

# Direct Tax Alert

April 17, 2023



## No penalty under Section 271C leviable on belated payment of withholding taxes – *Supreme Court*

The Hon'ble Supreme Court in a recent ruling<sup>1</sup> held that penalty under section 271C(1)(a) of the Income-tax Act, 1961 ('the Act') applies to failure to deduct taxes at source. No penalty under section 271C of the Act can be levied for delay in remittance of withheld taxes.

### Background and facts of the case

- The taxpayer deducted taxes at source ('TDS') in respect of salary, contractual payments, etc. for the Assessment Year 2003-04<sup>1</sup> and Assessment Year 2010-11 to 2012-13<sup>2</sup>. The TDS amount was deposited with the Government after the payment due date.
- In addition to penal interest payable under section 201(1A) of the Act, the Revenue levied penalty under section 271C for

belated payment of withheld taxes which was affirmed by the Kerala High Court.

- Aggrieved by the High Court order, the taxpayers preferred appeal before the Supreme Court.

### Contention of the Taxpayer

- As per cardinal principle of law, penal provisions should be construed literally and strictly.
- Penalty under section 271C(1)(a) applies only on failure to deduct taxes at source.

<sup>1</sup> *M/s. US Technologies International Pvt. Ltd. v. CIT* (Civil Appeal No. 7934 of 2011)

<sup>2</sup> *Eurotech Maritime Academy Pvt. Ltd v. CIT (TDS)* (Civil Appeal No. 1258-1260/2019)



Penalty under section 271C(1)(a) cannot be imposed for late payment of taxes after deduction.

- Penalty under section 271C(1)(b) is applicable only in case of non-payment of dividend distribution taxes under section 115-O or in case of non-payment of taxes for in-kind winnings from lottery or crossword puzzle under proviso to section 194B.
- Prior to 1 April 1989, section 276B provided for prosecution for failure to deduct taxes at source or after deducting failure to pay withholding taxes. The section was amended<sup>3</sup> to take away power to prosecute for failure to deduct taxes at source. Simultaneously, section 271C was introduced to levy penalty for failure to deduct TDS, whereas failure to pay, after deduction, continued to attract prosecution under section 276B.<sup>4</sup>
- Unlike section 276B, the words 'fails to pay' are absent in the language employed in section 271C(1)(a). Section 271C and Section 276B have different and distinct operation. Section 276B applies in case of failure to pay taxes after deduction, whereas section 271C applies in case of failure to deduct taxes at source.
- If the penalty under section 271C is upheld for belated remittance of TDS, it would tantamount to adding something more than which is provided in the section.
- The Kerala High Court order passed against the taxpayer has been overruled by the Full Bench of Kerala HC<sup>5</sup>.
- When the Parliament thought it fit to levy the penal interest on late remittance of the TDS for the belated period, there shall not be levy of the penalty under section 271C for belated remittance of TDS.

### Contention of the Revenue

- The old provisions of the Act provided for prosecution for failure to deduct tax at source or after deducting failure to remit the same to the Government. Section 271C was inserted to provide for levy of penalty for failure to deduct tax at source.
- In a case where though the taxpayer has deducted the taxes at source but does not remit the same to the Government and/or belatedly remits the TDS after deducting, such a taxpayer is liable to pay the penalty under Section 271C of the Act.
- The object and purpose of insertion of section 271C seems to be that over and above the prosecution, the person who has deducted the tax but not remitted the same to the government shall also be liable to pay penalty. Restricting penalty to the cases covering only non-deduction of taxes, would frustrate the legislative intent.

### Observation of the Supreme Court

- The words used in section 271C(1)(a) are clear and relevant words used are 'fails to

<sup>3</sup> Vide Direct Tax Laws (Amendment) Act, 1987

<sup>4</sup> CBDT Circular no. 551 of 1990 dated 23 January 1990

<sup>5</sup> Lakshadweep Development Corporation Ltd. (2019) 411 ITR 213 (FB)



- deduct' which does not speak about delayed payment of TDS.
- Section 276B provides for prosecution in case of failure to 'pay' TDS to the credit of central government, whereas the word 'pay' is missing in language of the section 271C(1)(a).
  - As per cardinal principle of interpretation of statute and more particularly that of a penal provision, they should be interpreted as they are. It is not for the Court to read something more into it, contrary to the intent and legislative wisdom.
  - Plain reading of section 271C suggests that there shall not be penalty leviable on belated remittance of TDS.
  - Provisions of section 271C are categoric and its scope and extent of application can be discerned from its text in unambiguous terms.
  - While failure to deduct taxes at source may invite penalty under section 271C(1)(a) of the Act, failure to pay tax may invite penalty under section 271C(1)(b) of the Act only in limited instances specified in the section namely failure to pay dividend distribution tax as required under section 115-O(2) of the Act and failure to pay tax as required under proviso to section 194B of the Act which covers a situation where winnings from lottery, puzzle or game are wholly or partly in kind and cash component is not sufficient to meet the requirement of TDS, the person responsible for paying need to ensure that tax has been paid in respect of winnings before winnings are released.
  - Wherever the Parliament wanted to have the consequences of non-payment and/or belated remittance/payment of the TDS, the Parliament has provided the same in section 201(1A) and section 276B.
  - The Supreme Court observed that the CBDT Circular (*supra*) relied upon by revenue actually favours case of the assessee. The Supreme Court observed that if there is delay in remitting TDS, it will involve prosecution proceedings under section 276B of the Act and if there is omission to deduct tax at source, tax liability is shifted to the person who failed to effect deduction, by incorporating provision of penalty as remedial action to safeguard revenue's interest.
  - The words 'fails to deduct' as occurring in section 271C(1)(a) cannot be read as 'failure to deposit/pay the tax deducted'.
  - The Supreme Court held that there shall be no penalty leviable under section 271C of the Act for mere delay in remittance of the TDS after deduction.

#### **Dhruva comments**

It is a welcome decision as the Hon'ble Supreme Court has unequivocally held that penalty under section 271C(1)(a) of the Act cannot be levied for belated payment of TDS.

The Supreme Court ruling can be relied upon to defend penalty exposure in the pending matters related to non-payment/late payment of TDS.

Liability to deduct TDS is vicarious obligation and non-fulfilment of it attracts multiple adverse consequences and penalty under section 271C of the Act is just one of it. If



there is delay in remittance of TDS, taxpayer may be liable not only for interest under section 201(1A) of the Act, but also for prosecution under section 276B of the Act. If there is non-payment of TDS, the taxpayer can be held as assessee-in-default under section 201(1) of the Act and penalty under section 221 of the Act can also be levied.

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