

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “B” BENCH: BANGALORE

BEFORE SHRI N.V. VASUDEVAN, VICE-PRESIDENT AND
SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

ITA. Nos. 1283 & 1284/Bang/2017
Assessment Years: 2013-14 & 2014-15

M/s. Deccan Charters [P] Ltd., Jakkur Aerodrome, Bellary Road, Bangalore – 560 064. PAN: AACCD9105G	vs.	The Deputy Commissioner of Income Tax [TDS], TDS Circle -1[1]. Bangalore.
(Appellant)		(Respondent)

Assessee by	:	Shri Suresh Muthukrishnan, CA
Revenue by	:	Shri Priyadarshi Mishra, Addl. CIT (DR)

Date of Hearing :	11.11.2021
Date of Pronouncement :	22.11.2021

ORDER

PER SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER

These two appeals by assessee are against common order of CIT(A) for Assessment Years 2013-14 and 2014-15 wherein CIT(A) confirmed the levy of penalty u/s. 221 of the Act.

2. Facts of the issue are that the assessee is engaged in the business of chartered flying of small aircrafts. Assessing Officer received complaints from the payers that the appellant had not issued TDS certificates for F.Y. 2012-13. Based on such complaints, a survey was conducted in the business premises- of the appellant on 23.9.2013 and it was found that the

appellant had not remitted to the Government Account TDS to the tune of Rs. 76,92,033/- for F.Y. 2013-14 and Rs. 1,36,43,263/- for F.Y. 2012-13. On such failure, the AO passed, orders u/s 201(1) and 201(1A) on 07.10.2013 treating the appellant as assessee in default. It did not file any appeal against the orders u/s 201(1) & 201(1A) dated 07.10.2013. The appellant remitted the tax deducted at source along with the interest. The AO thereafter initiated penalty proceedings u/s 221 of the I.T. Act. The appellant's main arguments before the AO were that it was facing severe financial hardship and that the same constitutes a 'good and sufficient reason' for not levying the penalty. The AO after considering the appellant's submissions rebutted the same and held that financial hardship is not reflected in the appellant's books of account and that financial hardship cannot be taken as good and sufficient reason for not remitting the tax deducted at source. Referring also to the past conduct of the companies under the same management, he levied a penalty u/s 221 of Rs.1,08,38,662/- for F.Y. 2013-14 and Rs.29,06,500/- for A.Y. 2014-15.

3. Aggrieved, the assessee went in appeal before the CIT(A). The CIT(A) confirmed the levy of penalty u/s. 221 of the Act. Again the assessee is in appeal before us. The Ld.AR submitted that

12. Being aggrieved by the impugned order of the learned Commissioner of Income-tax [Appeals] dated 28/03/2017 the appellant is preferring this present appeal before this Hon'ble tribunal in pursuit of justice. The brief facts in support of the case of the appellant are as under:

[i]. The appellant is engaged in the business of providing services of aircraft maintenance, non-schedule air transport services; in industry parlance, it is known as 'charter services' such services were provided by using helicopters and fixed winged aircraft.

[ii]The appellant had serious financial constraints during the impugned assessment year 2013-14, wherein several factors were beyond the control of the appellant which contributed to such awkward situation, which actual led to irregular disbursement of salaries to its employees including the pilots. Disbursement of payments were not made on due dates but belatedly depending upon the availability of funds. It is submitted that disbursements of

salaries were not made to all the employees on same day, different employees were paid on different dates and that too payments were not of the full amount of salary.

[iii] As mentioned earlier since the appellant is engaged in the business of providing charter services using helicopters and aircraft and for running the same pilots are required to fly the same. Pilots will not fly the helicopters and aircraft if they are not paid their salaries, yet the appellant could not disburse the salaries promptly to its employees as the appellant was bleeding with losses and was not able to manage funds for its working capital.

[iv] It is submitted that in certain cases the employees who have not been disbursed salary by the appellant have filed a winding up petitions against the appellant, which fact itself proves beyond any doubt that all is not well with the financial position of the appellant.

[v] It is submitted that the appellant had sold certain revenue earning apparatus i.e. the helicopters which were in good working condition, for arranging funds for the appellant's operational activities to reduce losses being incurred by those assets and reduce the monthly out go on account of personnel.

[vi] It is submitted that in few cases the employees themselves have offered the appellant company to work for a reduced salary considering the financial position of the appellant.

[vii]. It is submitted that the financial difficulties which -the appellant faced are for the following reasons:

- Aviation Turbine Fuel [ATE] is one of the significant components of the operating expenditure for providing charter services. The ATF prices were very high and there was a steep increase in the price which badly affected the margins of the appellant.
- The competition in the charter service business increased as new competitors entered in this particular service industry and started giving very - low prices which eventually forced the appellant even to revise its tariff and which resulted in very less margin in earning profits.
- The appellant had started a project in the state of Gujarat and substantial amount of investments were made. Due to certain diverse reasons which included regulatory hurdles and certain political dispensations, the said project could not materialise.
- The appellant was operating lucrative charter service contract between Katra and Shri Matha Vaishnodevi shrine. Due to aggressive undercutting by a competitive bidder the appellant -could not renew the contract. This resulted not only in loss of revenue but also additional expenditure in winding up the infrastructure that was put in place to operate the services.

13. The provisions of section 221[1] of the Act reads as under which is reproduced .for the sake of ready reference:

"221. Penalty payable when tax in default.

(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the [Assessing] Officer may direct, and in the case of a continuing default, such further amount or amounts as the [Assessing] Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears :

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard :

[Provided further that where the assessee proves to the satisfaction of the [Assessing] Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.]

Explanation

For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.]

(2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded.

14. Whether the levy of penalty under section 221 of the Act is not automatic:

[i] As could be seen from the provisions of section 221 of the Act the levy or imposition of penalty is not automatic and there is a discretion vested upon the learned assessing officer whether to impose or not impose penalty under section 221 of the Act since the word used in the section is "MAY". It is submitted that the words used in the penalty provisions under section 221 of the Act is MAY and not SHALL. Thus, the learned assessing officer should always exercise his discretion in invoking and levying penalty under the provisions of section 221 of the Act.

[ii] In the instant case the learned assessing officer and the learned commissioner of income-tax [Appeals] has not exercised their discretion and levied penalty as if it is automatic and on an erroneous appreciation of the fact as regard to the financial position of the appellant without properly appreciating that the appellant had infact was and is in the financial difficulty. The learned authorities below without looking into the facts and circumstances of the case and further not appreciating the fact that the penalty proceeding under section 221 is independent proceedings to that of the assessment proceedings without applying his mind, invoked and levied penalty under section 221 of the Act and failed to exercise the discretion provided in the statute.

[iii] Reliance is placed on the parity of reasoning of the decision of the Hon'ble Jurisdictional High Court of Karnataka decision in the case of CIT Vs. Manjunatha Cotton Et Ginning Factory [2013] 359 ITR 565 [Kar], though the said decision is in the context of section 271[1][c] of the Act, wherein the Hon'ble Court has held that the penalty proceedings are not automatic and the learned assessing officer has got the power either to impose or not to impose penalty. The same analogy has to be applied to the case in hand before this Hon'ble Tribunal.

[iv] It is submitted that the plain reading of the provisions clearly indicate the use of the word May which is what that needs to be looked into and interpreted. The use of the word may is indicative of the fact that the AO has discretion either to levy or not to levy. The Hon'ble Apex Court in the case of Dilip Shroff Vs. JCIT, reported in 291 ITR 519 at page 544 in Para 47 has held that Penalty is not automatic. It has also held that discretion has to be exercised by the AO keeping the relevant factors in mind.

[v] Thus, from the act of the learned authorities below one can clearly state that the levy of penalty is without any application of mind, arbitrary, based on suspicion and surmises and not based on merits of the matter or proper application of mind.

15. Whether the financial difficulty and paucity of funds constitute "good and sufficient reasons" for not imposing penalty under section 221 of the Act:

[i] It is submitted that as per the second proviso to section 221 of the Act there is an exception as regard to levy and imposition of penalty under section 221 of the Act, which reads as under:

[Provided further that where the assessee proves to the satisfaction of the [Assessing] Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.]

[ii] It is submitted that the learned authorities have stated that the financial stringency cannot be accepted as a 'good and sufficient reason' since the default is on account of non remittance of TDS, are different footing vis-a-vis cases of default involving other taxes covered under section 221 of the Act.

[iii] In this regard the appellant wishes to state and submit that there is no distinction between non-payment of TDS and other taxes in the provisions of section 221 of the Act. The said finding and understanding of the provisions of section 221 by the authorities below are not correct and resulted in a perverse finding and decision.

[iv] As could be seen from the provisions of section 221 of the Act a second proviso to the said section has been brought into to the statute which has been reproduced in the above paragraph.

[v] It is submitted that the financial difficulty and paucity of funds does constitute 'good and sufficient reason' and ground for not imposing penalty under section 221 of the Act. It is submitted that the statute does not provide for distinguishing between penalty leviable when an assessee defaults in payment of his own taxes i.e. self assessment tax, advance taxes, etc., and the payment of TDS. It is submitted that the provisions of section 221 is applicable for all the cases irrespective of the fact whether the default is towards non-payment of self assessment tax, advance tax, etc., not even for default in payment of advance tax. Thus, there is no distinction as held by the learned Commissioner of Income-tax [Appeals] that the immunity provided in the second proviso to section 221 of the Act is not applicable is far from the right conferred in the statute.

[vi] As contended and also submitted and demonstrated before the authorities below the financial difficulty and paucity of funds as per the second proviso to section 221 of the Act amounts to "good and sufficient reason".

[vii] The appellant places reliance on the parity of reasoning and also the principles as laid out or derived out from the decisions of various Hon'ble Court in the country:

- CIT Vs. Chembara Peak Estates Ltd., [1990] 183 ITR 471 [Ker];
- CIT Vs. Jaipur Electro [P] Ltd., [1990] 183 ITR 476 [Raj];
- CIT Vs. Bhikaji Ramachandra [1990] 183 ITR 478 [Born];
- CIT Vs. Raunaq Et Co., [P] Ltd., [1983] 140 ITR 407 [Del];

- CIT Vs. Mysore Fertilisers Co., [1984] 145 ITR 91 [Mad];
- Addl. CIT Vs. Free Wheels India Ltd., [1982] 137 ITR 378 [Del];

[viii] The appellant places reliance on the parity of reasoning of the decision of the Hon'ble Hyderabad Tribunal in the case of ACTT [TM] Vs. M/s. Image Health Care Limited, in ITA No. 658/Hyd/2015, order dated 01/12/2015.

[ix] In view of the above submissions and also the parity of reasoning of the judicial precedents as set out above it is humbly prayed before this Hon'ble Tribunal to vacate the erroneous finding rendered by the learned authorities below and consequently levy and imposition of penalty under section 221 of the Act requires to be deleted in toto for the advancement of substantial cause of justice.

16. Whether the finding of Commissioner of Income-tax (Appeals) that there is no financial difficulty in the case of the appellant is justified:

[i]. The learned Commissioner of Income-tax (Appeals) has erroneously held as under:

- that there was a huge availability of cash as at 31/03/2013;
- that there was huge net cash generated from investing activities [sic] Operational activities; and
- that the payments have been made to unsecured loans i.e. to the related parties and consequently there is no financial stringency.

[ii] In this regard the appellant wishes to state and submit that the finding of the learned Commissioner of Income-tax (Appeals) is erroneous and has failed to understand the facts of the present case in the right perspective.

[iii] It is submitted that the learned Commissioner of Income-tax (Appeals) has stated that there was a huge availability of cash as at 31/03/2013 the relevant observations are at page 11 & 12 of the appellate order. In this regard the appellant wishes to submit that the learned assessing officer has not considered the cash credit limit which has been obtained by the appellant from its bankers and further the learned Commissioner of Income-tax (Appeals) has not considered the items on the liability side of the balance sheet. Thus, the learned Commissioner of Income-tax (Appeals) is not justified on facts in holding that there was a huge availability of cash as at 31/03/2013.

[iv] It is submitted that the learned Commissioner of Income-tax (Appeals) has stated that there was huge net cash generated from investing activities [sic] operational activities. In this regard the appellant wishes to state and submit that the appellant had made provisions towards its day to day activities and the same are recurring in nature for its operational activities and for the appellant to be a going concern. It is submitted that though there may be cash and bank balance as at 31/03/2013 the appellant for the purposes of operational cost has to have certain minimum amount to meet the operational cost and as could be seen from the ledger account of the appellant for the month of April there will be lot of disbursement of payments towards its operational cost, which fact has been completely ignored by the learned Commissioner of Income-tax (Appeals). It is further submitted that amounts considered by the learned Commissioner of Income-tax (Appeals) i.e. Rs. 9,44,43,669/- in her appellate order as regard to the cash flow is at the end of the year and it is only an abstract of the cash flow of the appellant which has resulted in wrong appreciation of facts. Thus, the learned

Commissioner of Income-tax [Appeals] is not justified on facts in holding that there was a huge net cash generated from investing [sic] activities as at 31/03/2013.

[v] It is submitted that the learned Commissioner of Income-tax [Appeals] has stated that as per Note 29 to the balance sheet w.r.t. 'Related Party Transactions' the appellant has paid to Bhargavi Gopinath and to DCL Holdings [P] Ltd., and the appellant's claim of financial crunch is far from truth. In this regard the appellant wishes to state and submit that the appellant has not made any payments to its related party transactions. The appellant has allotted shares to the related parties from whom the appellant had availed loans and no actual payments have been made to such persons as alleged by the learned Commissioner of Income-tax. The finding of learned Commissioner of Income-tax is baseless and far from actual fact. Thus, the learned Commissioner of Income-tax [Appeals] is not justified on facts in erroneously holding that the appellant has made payments to its related parties and the same requires to be deleted for the advancement of substantial cause of justice.

[vi] In view of the above submissions the appellant humbly prays before this Hon'ble Tribunal to vacate the erroneous findings given by the learned Commissioner of Income-tax [Appeals] as regard to huge availability of cash as at 31/03/2013; that there was huge net cash generated from investing activities [sic] Operational Activities; and that .the payments have been made to unsecured Loans i.e. to the related parties and consequently there is no financial stringency, for the advancement of substantial cause of justice.

17. It is further submitted that the learned assessing officer for disbursement o the arrears of demand in context to the demands raised in 201 [1] Et 20' [1A] orders had allowed the appellant to clear the arrears demand in instalments after knowing the financial hardship which the appellant was facing, which fact had been completely ignored by the learned authorities below and thereby imposed huge penalty under section 221[1] of the Act without even considering the discretion granted by the statute to the learned assessing officer not to impose penalty under certain circumstances.

18. The Appellant hereby denies every contention against the Appellant in the order of the authorities below which has not been specifically traversed above and prays liberty to address the same if raised by revenue at the time of hearing of the appeal.

19. In view of the above, the learned Commissioner of Income-tax [Appeals] has erred in denying relief to the Appellant and consequently, has passed a perverse order and which requires to be set aside for substantial cause of Justice and Equity.

4. The Ld.AR of assessee submitted that there is reasonable cause for remitting the TDS amount to the government exchequer belatedly and assessee has already paid the tax and interest amount and penalty may be deleted. On the other hand, the Ld.DR submitted that financial stringency cannot be accepted as a good and sufficient reason in matters relating to levy of penalty u/s. 221 of the Act. The assessee already got deducted the

TDS, the said amount belonged to the government and it should be deposited to the government account within the stipulated time and failure of such things should be viewed seriously. The question of financial stringency cannot come to the rescue of the assessee as the assessee in possession of the money belonging to the government in his hand and it has used the government money for its business purpose which cannot be conducted without levying the penalty u/s. 221 of the Act. Without prejudice to the above argument, the Ld.DR submitted that the assessee is having sufficient cash and bank balance in his hand which is evident from the financial statements furnished by the assessee before the authorities and being so, there is no question of deletion of penalty. According to the Ld.DR, the assessee used government money for its business purpose to clear of its dues which shall not be appreciated and the levy of penalty should be confirmed.

5. We have heard both the parties and perused the material on record. In the present case, it is an admitted fact that the assessee deducted the TDS from various payments made by assessee and the TDS has been recovered from various parties which requires to be deposited to the government account within the stipulated time. The amounts were not remitted to the government account within the stipulated time. The default in non-remittance was detected during the course of survey that the tax deducted at sources were remitted only after the survey and after the assessee was declared as an assessee in default u/s. 201(1) of the IT Act. There is no dispute regarding the quantum of TDS to be remitted to the government account. The assessee has also not filed any appeal against the order u/s. 201(1) and 201(1A) of the IT Act. Now the contentions here is that the Assessing Officer levied exorbitant penalty for non-remitting of TDS within the stipulated time which requires to be

deleted. In this case, department is only asking the assessee to remit the money which has been deducted as TDS to government account and it is not the assessee's monies which had to be remitted and the monies rightfully belong to the government and government has authorized the assessee to deduct it and pay to the government account. The assessee after having deducted the TDS from various payments it has kept that monies in his hands and used for business purpose. In this matter, the financial difficulties of the assessee company may not be very relevant unless the assessee also shows that they were not able to pay the payments on which TDS made and such a case was also suggested that it has not been made out in any stage with facts and figures. U/s. 221 of the IT Act penalty could be warded off if the assessee could show that the default was for good and sufficient reasons. The only reason now shown is financial difficulties which under these circumstances does not appear to be sufficient. It is no doubt that a mere default is not sufficient for levy of penalty but as the lower authorities pointed out that the assessee has been using the deducted TDS amount for meeting various business commitments and assessee continuously default the payment of TDS to the government account which is very serious in nature. Being so, the assessee cannot escape its consequences, it had kept back the tax deducted at sources with it. One can understand the financial difficulties of assessee is facing, if it was in defaulter for a short period. But in the present case, conduct of the assessee is that it continuously defaulting the payment of TDS amount to the government account by one was other reasons without remitting the same to the government account and these action of defaulter cannot be condoned by deleting the penalty. Accordingly, levy of penalty is confirmed. However, the Assessing Officer levied penalty at very exorbitant rate that 5% pm for which there is no legal sanction when the department itself has paid interest at 6% pa

to the assessee on the refund due to the assessee. Being so, in our opinion, it is reasonable and fair to levy penalty at 1% pm i.e. 12% pa instead of 5% pm levied by AO. Accordingly, we direct the AO to recompute the penalty for both Assessment Years at 1% pm or 12% pa. Accordingly, the appeal of the assessee is partly allowed.

6. In the result, both the appeals filed by the assessee are partly allowed.

Order pronounced in the open court on 22nd November, 2021.

Sd/-
(N.V. VASUDEVAN)
VICE-PRESIDENT

Sd/-
(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Dated: 22nd November, 2021.
/MS/

Copy to

1. The Appellant
2. The Respondent
3. CIT(A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore