words ought to have been 'may have been passed', which are not there.

In the memorandum explaining the provisions in the Finance (II) Bill, 2009, it was clearly stated that '*to provide sufficient time for **pending cases**, it is proposed to provide that such proceedings for a financial year beginning from 1st April, 2007 and earlier years can be completed by the 31st March, 2011*'. As such, the memorandum itself clarified that the proviso is for pending cases, and not decided cases. The Circular dated 3.6.2010, issued by the CBDT, also clearly specifies that the said proviso would be for pending cases and not decided cases. With regard to the applicability of the amendment made by the Finance Act, 2009 with effect from 1.4.2010, it was also clarified to be

from the assessment year 2011-12 and subsequent years. As such, it is clear that proviso to sub-section (3) did not legalize the cases where action had already been taken, but was meant for only such cases which were pending at the time of insertion of sub-section (3) to Section 201 of the Act.

Thus, for the reasons given above, we find that the Tribunal was correct in holding that the order passed under Sec.201 (1) and (1A) of the Act on 28.1.2008 for the assessment year 2002-03, would be barred by limitation as the period of limitation would be four years from the end of the financial year in question. As such, we answer the first question raised in this appeal, in favour of the respondent assessee and against the Revenue.

Question No.2:

Now, coming to the second question of law, it is true that in view of the first question having been decided in favour of the assessee, this question remains only academic in nature. However, since the question would be

relevant for the other assessment years (more particularly, assessment year 2004-05 and 2005-06), the appeals regarding which assessment years are also connected with this appeal, learned counsel for both the parties submitted that this question may also be considered and decided in this appeal, which would then govern the other appeals of the Revenue filed against the same assessee.

Sri K V Aravind, learned counsel for the Revenue has submitted that sub-section (1A) of Section 201 of the Act provides for payment of interest. The sub-section, as it stood at the relevant time, prior to 1.7.2010, reads as under:

(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section does not deduct the whole or any part of the tax 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 'one percent for every month or part of a month 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 and such interest shall be paid before furnishing the statement in accordance with the provisions of sub-section (3) of Section 200.”

The said sub-section clearly provides that interest would be payable from the date on which such tax was deductible, i.e., the date when payment was made by the assessee to the Recipient; till the date on which such tax was actually paid, i.e., tax was deposited by the Recipient.

As we have already noticed above, the provision for tax deduction at source is only a mechanism for collection of tax by the payer, even though the liability to pay tax is that of the Recipient. The provision for payment of interest under sub-section (1A) of Section 201 of the Act is only of compensatory nature. It cannot be a means to penalise the payer. The provision for payment of interest would arise from the date when it ought to have been deducted i.e., from the date of payment by the payer to the Recipient. The liability to pay interest would end on the

date when such tax has been deposited by the Recipient, either by way of advance tax or along with the return of income. Interest, herein, being compensatory in nature, cannot be thus charged for the period beyond the date when such tax has already been deposited by the Recipient. If the Revenue is permitted to charge interest even after the Recipient has deposited the tax, the same would amount to undue enrichment of the Revenue, as even after receiving the tax, it would continue to get interest on the amount which has already been paid or deposited with it. As such, the liability of the assessee herein would not be for payment of interest after the period of deposit of tax by the Recipient.

The Division Bench of this High Court, in the case of **Solar Automobiles India (P) Ltd Vs Deputy Commissioner of Income Tax** (2011) 245 CTR (Kar) 475 has, while dealing with a similar case, held in paragraph 9 of the judgment as under:

“In so far as payment of interest under S.194 A (Sic 201(1A) is concerned, the interest is payable for the period it is not paid after deduction. The principal liability of paying tax is that of the creditor and a statutory duty is cast on the debtor to deduct tax on the income of interest payable and remit the same to the company (sic-Government) irrespective of liability of the principal debtor. Unless the principal debtor (sic – creditor) files the return and pays tax, then the vicarious liability exists on the persons who should have deducted tax at source or ought to have deducted tax at source. The Revenue cannot collect tax on interest from both the principal and the agent. In that context, the order passed by the authorities holding that the assessee is liable to pay interest from the date of default till the date of the order is erroneous. However, the authorities have to find out whether the creditor has filed the returns and paid the tax. If he has filed the returns and paid the tax, the liability of the assessee ceases from the day they have paid the tax.”

In view of the above, the second question of law is also answered in favour of the assessee and against the Revenue.

Accordingly, for the reasons given hereinabove, both the questions of law raised in this appeal, are answered against the Revenue and in favour of the assessee.

Appeal stands dismissed. There shall be no order as to costs.

Sd/-
Judge

Sd/-
Judge

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