IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH, 'F': NEW DELHI
(Through Video Conferencing)

BEFORE SHRI R.K. PANDA, ACCOUNTANT MEMBER AND
SHRI KUL BHARAT, JUDICIAL MEMBER

ITA No.2207/DEL/2018
[Assessment Year: 2013-14]

Asst. Commissioner of Income Tax, Circle-76(1), New Delhi	Vs	M/s Parsons Brinckershoff India Pvt. Ltd. 210, 2nd Floor, Elegance Old Mathura Road, New Delhi-110025
		PAN-AACCP3729L
Revenue		Assessee

Revenue by	Sh. Divyanshu Agarwal, Adv. & Sh. Akarsh Gard, Adv.
Assessee by	Sh. Parikshit Singh, Sr. DR

Date of Hearing	**13.12.2021**
Date of Pronouncement	**28.02.2022**

ORDER

PER R.K. PANDA, AM,

This appeal filed by the Revenue is directed against the order dated 30.11.2018 of the learned CIT(A)-41, New Delhi, relating to Assessment Year 2013-14.

2. Facts of the case, in brief, are that the assessee is a company incorporated in India under the companies Act, 1956. During the year under consideration, the assessee was engaged in the business of providing engineering consultancy services and

supply of manpower services to the Indian Power sector and infrastructure sector and providing multidisciplinary consultancy services for power and infrastructure projects outside India. In this case, reference was received vide letter dated 10.07.2014 from the Deputy Commissioner of Income Tax, Circle-51(1), New Delhi, (pre-restructuring) which indicated failure on the part of the assessee company as required under the provisions of Chapter XVII-B of the Act to deduct tax at source of Rs.98,92,242/- and Rs.3,10,000/- for the F.Y. 2012-13 and F.Y. 2011-12 respectively. The JCIT issued show cause notice asking the assessee as to why penalty u/s 271C r.w.s 274(1) of the Act should not be imposed. It was explained by the assessee that it is not a case of non-deduction of tax at all. The assessee had duly deducted and deposited the taxes with the government treasury in the subsequent years, when the liability to pay such expenses was crystallized on receipt of invoices. The same was supported by filing challans evidencing the payment of taxes. The Ld. JCIT alleged that the argument taken by the assessee is not tenable in law. The Ld. JCIT inter alia stated that under the mercantile system of accounting, accrual of liability for any expenditure is not dependent on receipt of invoices.

2.1. Furthermore, the Ld. JCIT alleged that the assessee did not bring on record any material facts or evidences which could prove that the circumstance for non-deduction of tax at source were beyond the control of the assessee. He alleged that there was no reasonable cause within the meaning of section 273B of the Act for non-deduction of taxes at source. In view of the above and relying on various decisions, the JCIT levied penalty of Rs.98,92,242/- for the F.Y. 2012-13 and Rs.3,10,000/- for the F.Y. 2011-12 respectively.

3. In appeal, the ld. CIT(A), deleted the penalty levied by the JCIT for both the years by observing as under:-

> *4.2 I have considered the facts and circumstances of the case, submission of the appellant and perused the penalty order of the AO. I find merit in the argument of the appellant. It was submitted that certain provisions were created on an estimate basis (in the absence of receipt of actual invoices from the payee), which were debited to profit and loss account on conformity with the provisions of Accounting Standard 29, pertaining to provisions, contingent liabilities and contingent assets issued by the Institute of Chartered Accountant of India. Furthermore, the said provisions were reversed in the beginning of the next accounting year. The Appellant as a part of disclosure in the notes to tax computation (refer page 56 to 70 of the paper book) suo-moto disclosed the fact that it has disallowed the said amount of provision for expenses under section 40(a)(ia)/40(a)(i) of the Act. Taxes were duly deducted and deposited against the impugned amount of expenses amounting to Rs. 31,00,000/- and Rs. 9,92,66,459/- pertaining to financial year 2011-12 and*

2012-13 respectively with the Government treasury in the subsequent years, when the liability to pay such expenses was crystallized. The copy of the challans evidencing the payment of taxes on the aforementioned amount is enclosed as part of the paper book (refer page 22 to 43 of the paper book). Accordingly, the Appellant has not defaulted in deducting taxes. Delay in deducting the taxes does not appear to be the default contemplated under section 271C of the Act. The appellant was prevented by a reasonable cause to withhold taxes on the year end provisions primarily on account of the following reasons:

"No income had accrued to the payees and a mere ad-hoc provision was made in the books of accounts at the year end. The existence/accrual of income in the hands of payee is a pre-condition to fasten the liability of tax deduction at source in the hands of the payer. The exact amount payable to the payees were not identifiable and therefore, no liability to deduct tax at source."

The mere fact that the taxes have not been deducted on the year end provision but have been subsequently deducted and deposited upon crystallization of liability to pay the expenses will not automatically justify the imposition of penalty under section 271C of the Act.

4.3. After careful consideration of the facts and in view of above discussion, I find that penalty under section 271C is not found to be leviable on the facts of the present case, therefore, the AO is directed to delete the same.

5. In the result, the appeal is allowed."

4. Aggrieved with such order of the Ld. CIT(A), the Revenue is in appeal before the Tribunal by raising the following grounds of appeal:-

(1) *Whether the Ld. CIT(A) was right in holding that exact amount payable to the payee was not identifiable*

even though the Auditor in its report in Form No.CD has clearly mentioned the amount on which tax was deductible, amount of tax deductible, head and section under which tax deductible and name of party/dedcutee and their PAN No.

(2) *Whether the Ld. CIT(A) was right in holding that there is no liability to deduct TDS even though the Auditor has clearly mentioned in its report in Form No.3CD, the amount of TDS deductible and section under which TDS deductible.*

(3) *Whether the Ld. CIT(A) was right in holding that penalty was not leviable u/s 271C without appreciating the fact that the deductor assessee has failed to comply with the statutory provisions under section 194C, 1941 and 194J of the I.T. Act, 1961 by not deducting TDS on credit/payment of expenses.*

(4) *Whether the Ld. CIT (A) has failed to appreciate the distinction between the relief provided to the assessee as per proviso to section 201(1) /201(1 A) and the provisions of section 271C where this relief is not available to the assessee.*

(5) *Whether the Ld. CIT(A) was right in holding that the assessee was prevented by a reasonable cause to withholding taxes without considering the fact that the assessee was aware of the liability of deduction of TDS which is evident from the fact that the assessee itself deducted tax at source in the subsequent year.*

5. The Ld. DR heavily relied on the order of the JCIT.

6. The ld. Counsel for the assessee, on the other hand, while supporting the order of the ld. CIT(A), relied on the decision

of the Co-ordinate Bench of the Tribunal in the case of ITO vs DLF Southern Homes Pvt. Ltd., reported in 2017 SCC OnLine ITAT 148 and the decision of the Bangalore Bench of the Tribunal in the case of DCIT vs M/s Telco Construction Equipment Co. Ltd. in ITA No.478/Bang/2012, order dated 07.03.2014 for AY 2007-08. He accordingly submitted that this being a covered matter in view of the two decisions of the Tribunal under identical facts and circumstances of the case, the order of the Ld. CIT(A) should be upheld and the grounds raised by the Revenue should be dismissed.

7. We have heard the rival arguments made by both the sides, perused the orders of the A.O. and the Ld. CIT(A) and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the JCIT in the instant case levied penalty of Rs.98,92,242/- u/s 271C on the ground that the assessee has not deducted TDS on certain expenses for which provision of Rs.9,92,66459/- was created in its books of account. We find the Ld. CIT(A) deleted the penalty levied by the JCIT u/s 271C of the Act, the reasons of which have already been reproduced in the preceding paragraph. We do not find any infirmity in the order of the Ld. CIT(A) on this

issue. The assessee during the course of hearing of penalty proceedings before the JCIT had categorically mentioned that in absence of receipt of actual invoices as in the last day of respective financial years, the amount of provision for expenses were based on estimates. In the absence of invoices and consequential liability to make the payment, the assessee did not withhold taxes on the said yearend provision for expenses u/s 40(a)(i)/40(a)(ia) of the Act. The relevant submission of the assessee before the JCIT vide letter dated 12.06.2017 reads as under:-

> *"In the absence of receipt of actual invoices as on the last day of the respective financial year viz. 31 March 2012 and 31 March 2013, the amounts of provision for expenses were based on estimates. In the absence of the invoices, and consequential liability to make the payment, the Appellant did not withhold taxes on the said year-end provision for expenses. In this regard, despite no liability' to withhold taxes on the said provision, the Appellant disclosed the said amounts in the tax audit reports and suo-motu disallowed the same under section 4o(a)(ia)/ 4o(a)(i) of the Act on a conservative basis. The computation of taxable income along with the acknowledgement copy of filing of return of income of the respective financial years is enclosed as part of the paper book* ***(refer pages 1 to 11 of the paper book).*** *In the subsequent year,* ***on receipt of invoices, the applicable taxes were duly deducted and deposited within the stipulated timelines, without any intimation by the tax authorities."***

8. We find identical issue had come up before the Co-ordinate Bench of the Tribunal in the case of ITO vs DLF Southern Homes Pvt. Ltd.(supra). We find the Tribunal under somewhat identical circumstances dismissed the appeal filed by the Revenue against the order of the ld.CIT(A) deleting the penalty levied u/s 271C by observing as under:-

> ***"4.*** *We have carefully gone through the record. There is no contravention of the observations of the Ld. CIT(A) that in view of the fact that nothing was due to be paid on account of brokerage at the time of creation of the provision for brokerage expenses, TDS was not practically feasible to be deducted by the assessee on the provision so made, and as and when the payments were made to the brokers, TDS was deducted and remitted to the Government. So also is not disputed that no benefit of any provision for expenses was availed by the assessee and due tax was paid in full, as such there is neither tax evasion nor loss of revenue to the Government. In the circumstances, the controverted facts establish that because of the peculiarity of the circumstances involved in this matter, namely, at the time of creation of the provision for brokerage expenses, neither the names of the brokers nor the amounts to be paid to them on account of brokerage was a determinable owing to the fluid situation, due to which TDS was not practically feasible to be deducted by the assessee, and more particularly in view of the fact that the assessee neither claimed nor availed any benefit of the provision made for expenses and paid due tax in full, we are of the considered opinion that the findings of the Ld. CIT(A) that there is neither any tax evasion nor loss of revenue to the Government do not suffer any illegality or irregularity, and that this tribunal cannot interfere with the same. We, therefore, uphold*

the finding of the Ld. CIT(A) and hold that the appeal is devoid of merits. We, accordingly, dismiss the grounds of appeal.

9. We find the Bangalore Bench of the Tribunal in the case of DCIT vs M/s Telco Construction Equipment Co. Ltd. (supra) while disposing of identical issue dismissed the appeal filed by the Revenue challenging the order of the Ld. CIT(A) in cancelling the penalty levied u/s 271C of the Act by observing as under:-

"6. Having heard both the parties and having considered the rival contentions, we find that the amount credited by the assessee is to the provision account and not to the respective agent's accounts. Therefore, it is clear that the assessee has not made any payment to the agents. The provisions of sec.194H would apply when the payments are made to the agents or credited to the agent's accounts, whichever is earlier, and not when the payment is credited to the provision account. As rightly pointed out by the learned counsel for assessee, the agents would get vested right to receive the commission only when they fulfill the obligations under the agreement for commission. We find that the CIT(A) has properly appreciated the issue before deleting the addition made by the AO. In view of the same, we do not see any reason to interfere with the finding of the CIT(A) on this issue. This ground of appeal is accordingly rejected."

10. Since, the Ld. CIT(A) while cancelling the penalty levied u/s 271C has given justifiable reasons, therefore, in absence of any distinguishable features brought to our notice by the Ld. DR to take a contrary view than the view taken by the Ld. CIT(A) on

this issue on the basis of facts available on record, we do not find any infirmity in the order of the Ld. CIT(A). Accordingly the same is upheld and the grounds raised by the Revenue are dismissed.

11. In the result, the appeal filed by the Revenue is dismissed.

Order was pronounced in the open court on 28/02/2022.

Sd/-	**Sd/-**
(KUL BHARAT)	**(R.K. PANDA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Delhi/Dated- 28th February, 2022

Shekhar

Copy forwarded to: -

1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR, ITAT

By Order

Assistant Registrar,
ITAT, Delhi