PENALTY UNDER SECTION 271C—WHETHER LEVIABLE FOR NON-DEDUCTION OF TAX FROM SALARY PAID ABROAD

[156 CTR (Art) p.196 (Part-V)]

—S.K. TYAGI

A number of foreign companies have established their liaison offices in India. The liaison offices of these foreign companies engage a number of employees in their offices in India. Some of the employees are deputed to these liaison offices by the parent companies from abroad. Such expatriate employees continue to be on the pay-roll of the parent company also and the parent company continues to pay them a part of salary in lieu of retainership, etc. The Income-tax Department is asking these liaison offices to deduct and pay tax at source in respect of the part of salary paid to expatriate employees by the parent companies abroad. The question considered by the learned author is whether penalty under section 271C is leviable on such liaison offices. After an elaborate analysis, the learned author concludes that no penalty under section 271C for non-deduction of tax at source in respect of salary paid abroad to expatriate employees by the foreign parent company, is leviable on the liaison offices.

SYNOPSIS

1. Introduction

After the opening-up of the Indian economy to liberal foreign investment, a number of foreign

companies have established their liaison offices in India. The main function of a liaison office is to collect information regarding the various projects, etc. likely to come up in India and transmit the same to its parent company abroad.

It needs to be clarified here that a liaison office cannot be equated with a branch office or a permanent establishment, as a liaison office is not allowed to conduct any business in India in view of the regulations laid down by the Reserve Bank of India.

The liaison offices of these foreign companies engage a number of employees in their offices in India. Some of the employees are deputed to these liaison offices by the parent companies from abroad, normally for short durations of one to two years. Such expatriate employees continue to be on the pay-roll of the parent company also and the parent company continues to pay them a part of salary in lieu of retainership, etc.

The liaison offices deduct tax at source from the salary and allowances etc. paid to such employees in India. Regarding the part of salary paid to such employees by the parent company abroad, no tax is deducted at source by most of the liaison offices under the bona fide belief that they are not persons responsible for deducting tax at source, in respect thereof, under section 192 of the Income-tax Act, 1961.

Of late, such liaison offices have been subject to surveys under section 133A of the Income-tax Act. During the course of survey operations the Income-tax authorities have advised/asked/directed these liaison offices to deduct and pay tax at source in respect of the part of salary paid to expatriate employees by the parent companies abroad. Most of such liaison offices have complied with the aforesaid directions of the Income-tax officials and accordingly paid tax under section 201(1) and interest thereon under section 201(1A) of the IT Act. The aforesaid payments have been made in order to avoid litigation and buy peace with the Income-tax Department.

Though the concerned liaison offices have paid tax under section 201(1) and interest thereon under section 201(1A) of the Act, all of them are now facing penalty proceedings under section 271C of the Act.

The purpose of this article is to consider whether penalty under section 271C is leviable on such liaison offices.

2. In certain cases the part of salary paid by the parent company abroad, is not liable to tax in India

As already pointed out, the aforesaid expatriate employees working with the liaison offices are also on the pay-roll of the parent companies and these parent companies pay a part of salary to these employees abroad. Actually all these expatriate employees are basically the employees of the parent companies abroad and they are deputed for rendering services at the liaison offices in India.

They report to head office of the parent company abroad and spend considerable time in their parent organisation abroad. The salary paid by the parent companies abroad is towards services rendered abroad and also for retainership.

All the aforesaid expatriate employees come on deputation to liaison offices in India for short durations of one to two years. All of them, therefore, continue to be resident but not ordinarily resident (R but NOR) in India. As per proviso to section 5(1)(c) of the IT Act, in case of a person who is R but NOR, the income which accrues or arises to him outside India, shall not be included in his total income liable to tax in India.

In view of the aforesaid reasons the salary paid by the parent company to such employees abroad, is not liable to tax in India and accordingly on tax is required to be deducted at source therefrom.

3. The liaison office in India is not liable to deduct tax at source from the salary not paid by it

As per section 192 of the IT Act, and person responsible for paying any income chargeable under the head '*Salaries*' shall, at the time of payment, deduct income-tax on the amount payable at the average rate of income-tax computed on the basis of rates in force for the financial year, in which the payment is made.

Therefore, the person making the payment of income by way of salary, is responsible for deducting tax at source from the payment which it makes to the employees in India. In other words a liaison office (L.O. for short) making payment of part of salary in India is responsible for tax deduction at source (TDS) only in respect thereof and not in respect of the part of salary paid by parent company (PC for short) abroad.

We may take a practical example of an employee, who is paid Rs. 20 lakhs in India and Rs. 80 lakhs abroad out of his total salary of Rs. 100 lakhs payable to him in a year. The tax on his total salary will be around Rs. 30 lakhs. Thus even if L.O. deducts his whole salary payable in India by way of tax at source then also his total tax liability would not be met. Under section 192 tax has to be deducted out of the payment of salary. L.O. therefore, cannot be expected to recover Rs. 10 lakhs from PC on behalf of the employee and then pay the same by way of TDS under section 192 of the IT Act. Such an obligation on L.O. would obviously be absurd and ridiculous.

In view of the aforesaid reasons, it is beyond any doubt that L.O. is under obligation to deduct tax only out of and in respect of part of salary paid by it to an employee in India and it is under no obligation to deduct tax out of and in respect of the part of salary paid to an employee by PC abroad. Its aforesaid obligation has been duly fulfilled by L.O. Therefore, the provisions of section 271C would not be attracted in the case of L.O.

4. The foreign parent company in question, is non-resident in India

As per the provisions of section 6(3) the foreign parent company (PC) is non-resident in India. Section 6(3) reads as follows :

"*A company is said to be resident in India in any previous year, if—*

(i) it is an Indian company; or

(ii) during that year, the control and management of its affairs is situated wholly in India."

PC is a company incorporated abroad. Therefore, it is not an Indian company. The control and management of its affairs is situated abroad. It has got only a LO in India which is not authorised to conduct any business in India. Therefore, the condition provided in section 6(3)(ii) is also not satisfied in the case of such PC. Hence, it is absolutely clear and beyond any doubt that the parent company is a company not resident in India.

5. Liability for payment made by non-residents to persons resident in India

The basic purpose of the IT Act is to determine taxable income of an assessee, levy tax on it and recover the same. All the provisions of the Act are geared for achieving the aforesaid objective. The basic liability in respect of assessment and payment of tax under the Act lies on the person whose income is chargeable under section 4(1) of the IT Act.

A non-resident may fall within the jurisdiction of the Indian IT Act 1961, only if the source of any part of his income lies within the Indian territory. In other words, an income is taxed in India if India is the country of its source.

A non-resident may be proceeded against only in respect of assessment and collection/recovery of tax on his income for which India is the source country. A non-resident is not liable to company with other provisions of the Indian IT Act.

The IT Act, 1961 has got some special provisions in respect of non-residents, viz.

(a) The special provisions relating to certain incomes of non-residents—Chapter XII-A—Sections 115C, 115D, 115E, 115F, 115G, 115H & 115-I.

(b) Liability in special cases chapter XV—Sections 160(1), 163, 172 and 173. All these provisions relate to assessment and recovery of tax in respect of income of non-resident

(c) Deduction of tax at source—Chapter XVII-B—Sections 194E, 195, 196A and 196D.

All the above provisions are regarding TDS from payments to non-resident to be remitted outside India.

All the aforesaid provisions in sub-paras (a), (b) and (c) relate to assessment of incomes of non-residents or recovery of tax thereon. There is no specific provision in the Act regarding the liability of non-residents in respect of payments made by them to persons resident in India.

In view of the aforesaid reasons the TDS provisions under the Indian IT Act, 1961, would not be applicable to non-residents in respect of payments made by them to persons resident in India.

A. Special provisions of Chapter XV "Liability in special cases" support the aforesaid view.

The IT Act, 1961, has made special provisions in Chapter XV—Sections 160(1), 163, 172 and 173; in order to assess and tax the income of non-residents, chargeable to Indian Income-tax, by placing vicarious liability on persons resident in India, by treating them as agents in respect thereof; primarily because the persons resident in India are subject to territorial jurisdiction of Indian IT Act, 1961, whereas the non-residents are not.

A converse relationship could not have been envisaged under the IT Act, 1961. In other words a non-resident could not have been vicariously liable for deducting and paying tax leviable on a person resident in India in respect of payments made to him by the non-resident.

B. Provisions of Chapter XVII-B go to show that they do not apply to non-residents in respect of payments made by them to persons resident in India.

(i) Section 203A—Allotment of Tax Deduction Account Number (TAN)

Under section 203A every person deducting tax at source is required to apply to the Assessing Officer (AO) for allotment of TAN. If a non-resident is to deduct tax at source from payments to persons resident in India, in the first place, which would be the AO in his case ? Secondly if non-resident is making payments to many Indians, staying in different parts of the country which would be the AO for allotment of TAN, in that case ? There is no provision in the Act covering such a situation. Thus the provisions of section 203A go to show that the TDS provisions under Chapter XVII-B, are not applicable in respect of payments by non-residents to persons resident in India.

(ii) Recovery of TDS not paid by a non-resident to the Government of India

In case a non-resident deducts tax from payments to a person resident in India but does not pay the same to the Government of India, there would be no one to proceed against in India, for the recovery of such a tax under the provisions of section 201.

Besides, such a tax deducted at source but not paid, cannot also be recovered from the receiver of relevant payments made by the non-resident, in view of the provisions section 205 which bars direct demand on the assessee in respect of tax deducted from his income. Such could never been the intention of the legislature. It is obvious that it would be better to levy and collect tax from the Indian resident in respect of such payment made by the

non-resident, as the Indian resident is under complete jurisdiction of the IT Act whereas the non-resident is not.

(iii) Sections 191 and 202

As per section 202 TDS is only one of the modes of recovery of tax and section 191 provides for a direct levy and assessment of tax on the assessee :

(i) where no provision has been made for TDS; and

(ii) where there is such a provision for TDS but no deduction has been made at source.

Thus the provisions of sections 202 and 191 provide a better alternative for levy and collection of tax from the Indian residents on their income in respect of payments received from non-residents, as they are under complete jurisdiction of the IT Act and, therefore, all the provisions for levy and collection of tax are applicable to them.

(iv) Exemption from TDS liability for individuals and HUFs in certain cases

The vicarious liability for TDS has not been imposed on individuals and HUFs in certain cases in view of practical difficulties e.g. sections 194, 194C, 194H, 194-I and 194J. If some persons resident in India could be excluded from the operation of the provisions of Chapter XVII-B, on account of practical difficulties, a notion that non-residents could be saddled with such a vicarious liability would be totally far-fetched, because in their case there would be far more practical difficulties.

(v) Persons deducting tax to furnish prescribed returns—Section 206

The provisions of section 206 require a person responsible for TDS, to furnish certain prescribed returns. Rule 36A of the Income-tax Rules, 1962, is relevant for this purpose. As per rule 36A the relevant returns are to be furnished to—

(i) the Assessing Officer so designated by the Chief Commissioner of Income-tax or Commissioner of Income-tax, within whose area of jurisdiction the office of the person responsible for TDS is situated, or

(ii) in any other case the AO within whose area of jurisdiction the office of the person responsible for TDS is situated.

In this context the moot question will be regarding the AO in respect of a non-resident deducting tax at source who has no office in India. There are no guidelines as to who would be the AO in case of such a non-resident for the purpose of section 206.

(vi) Rule 37A of Income-tax Rules, 1962

There is a separate rule 37A for returns regarding TDS in the case of non-residents.

There is, however, no rule for non-residents deducting tax at source from payment to residents in India.

(vii) Rule 26 of Income-tax Rules, 1962

There is another Rule 26 in respect of rate of exchange for the purpose of TDS on income payable in foreign currency. This rule applies to income payable to an assessee outside India. There is, however, no corresponding rule in respect of payments made by non-residents to persons resident in India.

Thus the aforesaid provisions of various sections of Chapter XVII-B make it amply clear that the same are not applicable to non-residents in respect of payments made by them to persons resident in India.

C. Indication from Chapter XIX-B "Advance Rulings"

Any non-resident can make application to the Authority for Advance Rulings (AAR), but such application can be made in respect of a "transaction" leading to generation of income chargeable to Indian Income-tax (refer section 245S).

There is no provision for approaching the AAR in respect of TDS liability of non-resident. Thus, the provisions of Chapter XIX-B, also go to show that provisions of Chapter XVII-B regarding TDS are not applicable to non-residents in respect of payment made by them to persons resident in India.

D. Practical wisdom regarding the collection and recovery of income-tax.

The IT Act has got various provisions in order to ensure that tax in respect of income of non-residents is levied and collected in India itself before the same is remitted outside India. The basic idea behind the scheme in the Act, for this purpose, is to levy, collect/recover tax in respect of such income as long as it is present within the Indian territory and accordingly subject to all the provisions of Indian IT Act.

If, on the other hand, a non-resident makes a payment to a person resident in India and he is required to deduct tax at source in respect thereof, then in would mean that he is being authorised to deduct a part of the payment in the form of tax, before the payment is sent to India. Thus, it would lead to a situation where a non-resident will have control over a part of payment being sent to India.

If no tax is deducted at source by the non-resident, then whole of the payment is received in India and the recipient thereof, is under full and complete jurisdiction of the Indian IT Act. He may accordingly be required to pay advance tax in respect of income embedded in such a payment.

In the light of the aforesaid discussion it would always be prudent and wise to allow the receipt of income in India without any deduction of tax therefrom and thereafter levy, collect or

recover tax from the person who is resident in India and, therefore, liable to comply with all the provisions of the IT Act, Thus the relevant income as well as the tax thereon would both be under the control and jurisdiction of the Indian IT authorities.

E. Summary

On examination of various provisions of the IT Act, one may reach an unmistakable conclusion that if the source of income lies within the territorial limits of India then all the provisions of the IT Act, 1961, are applicable to it; or the other hand if the source of income lies outside the Indian territory then it would not be subject to the jurisdiction of the IT Act, 1961, even though such an income is chargeable to tax in India. In this context one may say that the locus of the source of income is synonymous with the locus of the "person responsible for paying", as defined in section 204 of the Act. In other words, it would mean that if the "person responsible for paying"; along with the source of the payments; is located outside the territorial limits of India, then such a person would not be liable to comply with the provisions of Chapter XVII-B of the Act.

In view of the aforesaid reasons it is clear that even the foreign PC is under no obligation to deduct tax at source from the salary paid by it abroad to expatriate employees working in its LO in India. Therefore, the provisions of section 271C would not be attracted even in the case of the PC for non-deduction of tax at source in respect of part of salary paid by it abroad to the aforesaid employees working in its LO in India.

6. Principal liability for payment of income-tax is that of the recipient of income

As per section 1(2), the Indian IT Act, 1961 extends to whole of India. It means the Act is not, in general, applicable to a person who is not resident in India.

The basic liability in respect of assessment and payment of tax under the Act, lies on the person whose income is chargeable under section 4(1) of the IT Act.

The power of TDS is enshrined in section 4(2) of the Act. As per section 4(2), in respect of income chargeable to tax, income-tax shall be deducted at source or paid in advance, where it is so deductible or payable under any provision of this Act. All the sections regarding TDS, fall under Chapter XVII of the IT Act and the heading of this Chapter is 'Collection and Recovery of Tax'.

As per section 190, pending regular assessment, tax is deductible at source wherever so provided section 191 provides for a direct levy and assessment of tax on the assessee :

(a) where no provision has been made for TDS, or

(b) where there is such a provision for TDS but no tax has actually been deducted at source.

As per section 202 TDS is only a mode of recovery of tax.

In view of the aforesaid reasons, no irrecoverable loss of revenue is caused if there is a default in

respect of TDS. The aforesaid proposition is also supported by the decision of Kerala High Court in the case of *CIT vs. K.D.H. Produce Co. Ltd. (1987) 63 CTR (Ker) 28 : (1987) 161 ITR 477 (Ker) : TC 5R.592.*

The relevant observations are as follows :

"*The provisions of sections 192, 201 and connected sections of the IT Act, 1961, regarding deduction of tax at source and payment of tax so deducted to the Revenue lay down only a mode of recovering tax due from the employee. The duty on the employer is not an end in itself. It is only a means to an end, viz., recovery of tax payable by the employee. Tax paid over to the Revenue after deduction by the employer is for and on behalf of the employee. This is subject to the ultimate assessment to be made on the employee and the tax so deducted and paid is to go in adjustment of the employee's liability*".

In view of the aforesaid reasons it is clear that the principal liability to pay income-tax on an income is that of the recipient thereof. It also establishes that the liability of an employer for TDS is a vicarious one. Therefore, no stringent or penal action is called for against an employer in case of failure to deduct tax at source on account of bona fide reasons.

7. Even otherwise no penalty under section 271C is leviable on liaison office

As already pointed out there was no liability on LO to deduct tax at source in respect of salary the payment of which is not made by it. In other words there is no liability on the LO for TDS in respect of salary payment made by the PC abroad. However, even if it is assumed that there was a liability for TDS on the LO, on penalty under section 271C is leviable on it. The reasons for the same are as follows :

A. No tax was deducted in respect of salary paid abroad, on the basis of counsel's advice

As already pointed out LO was of the view that it was not responsible for TDS in respect of salary received by the expatriate employees abroad. This view was formed on the basis of its counsel's advice.

For the aforesaid proposition reliance is placed on the decision of Orissa High Court in the case of *CWT vs. Ramniklal D. Mehta (1982) 28 CTR (Ori) 69 : (1982) 136 ITR 729 (Ori) : TC 66R.763.* It was held in this case by the Income-tax Appellate Tribunal that almost all the assessees are completely dependent upon their lawyers or advisers for the highly technical taxation affairs involving a change almost in every year and consequently they could not comply with the terms of the Act unless they were advised by their tax lawyers. It was further held by the Income-tax Appellate Tribunal that it was not the case of the Appellate Assistant Commissioner that the assessee had not filed his wealth-tax returns although he was advised to file the same by his lawyer. It was held by the Orissa High Court that the Tribunal was justified in deleting the penalty.

In this context the decision of the Madras High Court in the case of *Nachimuthu Industrial Association vs. CIT (1980) 123 ITR 611 (Mad) : TC 49R.337,* is very relevant. It was a case regarding levy of penalty under section 221 of the Act. It was held, inter alia, that assessee's claim that it was exempt from tax was not a frivolous one and hence the assessee could reasonably believe that there would be no liability to tax. In view thereof, inter alia, the deletion of penalty was upheld. Exactly similar is the situation in the case of LO, as it was under a bona fide belief that it was not responsible for TDS in respect of that part of salary of expatriate employees which was paid abroad.

Besides, even if LO's bona fide belief that it was under no obligation to deduct tax at source from the salary of expatriate employees paid abroad, was not correct as per law, it cannot be visited with penal proceedings, as there is no presumption that every person knows the law, as laid down by the apex Court in the case of *Motilal Padmapat Sugar Mills Co. Ltd. vs. State of UP & Ors. (1979) 118 ITR 326 (SC).*

The Delhi Bench of the Tribunal has also taken a similar view in Mitsui & Co. Ltd. vs. Dy. CIT (1999) 65 TTJ (Del) 1.

B. There was no mens rea or deliberate defiance of law in respect of the alleged default of non-deduction of tax at source

As already pointed out the action of LO for non-deduction of tax at source from the salary paid abroad, was supported by its bona fide belief as well as by the advice of its counsel. Therefore, no *mens rea* can be attributed to it or no conscious defiance of law can be alleged against it. Hence, no penalty under section 271C is leviable on LO.

For the aforesaid proposition reliance is placed on the following case law :

(i) *Hindustan Steel Ltd. vs. State of Orissa (1972) 83 ITR 26 (SC) : TC 49R.330*

The relevant observations are as follows :

"*An order imposing penalty for failure to carry out a statutory obligation is the result of a quasi-criminal proceeding, and penalty will not ordinarily be imposed unless the party obliged either acted deliberately in defiance of law or was guilty of conduct contumacious or dishonest, or acted in conscious disregard of its obligation. Penalty will not also be imposed merely because it is lawful to do so. Whether penalty should be imposed for failure to perform a statutory obligation is a matter of discretion of the authority to be exercised judicially and on a consideration of all the relevant circumstances. Even if a minimum penalty is prescribed, the authority competent to impose the penalty will be justified in refusing to impose penalty, when there is a technical or venial breach of the provisions of the Act or where the breach flows from a bona fide belief that the offender is not liable to act in the manner prescribed by the statute*."

(ii) *Addl. CIT vs. Kalyanmal Mills Tent Factory (1979) 116 ITR 881 (MP) : TC 49R.335*

The relevant part of the observation is as follows :

"*Where the law authorises an authority to impose penalty, the penalty cannot be imposed without examining as to whether there was a deliberate defiance of law or a conscious disregard of the obligations. Penalty could not simply be imposed merely because there is disobedience of law*."

(iii) *Burmah Shell Oil Storage and Distributing Company of India Ltd. vs. ITO (1978) 112 ITR 592 (Cal) : TC 50R.666*

It was held in this case that no penalty for concealment of income could be levied in the absence of fraud or gross or wilful neglect on the part of the assessee. It was further held that legal contention *bona fide* raised, whether it is ultimately accepted or rejected, will not generally be an act of fraud or gross or wilful negligence.

In view of the aforesaid position in law no penalty under section 271C could be levied on LO, as it held as bona fide belief that it was under no obligation to deduct tax at source from the aforesaid payment of salary made abroad.

(iv) *Kartar Singh vs. State of Punjab (1994) 3 SSC 569 (SC)*

It was held by the apex Court in this case that unless a statute either expressly or by necessary implication rules out '*mens rea'*, the element of '*mens rea'* must be read into the provisions of the statute. If one examines the provisions of section 271C the element of '*mens rea'*, has not been excluded therefrom. Therefore, the onus of proof will lie on the Department. In the circumstances prevailing in the case of LO, as already explained, no '*mens rea'*, could be attributed to it in respect thereto.

(iv) *E.K. Varghese & Anr. vs. ITO (1974) 96 ITR 577 (Ker) : TC 49R.295*

This was a case regarding levy of penalty under section 221 of the Act. The relevant observations are as follows :

"*Where an offence is the creation of a statute, normally, without saying more, the requirement of the element of mens rea is imported into the concept of the offence unless there is something express or implied in the language of the provision which goes against the such presumption. No intention is expressed or implied in section 221(1) as it stood prior to the amendment which may be sufficient to hold that the normal rule that mens rea must be read as an ingredient of the offence is to be ruled out. The amendment of the section by the Taxation Law (Amendment) Act, 1970, which has introduced a proviso does not really effect any change in the law. Therefore, in order to justify the imposition of a penalty under section 221 the Income-tax Officer must not only find that there is default but should also consider the question whether there was good and sufficient reason for the*

default and only if he finds that there was none he should impose the penalty."

(vi) *CIT vs. Smt. Vijayanthimala 1977 CTR (Mad) 266 : (1977) 108 ITR 882 (Mad) : TC 49R.265*

This was also a case regarding levy of penalty under section 221 of the Act. It was held in this case that before levy of penalty of officer will have to see whether the default was wilful or merely accidental. It was observed :

"*Simply because an assessee has incurred the liability to penalty, it is not obligatory on the part of the officer to levy a penalty; whether a penalty should be levied or not and if so what should be the quantum of the penalty will depend on the facts and circumstances of each case which will primarily concern whether the default was wilful or merely accidental*."

(vii) *Dr. Narottam Shah vs. Dy. CIT (1996) 59 ITD p. 657 (Mum-Trib)*

It was also a case regarding levy of penalty under section 221 of the Act. It was held in this case that for levying penalty under section 221, default must be wilful and not merely accidental.

C. The LOs in question, have proved their bona fides by payment of TDS

Most of the liaison offices have paid the tax under section 201(1) and interest thereon under section 201(1A) of the IT Act, either voluntarily or on the advice of the Income-tax authorities. This has been done in order to avoid litigation and buy peace with the IT Department with an understanding that no penal proceedings would be initiated against them. Some of the LOs have made the aforesaid payments after consultation with their respective Chambers of Commerce. Thus all the LOs have fully co-operated with the Income-tax Department and paid the requisite tax and interest thereon, on their own.

All the aforesaid steps were taken in order to be on the right side of law and buy peace with the Income-tax Department, though these LOs still stand by their belief that they were not responsible for deducting tax at source from the salary paid to the expatriate employees by the parent companies abroad. The aforesaid conduct of these assessees totally establishes that there was no mens rea or deliberate defiance of law on their part in respect of the aforesaid TDS liability.

In the light of the aforesaid facts and position of law no penalty under section 271C is leviable on such assessees.

In Mitsui & Co. Ltd. vs. *Dy. CIT (1999) 65 TTJ (Del) 1*, the Delhi Bench of the Tribunal has held that when no action has been taken by the Revenue for levy of penalty under section 221

and delay in payment of tax has been fully compensated by payment of interest no further action is justified under section 271C.

8. **Even if there is ambiguity regarding assessee's liability for TDS, the view favourable to the assessee has to be accepted**

It has already been pointed out in earlier paras that the assessee was under no obligation to deduct tax at source from the salary paid abroad. However, even if there is an ambiguity regarding the aforesaid obligation of the assessee, a view favourable to the assessee has to be accepted. Reliance for this proposition is placed on the following decisions of the apex Court :

(i) *CIT vs. Vegetable Products Ltd. 1973 CTR (SC) 177 : (1973) 88ITR 192 (SC) : TC 49R.516*—"*If the Court finds that the language of a taxing provision is ambiguous or capable of more meaning that one, then the Court has to adopt that interpretation which favours the assessee, more particularly so where the provision relates to the imposition of a penalty*."

(ii) *CIT vs. Naga Hills Tea Co. Ltd. 1973 CTR (SC) 349 : (1973) 89 ITR 236 (SC) : TC 68R.347*—"*If a provision of a taxing statute can be reasonably interpreted in two ways that interpretation which is favourable to the assessee has got to be accepted*."

(iii) *CIT vs. Poddar Cement (P) Ltd. (1997) 141 CTR (SC) 67 : (1997) 226 ITR 625 (SC) : TC* 68R.253—It was *inter alia*, held in this case that in case of ambiguity, a construction of the statute, beneficial to the assessee has to be preferred.

Therefore, even if there is any ambiguity regarding the aforesaid claim of the assessee, in view of the aforesaid decisions of the apex Court, a view favourable to the assessee has to be adopted, more particularly where the provision relates to the imposition of a penalty. Hence in this view of the matter also no penalty under section 271C of the Act could be levied on the assessee.

9. **Payment of TDS by an assessee does not, in anyway prove the liability of the assessee in respect thereof**

As already pointed out the assessee has paid the requisite TDS liability in order to be on the right side of law and buy peace with the Department. From this action of the assessee it cannot and should not the construed that the assessee has accepted its liability in respect of the aforesaid TDS and, therefore, its liability to penalty under section 271C is proved.

As already explained the aforesaid action of the assessee only proves that it did not want to commit any infringement of law and also co-operate with the Department, though it still holds the view that it was not responsible for deducting tax at source from the salary of expatriate employees paid

abroad. This proposition is supported by the decision of the apex Court in the case of *Sir Shadilal Sugar & General Mills Ltd. vs. CIT (1997) 64 CTR (SC) 199 : (1987) 168 ITR 705 (SC) : TC 50R.300* on analogical basis, It was held in this case that the very fact that the assessee agreed to additions to his income does not prove that the amount agreed to be added was concealed income. The relevant observation is as follows :

"*From the assessee agreeing to additions to his income, it does not follow that the amount agreed to be added was concealed income. There may be a hundred and one reasons for such admission, i.e. when the assessee realises the true position, it does not dispute certain disallowances but that does not, absolve the Revenue from proving the mens rea of quasi-criminal offence*".

From the aforesaid observations of the apex Court it is quite evident that the payment of TDS on the part of the assessee does not, in anyway and by any stretch of imagination, prove that by virtue of its aforesaid action it is liable to penalty under section 271C of the Act.

10. No penalty of any kind is leviable on the employees if the requisite TDS and interest thereon has already been paid

The dispute regarding TDS liability is only in respect of the part of salary paid abroad. If total tax and interest thereon have already been paid by the employer under section 201(1) read with section 192 and under section 201(1A) of the Act; there would be no liability for payment of advance tax in respect thereof. This is clear from the provisions of section 4(2) and section 190 of the IT Act. As per section 4(2), in respect of income chargeable under section 4(1), income-tax shall be deducted at source or paid in advance, where it is so deductible or payable under any provisions of the Act. From the aforesaid provisions, of section 4(2) it is clear that in respect of an income either tax can be deducted at source or paid in advance.

Therefore, if tax has already been deducted at source in respect of certain income then there would be no liability for payment of advance tax in respect thereof.

Similarly, as per section 190, notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction or collection at source or by advance payment, as the case may be, in accordance with the provisions of Chapter XVII.

Thus from the provisions of section 190 also it is clear that if tax has been deducted at source in respect of certain income then there would be no liability for payment of advance tax in respect thereof.

11. Conclusion

In view of the aforesaid reasons, no penalty under section 271C of the IT Act, for non-deduction of tax at source in respect of salary paid abroad to expatriate employees by the foreign parent company, is leviable on the liaison offices.

S. K. TYAGI	☎ Office	: (020) 2613 3012	Flat No.2, (First Floor)
M.Sc., LL.B., **Advocate**		: (020) 40024949	Gurudatta Avenue
Ex-Indian Revenue Service	Residence	: (020) 40044332	Popular Heights Road
Income-Tax Advisor	E-mail	: sktyagidt@airtelmail.in	Koregaon Park
			PUNE - 411 001