आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"SMC" JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयंतभाई, लेखा सदस्य के समक्ष
BEFORE: SHRI SANDEEP GOSAIN, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 528/JP/2023
निर्धारण वर्ष/Assessment Years : 2011-12

Isys Softech Pvt. Ltd. 11, Mohan Bari Outside Surajpole Gate Jaipur	बनाम Vs.	ITO Ward 2(2), Jaipur
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AAAC 17859 J		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओर से/ Assessee by : Sh. G. M. Mehta
राजस्व की ओर से/ Revenue by : Smt. Monisha Choudhary (Addl. CIT)

सुनवाई की तारीख/ Date of Hearing : 27/09/2023
उदघोषणा की तारीख/Date of Pronouncement: 22/11/2023

आदेश/ ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal filed by assessee is arising out of the order of the National Faceless Appeal Centre, Delhi dated 14.06.2023 [here in after ld. NFAC/CIT(A)] for assessment year 2011-12 which in turn arise from the penalty order dated 30.03.2018 passed under section 271C of the Income Tax Act, 1961 [here in after to as Act] by Addl. CIT (TDS), Jaipur.

2. In this appeal, the assessee has raised following grounds: -

"1. Not agreeing to different judicial pronouncements referred to in order appealed against, ld. CIT(A) (NFAC) was not justified in dismissing the appeal challenging levy of penalty of Rs. 11,46,838/- under section 271C of IT Act, ignoring the fact that no penalty under section 271C of IT Act was initiated in order dated 29.03.2014 under sec. 143(3) of IT Act for which reason appears that ld. AO also appreciated the bona-fide belief of assessee that no tax is deductible on payment to foreign Suppliers, having no permanent establishment in India.

2. The ld. CIT(A) was not justified in disagreeing to different judicial pronouncement that period of 4 years from assessment year is the limitation to initiate and levy of penalty where there is no limitation prescribed under the relevant Act.

3. Without prejudice to above grounds of appeal, though the quantum appeal of the Assessee Company was partly allowed on 13th Nov, 2017 by this Hon'ble Tribunal with relief of 100% deduction of enhanced profit as per CBDT Circular dated 2nd Nov, 2016, however after different judicial pronouncements by the Hon'ble High Court and Apex Court, the dispute is resolved that when there is no PE, no branch, no liaison office nor PAN in India, there is no Income tax liability of the foreign company in India under sec. 195(1) of the Act and therefore, TDS provisions are not applicable. Considering the language of section 195 of IT. Act and DTAA between India and USA, the Assessee company was under bon-fide belief that no tax is deductible and therefore, it had not committed any infringement of law for which penalty u/s 271C is to be levied on account of non-deduction of tax at source on payments to non-resident."

3. Succinctly, the fact as culled out from the records is that in this case, the ITO, Ward 5(4), Jaipur passed an order dated 30.04.2014 u/s 143(3) of the I.T. Act, 1961. During scrutiny proceedings, it was found that in the P & L account the assessee company has debited an amount of Rs. 1,14,68,382/- under the head 'Software License and Set-up charges' which was credited to M/s BJW consulting Service LLC and Practice forces - Anesthesia Billing software. As per section 195(1) of the I.T. Act, 1961 which reads "Any person responsible for paying to a non-resident, not being a company, or to a foreign company, any interest or any other sum

chargeable under the provisions of this Act shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income tax thereon at the rates in force." However, the assessee company has not made TDS at the time of payment/credit to the above-mentioned parties. Therefore, the AO disallowed the amount of Rs. 1,14,68,382/- u/s 40(a)(i) of the Income-tax Act, 1961. The matter went in appeal and finally the Income Tax Appellate Tribunal held that the payment made by the assessee will fall in the definition of royalty as defined u/s. 9(1)(vi) as well as under Article 13(2) of Indo-US DTAA. As the assessee was considered as defaulted in payment of TDS notice u/s. 271C of the Act was issued to the assessee on 22.03.2018. Considering the reply of the assessee ld. AO did not convince and held that the assessee is defaulter in not deducting TDS and liable for penalty u/s. 271C of the Act. For this failure the Addl. CIT(TDS) passed an order levying penalty of Rs. 11,46,838/- against the assessee.

4. Aggrieved from the order of the Addl. CIT(TDS) the assessee preferred an appeal before the ld CIT(A). Apropos to the grounds so raised the finding of the ld. CIT(A) is reproduced here in below:

“6.1 The appellant has contended that no penalty proceedings u/s 271C was initiated in order dated 30.03.2014 u/s 143(3) of the Act and levy of penalty was done after four years of such assessment for which the order is not maintainable. The appellant has referred to several case laws which are not squarely applicable to the facts and circumstances of the case. Moreover, the contention taken in ground no. 1 has been controverted in ground no.2 taken by the appellant itself. In ground no.2 the appellant has stated inter alia that penalty proceedings u/s 271C, 271D, 271E, 271F and so on of the 1.T. Act are independent of the quantum appeal and therefore provision of section 275(1)(c) of the Act is applicable and not the provision of section 275(1)(a), if at all the penalty is initiated in the assessment order. The appellant has rightly pointed out that limitation of penalty u/s 271C is guided by section 275(1)(c) and therefore independent of any assessment order through which the penalty might have been initiated.

Therefore, the cited court case of Pr.CIT Vs. Mahesh Wood Products Pvt. Ltd. (2017)394 ITR 312 (Del) is not applicable to the fact of the instant case. The appellant has raised the issue of reasonable cause for failure to deduct tax at source and has cited the case of CIT Vs. I.T.C Ltd. (2017)297 CTR (Del) 47. In the case of the appellant, the liability to deduct TDS has been upheld by the CIT(A) as well as the Ld. ITAT in appellant's case in quantum appeal. Reference is invited to page 6 of the order of the CIT(A)-2, Jaipur in the instant case of the appellant in appeal against order u/s 143(3) dated 30.03.2014 for the instant assessment year i.e AY 2011-12 wherein it is observed as under:

“Interestingly, at this stage, the A/R informed that it had deduction (sic) TDS on some amounts relating to one party which could not be informed earlier. This further goes to show that for similar type of transactions assessee himself has a dual stand, in one case it has deducted TDS while on the other party it has not. Thus, this also goes to prove that a clear default has been committed of TDS to be deducted and amounts are disallowable.

The above observation of the CITA) goes to establish the contumacious conduct on the part of the appellant and negates the question of debatable issue and therefore there can not be any reasonableness to the act of failure to deduct tax at source as contended by the appellant. INCOME TAX DEPARTMENT

Thus, the case laws of Bank of Nova Scolá and ITC Ltd. as cited by the appellant in ground no. 1, are distinguished.

The appellant's citing of all the case law of CIT Vs. Hissaria Brothers (2016) 288 CTR (SC) 244 is misleading as Honourable Court has rightly reiterated the provisions of section 275(1)(c) and there is nothing in the order to draw inference in favour of the appellant.

It is further observed that the penalty order u/s 271(1)(c) was passed well within the limitation period prescribed u/s 275(1)(c) of the Act.

Thus, ground No. 1 is therefore dismissed.

6.2 Decision on Ground No.2

The appellant has cited the case of Lodha Builder (P) Ltd. Vs. ACIT (2014) 163 TTJ (Mumb) 778 in its favour. From the perusal of such case laws it transpires that the questions raised are as follows:
1. Whether provisions of section 275(1)(a) would not be applicable to penalties u/s 271D/ 271E and provisions of section 275(1)(c) would be attracted. Held-yes;

2. Whether in case of such penalty limitation period would be counted from the date of assessment order with assessing officer's decision to make reference to his Additional CIT, who is authorized to impose penalty and not from the date of issue of show cause notice by the Additional CIT. Held-yes;

From the above, it is apparent that decision of the case does not in any way have a bearing on the decision to be taken on the grounds taken in the appeal by the appellant. The appellant has again relied upon the jurisdictional ITAT case of ITO Vs. Eid Mohammed Nizamuddin (2018) 196 TTJ (JP) 232 wherein the Honourable Tribunal has considered a period of 4 years to be reasonable for passing the order u/s 201(1)/ 201(1A) of the Act.

The ratio of the case is not applicable to the penalties u/s 271C etc. and is not related to the limitations provided u/s 275(1)(a) and 275(1)(c) of the Act. Therefore, this ground of appeal is dismissed.

7. In the result, the appeal of the appellant is dismissed. ”

5. As the assessee did not find any favor from the appeal so filed before the ld. CIT(A) the assessee has preferred the present appeal. The ld. AR of the assessee in support of the grounds so raised has filed and relied upon the following written submission:

BRIEF FACTS OF THE CASE:
Data-wise happenings in this case are as under:-

S. No.	Order dated	Description of issue and the relevant authority, if any
1	29.03.2014	Assessment order under s. 143(3) by ld. AO
2	26.11.2015	Order of ld. CIT(A) dismissing the quantum appeal
3	31.11.2017	Order of Hon'ble ITAT-partly allowing quantum appeal
4	22.03.2018	Initiation of penalty proceeding u/s 271C of Act
5	30.03.2018	Order levying penalty of Rs. 11,46,838/- u/s 271C
6	14.06.2024	Order of ld. CIT(A) dismissing the appeal
7	14.08.2024	Appeal to this Hon'ble ITAT against order of CIT(A)

Assessment u/s. 143(3) of Act was completed by ld. AO vide order dated 9) on which no tax was deductible but ld, AO, by treating it as payment for Royalty, made addition under sec. 40(a)(i) of Act (P.B. Pages 10 to 14). On such disallowance penalty u/s. 271(1)(c) was initiated by the ld. AO in order u/s. 143(3). The first appeal of the assessee was dismissed (P.B. pages 15 to 23) whereas the second appeal before this Hon'ble ITAT was partly allowed (P.B. pages 24 to 35) with direction to allow deduction @ 100% under section 10A of Act on enhanced profit as per circular No. 37 of 2016 of CBDT. Since there was no fax liability after order of this Hon'ble ITAT, assessee company did not prefer appeal u/s. 260 A before the Hon'ble High Court.

After receipt of order of the Hon'ble ITAT, a notice dated 22.03.2018 was issued for the first time by Addl. CIT (TDS) Jaipur to show-cause why penalty various liabilities in period relevant to A.Y. 2011-12 (P.B. page 36). Rejecting the response, penalty of Rs.11,46,838/- u/s. 271C was levied. (P.B. pages 37 to 42). Ignoring different judicial pronouncements, the appeal of the assessee was dismissed by first appellate authority (copy already submitted with appeal sets)

GROUND OF APPEAL:

Ground No. (1) Not agreeing to different judicial pronouncements referred to in order appealed against, ld. CIT(A) (NFAC) was not justified in dismissing the appeal challenging levy of penalty of Rs.11,46,838/- under section 271C of IT Act, ignoring the fact that no penalty under section 271C of IT Act was initiated in order dated 29.03.2014 under sec. 143(3) of IT Act for which reason appears that ld. AO also appreciated the bona-fide belief of assessee that no tax is deductible on payment to foreign Supplier, having no permanent establishment in India.

High Courts and finally the Hon'ble Supreme Court, in different judicial pronouncements have held that payment to non-resident, having no PE in India is not liable to Income tax in India and therefore no TDS was required. Reliance is placed on following decisions:

(1) CIT v S. Herbalife International India (P) Ltd. (2016) 286 CTR (Del) 372 & (2016) 384 ITR 276 (Del): Disallowance under sec. 40(a)(i)- Effect of non-discrimination clause of art. 26(3) of DTAA between India and USA. Sec. 40(a)(i) is discriminatory and therefore, not applicable in terms of article 26(3) of Indo US DTAA. Tribunal was correct in allowing deduction.(PB P.43 to 54)

(2) US Technology Resources Pvt. Ltd. Vs. CIT (2018) 407 ITR 327 (Ker): India and USA. Non-resident- Income deemed to accrue or arise in India. DTAA more beneficial than Income tax Act. Fee for included services would be taxable in India. Meaning of included services. Transfer of technical knowledge, experience, skill, know-how or process or consists of development or transfer of technical plan or design. Payment to US Company for providing management, financial, legal public relations and treasury or risk management services- not for included services. Payment not taxable in India- Income tax Act 1961 ss, 9(1)(vii), 90 Double Taxation Avoidance Agreement between India and United States of America- Art. 12 (PB pages 55 to 68).

(3) Pr. CIT Vs. Disham Pharmaceuticals and Chemicals Ltd. (2019) 417 ITR 373 (Guj): Payment to non-resident, not taxable in India. Tax not deductible at source on such payment. (PB pages 69 to 86).

(4) CMA CGM Agencies India (P) Ltd. Vs. Dy CIT (2020) 203 TTJ (Pune) 249: Royalty and fee for technical services- payment made by the assessee to French company for use of software and maintenance charges neither constituted royalty nor fees for technical services hence not taxable in India and not disallowable u/s. 40(a)(i) for non-deduction of tax at source (PB pages 87 to104).

(5) Van Oord ACZ India (P) Ltd. Vs. CIT (2023) 332 CTR (SC) 851: Payment to non- resident- Recipient not liable to pay tax in India vis a vis reimbursement of cost. I.T. Authorities having accepted that the foreign company is not liable to pay tax in India, assessee was not liable to deducted tax at source under sec. 195 in respect of the mobilization and de-mobilization cost reimbursed by it. (PB pages 105 to 107).

(6) Engineering Analysis Centre of Excellence (P) Ltd. Vs. CIT (2021) 319 CTR (SC) 497: Payment to non-resident- Royalty vis a vis payment for purchase of Shrink-wrapped software- Amount paid by resident Indian- end users/distributors to non-resident computer software manufacturer/suppliers as consideration for the re-sale/use of computer software is not the payment of royalty for the use of copy right in the computer software as per Art. 12 of the DTAA and the same does not give rise to any income taxable in India as a result of which the persons referred to in sec. 195 were not liable to deduct TDS. (PB pages 108 to 125).

No penalty under sec. 271C was initiated in order dated 29.03.2014 u/s. 143(3) (P.B. Pages 10 to 14) as the Assessee company was under bona-fide belief that since both the American suppliers had no PE or Agent or PAN in India and therefore, as per the provisions of section 195 of Act, they were not liable to be taxed in India.
Other relevant recent decisions that payment for software is not Royalty and therefore, "when no tax is chargeable under the Act" no TDS is required, are:
(1) GE India Technology Centre P. Ltd Vs. CIT & Anr (2010) 327 ITR 456 (SC)
(2) Anusha Investment Ltd. Vs. ITO (Intt. Taxation) (2015) 378 ITR 621 (Mad)
(3) CIT (Intt. Taxation) Vs. Micro Focus Ltd. (2021) 431 ITR 136 (Del)
(4) CIT (Intt. Taxation) vs. Gracemac Corp. (No.1)(2023) 456 ITR 124 (Del);
(5) CIT VS. Gracemac Corp. (2023) 456 ITR 135 (SC);
(6) CIT (Intt. Taxation) Vs. ZTE Corp. (2023) 454 ITR 541 (SC)

Ground No. (2) That Id. CIT(A) was not justified in disagreeing to different judicial pronouncement that period of 4 years from assessment year is the limitation to the assessment year 2011-12. initiate and levy of penalty where there is no limitation prescribed under the relevant Act.

The penalty U / s 271C was initiated on 22.03.2018, i.e. after six years from In case of State of Punjab Vs. Bhatinda Distt. Cooperative Milk Producer Union Ltd. (2007) 11 SSC 363 (referred to at page 298 of 428 ITR), Hon'ble Supreme Court has held as under (P.B. Page 126-127):

18. In so far as the Income tax Act is concerned, our attention has been drawn to section 153(1)(n) 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 year. This seems to be reasonable period as accepted under section 153 of the Act, through for the completion of assessment

proceedings. The provisions of reassessment are under sec. 147 and 148 of the Act and they are on a completely different footing and, therefore, do not merit consideration for the purpose of this case.

19. Even though the period of three years would be a reasonable period as prescribed under section 153 of the Act for completion of proceedings, we have been told that 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".

(1) CIT Vs. Satluj Jal Vidyut Nigam Ltd.(2012) 250 CTR (HP) 113: Limitation for initiating proceedings under section 201. Even if no period of limitation is prescribed, the statutory power must be exercised within reasonable period. This reasonable period, taking into consideration the various provisions of IT Act has been held to be four years in number of cases. Tribunal was, therefore, justified in holding that since notices were not issued within period of limitation i.e. four years hence the claim and action of revenue is time barred (P.B. pages 128 to 130)

(2) CIT Vs. I.T.C Ltd. (2017) 297 CTR (Del) 47: Failure to deduct tax at source. Reasonable cause. Where the question of penalty is debatable issue, assessee is not liable to penalty under section 271C r.w. section 273B (P.B. pages 131 to 142).

(3) Hathway C. Net (P) Ltd. Vs. TRO (2018) 192 TTJ (Mumb 'F') 497 : Assessee in default- limitation for passing order under section 201(1) / 201 * (1A) . Show-cause notice having been issued on 23rd September 2003. Order passed u/s. 201(1) / 201 * (1A) on 28th March 2011 was barred by limitation. (P.B. pages 143 to 156)

(4) ITO Vs. Eid Mohammad Nizamuddin (2018) 196 TTI (JP) 232: TDS- Tax collection at source under sec. 206C. Time limit for passing order under - 206(6) / 206 * (7) . Sec. 206C or any other provisions of the IT Act do not provide any limitation for passing the order by the AO under ss.206(6)/206(7)- However, non-providing the limitation in the statute would not confer the powers to the AO to pass order under s. 206C at any point of time- if the contention of the Revenue that the AO is free to initiate the action and pass the order under s. 206C at any time depending upon the circumstances of the case is accepted, it would give an unfettered powers to AO to take action at any point of time till an indefinite

period- such interpretation or inference would defy or defeat the very purpose and scheme of the statute and further the concept of finality of matter- A consistent view has been taken by various High Courts that since no limitation is provided in the statute, a period of four years be considered a reasonable for passing the order under ss. 201(1) / 201 * (1A) and consequent amendment has been made in those provisions- Therefore, the analogy and reasoning given in those decisions of various High Courts is also applicable for considering the reasonable period for passing the order under s. 206C- Hence, applying the reasonable period of limitation as four years within which the AO could pass order under ss. 206(6) / 206 * (7) , the impugned order passed by the AO on 30th March 2016 is beyond the said reasonable period of limitation and consequently, invalid being barred by limitation. Accordingly, the impugned order passed under ss. 206(6)/206(7) is quashed (P.B. pages 157 to 169).

(5) Director of Income tax (International taxation) Vs. Executive Engineer (2020) 428 ITR 294 (Karn): Limitation - TDS- Short deduction. Supreme Court in State of Punjab Vs. Bhatinda Distt. Cooperative Milk Producers (2007) 11 SSC 363 has held that four years. would be a reasonable period of time for initiating action in case where no limitation is prescribed. Proceeding under section 201 to treat Deductor as assessee in default - proceedings must be initiated within reasonable time. Proceedings initiated after four years- barred by limitation. (P.B. pages 170 to 174)

(6) CIT & Anr. Vs. Acer India (P) Ltd. (2022) 327 CTR (Karn) 613: (case relating to A.Y. 2009-10) Limitation for initiating proceedings under sec. 201. TDS- Assessee in default. Limitation of two years as prescribed in sec. 201(3) as it existed prior to its substitution by Finance (No.2) Act 2014 applies to the facts of the case- Limitation to pass an order under section 201(1A) expired prior to Finance (No.2) Act 2014 which came into force w.e.f. 1st October 2014. Thus, a right accrued to the assessee and the subsequent amendment therefore, could not have revived the period of limitation and take away the vested right accrued to the assessee. Therefore, the order passed under sec. 201 dated 30th March 2016 is clearly barred by limitation. (P.B. pages 175 to 178)

Therefore the order passed by Id. Addl. CIT (TDS) on 30.03.2018 was barred by limitation.

GROUND No. (3) Without prejudice to above grounds of appeal, though the quantum appeal of the Assessee Company was partly allowed vide order dt. 13th Nov. 2017 by this Hon'ble Tribunal allowing relief of 100% deduction of enhanced

profit as per CBDT Circular dated 2nd Nov. 2016, however after different judicial pronouncements by the Hon'ble High Courts and Apex Court, the dispute is resolved that when there is no PE, no branch, no liaison office nor PAN in India, there is no Income tax liability of the foreign company in India under sec. 195(1) of IT Act and therefore, TDS provisions are not applicable. Considering the language of section 195 of I. T. Act and DTAA between India and USA, the Assessee company was under bona-fide belief that no tax is deductible and therefore it had not committed any infringement of law for which penalty u / s 271C is to be levied on account of non-deduction of tax at source on payments to non- resident.

The appeal of the Assessee company was partly allowed by this Hon'ble Tribunal (P.B. page 24 to 35) with direction to allowed 100% deduction of the enhanced profit as per CBDT Circular therefore no appeal before Hon'ble Rajasthan High Court under section 260A of Act could be preferred. Thereafter, as per different judicial pronouncements by higher judicial authorities, it is now settled that when there is no tax liability of the non-resident in India as per provisions of sec. 195 of Act and there exist DTAA, no tax is deductible at source on payments made to non-residents having no PAN, no branch, no PE, no liaison office in India. Therefore considering the language of section 195 of Act and DTAA between India and USA, the assessee company was under bona- fide belief that no tax is deductible on payments made to USA Companies against purchase of software. Reliance is placed on the following decision of Delhi Bench of Hon'ble Tribunal:

Dy. CIT Vs. Jt. Secretary, Organising Committee for Winter Games (2018) 196 TTI (Del) 975: Failure to deduct tax at source. Reasonable cause- Assessee having not deducted TDS under bona-fide belief that payment made are not subject to TDS, the failure to deduct tax at source was for a reasonable cause and therefore, penalty levied u/s. 271C is not sustainable (P.B. pages 179 to 193)."

5.1 To support the contentions so raised in the written submission the ld. AR of the assessee has also submitted a paper book containing following documents which reads as under:-

Index to paper book

S.No.	Particulars/Short description	P.B. Page
1.	Written synopsis in support of grounds of appeal.	1 to 5
2.	Software import Invoices	6 to 9
3.	Order under sec. 143(3) dated 29.03.2014 of ld. AO	10 to 14
4.	Order dated 26.11.2015 u/s. 250 of ld. CIT(A)	15 to 23
5.	Order dated 13.11.2017 of this Hon'ble Tribunal (quantum appeal)	24 to 35
6.	Notice dated 22.03.2018 by ld. Add. CIT (TDS) – show cause u/s. 271C	36
7	Order date 30.03.2018 u/s. 271C imposing penalty of Rs.11,46,838/-	37 to 42
8	Decisions/judgments in support of **ground No. (1):** (1) CIT Vs. Herbalife International P. Ltd (2016) 384 ITR 276 (Del) (2) US Technology Resources P. Ltd.. Vs CIT (2018) 407 ITR 327 (Ker) (3) Pr. CIT Vs. Dishman Pharma & Chem. Ltd. (2019) 417 ITR 373 (Guj) (4) CMA CGM Agencies India (P) Ltd. Vs. Dy. CIT (2020) 203 TTJ (Pune) 249 (5) Van Oord ACZ India (P) Ltd.. Vs. CIT (2023) 332 CTR (SC) 851 (6) Engg..Analysis Centre of Excellence P. Ltd. Vs. CIT (2021) 319 CTR (SC) 497	 43 to 54 55 to 68 69 to 86 87 to 104 105 to 107 108 to 125
9.	Decisions/judgments in support of **ground No. (2):** (1) Supreme Court in case of Distt. Co-op. Milk Produce Union (page 127) (2) CIT Vs.Satluj Jal Vidyut Nigam Ltd. (2012) 250 CTR (HP) 113 (3) CIT Vs. I.T.C. Ltd (2017) 297 CTR (Del) 47 (4) Hathway C-Net (P) Ltd. Vs. TRO (2018) 192 TTJ (Mumbai) 497 (5) ITO Vs. Eid Mohammad Nizamuddin (2018) 196 TTJ (JP) 232 (6) Director of I.T.(Intt.Taxation) Vs. Executive Engg. (2020) 428 ITR 294(Karn (7) CIT Vs. ACER India (P) Ltd. (2022) 327 CTR (Karn) 613	 126 to 127 128 to 130 131 to 142 143 to 156 157 to 169 170 to 174 175 to 178
10.	Decision/judgment in support of **ground No. (3):** Dy. CIT Vs. Jt. Secretary Org. Committee for Winter Gems 2009 (2018) 196 TTJ (Del) 975	 179 to 193

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6	CIT (Intt. Taxation) vs. ZTE Corporation (2023) 454 ITR 541 (SC)	43 to 46
7	CIT (Intt. Taxation) vs. Gracemac Corporation (2023) 457 ITR 130 (Del)	47 to 51
8	Hapang Lloyd India (p) Ltd. vs. Dy. CIT (Intt. Tax) (2023) 457 ITR 376 (Mum)	52 to 56

5.2 The ld. AR of the assessee in addition submitted that the assessee has under bondfide believe not deducted TDS. The penalty has been levied after 4 years and therefore, the levy penalty is beyond the permitted time line. The ld. AO in the assessment proceeding considered the explanation of the assessee and has not initiated the penalty proceeding. The payer has not PE and no agency agreement, so the sum paid is not chargeable to tax in India. To drive home to the contentions so raised, he relied upon the various judgment cited here in above.

6. The ld. DR is heard who relied on the findings of the lower authorities and more particularly advanced the similar contentions as stated in the order of the ld. CIT(A). The ld. DR as regards the contention of the assessee for limitation for levy of penalty he submitted that there is no time limit prescribed for levy of penalty for 271C r.w.s. 275 of the Act. The assessee admitted that they have not deducted TDS under bondfide and the law does not permit the waive of levy of penalty under bonafide.

7. We have heard the rival contentions and perused the material placed on record. The bench noted that assessment u/s 143(3) of Act was completed by ld. AO vide order dated 29.03.2014 after disallowing Rs.1,14,68,832/-, under sec. 40(a)(i) of Act for payment made for supply of software to two USA companies on which no tax was deductible but ld. AO, by treating it as payment for Royalty, made addition under sec. 40(a)(i) of Act. The first appeal filed by the assessee was dismissed (P.B. pages 15 to 23) whereas the second appeal before this Hon'ble ITAT was partly allowed with a direction to allow deduction @ 100% under section 10A of Act on enhanced profit as per circular No. 37 of 2016 of CBDT. Since there was no tax liability after order of this Hon'ble ITAT, assessee company did not prefer appeal u/s. 260 A before the Hon'ble High Court.

7.1 After receipt of order of the Hon'ble ITAT a notice dated 22.03.2018 was issued for the first time by Addl. CIT (TDS) Jaipur to show-cause as to why penalty under section 271C of Act should not be imposed as no TDS was made on various liabilities in period relevant to A.Y. 2011-12 (P.B. page 36). Rejecting the response, penalty of Rs.11,46,838/- u/s. 271C was levied. The bench noted that the levy of penalty under section 271C, for failure to deduct tax at source, is not automatic. In order to bring in

application of section 271C, in the backdrop of the overriding non obstante clause in section 273B, absence of reasonable cause, existence of which has to be established is a sine qua non. Before levying penalty, the concerned officer is required to find out that even if there was any failure to deduct tax at source, the same was without reasonable cause. The initial burden is on the assessee to show that there exists reasonable cause which was the reason for the failure. Thereafter, the officer has to consider whether the explanation offered by the assessee or other person as regards the reason for failure, was on account of reasonable cause or not. 'Reasonable cause' as applied to human action, is that which would constrain a person of average intelligence and ordinary prudence. It means an honest belief founded upon reasonable grounds, of the existence of a state of circumstances, which assuming them to be true, would reasonably lead an ordinary, prudent and cautious man, placed in the position of the person concerned, to come to the conclusion that the same was the right thing to do. The cause shown has to be considered and only if it is found to be frivolous, without substance or foundation, would the prescribed consequences follow.

7.2 Thus in the substance of this case after the decision of ITAT, the disallowance was sustained but at the same time the assessee was allowed deduction of that income and therefore, the effect was tax neutral. Therefore, the reasonable cause for the assessee not to deduct the TDS which although was added in the income of the assessee u/s 40(a)(i) of the Act. Since the effect was revenue neutral assessee has not disputed the levy or addition further in the Hon'ble High Court. Based on this fact, we are of the view that the assessee was having reasonable cause for not deducting the tax and ultimately the revenue has chosen it to income of the assessee by adding the same in the income of the assessee u/s. 40(a)(i). Further, the bench noted that there is no deliberate inaction on the part of the assessee. Therefore, in view of the Hon'ble Apex Court decision in the case of **CIT vs. Bank of Nova Scotia** wherein the Hon'ble Apex Court hold that the assessee has deliberately not avoided TDS and there is no contumacious conduct on the part of the assessee. Therefore, considering that aspect of the fact in this case. The bench feels that in this case levy of penalty is not correct as the assessee has reasonable cause for such failure and the revenue has already disregarded and disallowed the claim of the assessee on account of non deduction of tax. Thus, based on that set of facts, we hold that the levy of penalty is deleted on the ground that there

was bona fide and reasonable cause in not deducting TDS. Thus the ground of appeal taken by the assessee on the reasonableness is considered and accordingly, the penalty is deleted. The other ground raised by the assessee has become purely academic and the same are treated as infructuous.

In the result, appeal of the assessee is allowed.

Order pronounced in the open court on 22/11/2023.

Sd/-	Sd-
(संदीप गोसाई)	(राठौड कमलेष जयंतभाई)
(Sandeep Gosain)	(Rathod Kamlesh Jayantbhai)
न्यायिक सदस्य / Judicial Member	लेखा सदस्य / Accountant Member

जयपुर / Jaipur
दिनांक / Dated:- 22/11/2023
*Ganesh Kumar, PS
आदेश की प्रतिलिपि अग्रेशित / Copy of the order forwarded to:

1. The Appellant- M/s Isys Softech Pvt. Ltd., Jaipur
2. प्रत्यर्थी / The Respondent- ITO, Ward 2(2), Jaipur
3. आयकर आयुक्त / The ld CIT
4. आयकर आयुक्त(अपील) / The ld CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 528/JP/2023)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar