**IN THE INCOME TAX APPELLATE TRIBUNAL**
**"B" BENCH: BANGALORE**

**BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**
**AND SMT. BEENA PILLAI, JUDICIAL MEMBER**

| ITA No.409/Bang/2020 |
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| Assessment Year: 2011-12 |

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| The Additional Commissioner of Income Tax, TDS, Range-3, Bengaluru. | **Vs.** | Wipro GE Healthcare Pvt.Ltd., Plot:4, Sadaramangala 4, Kadugodi Industrial Area, Bengaluru – 560 067. **PAN NO : AAAW 1685 J** |
| **APPELLANT** | | **RESPONDENT** |

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| **Revenue by** | : | Shri. Ramesh Kumar, Addl. CIT(DR)(ITAT) |
| **Assessse by** | : | Shri. K. R. Pradeep and Ms. G. P. Girija, Advocates |

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| **Date of Hearing** | | : | 01.04.2021 |
| **Date of Pronouncement** | | : | 07.04.2021 |

**O R D E R**

***Per Beena Pillai, Judicial Member:***

Present appeal has been filed by revenue against order dated 07/01/2020 passed by the Ld.CIT(A)-13, Bangalore for assessment year 2011-12 on following grounds of appeal:

1. *The order of the Ld.CIT(A) is opposed to law and facts of the case.*
2. *The Ld.CIT(A) has erred in law as well as in facts in deleting the penalty levied u/s.271C of Income Tax Act, 1961.*
3. *The Ld.CIT(A) has erred in relying on the jurisdictional ITAT decision in the assessee's own case of Wipro GE Medical Systems Ltd vs. ITO (TDS) -III [2005] 3 SOT 627 wherein the facts are that tax and interest were paid in the usual course under the provisions of the Act by the payees, whereas in the present case, the*

*assessee has accepted its liability by disallowing the expenses in Tax Audit report in Form 3CD, but accounted for the income and paid taxes in next FY.*

4. *The Ld.CIT(A) has erred in not considering the decision of Hon'ble Supreme Court judgement in the case of Hindustan Coca Cola Beverages (P) Ltd (293 1TR 226) wherein it was held that " if the deductee makes the payments, this will not alter the liability of the assessee to pay interest u/s201(1A) and penalty u/s271C ".*
5. *The Ld.CIT(A) has erred in not relying on the Jurisdictional ITAT in the cases of M/s. IBM India P Ltd vs. ITO(TDS)(ITA 2263 to 2272/Bang/2016) & Toyota Kirloskar Motors P ltd Vs. iTO(TDS)(LTU), Bangalore (1TA No.1185/Bang/2014) dated 31.10.2017 which on same issue has been held in favour of revenue.*
6. *The Ld.CIT(A) has erred in not relying on the case of M/s. Abad Builders P Ltd. Vs. ACIT Circle 1(1)(2014) 43 taxmann.com 128 , wherein the Hon'ble High Court of Cochin has held that failure to effect TDS on expense provisions' concomitantly result in assessee being deemed to be an assessee in default.*
7. *The Ld.CIT(A) has erred in not relying on the decision of the Allababad High Court in the case of Union Bank of India vs. Addl.CIT TDS [2018] 100 taxmann.com 231, wherein Hon'ble HC has held that failure of assessee-bank to deduct TDS on interest income of the Agra Development Authority will attract penalty.*

**2. <u>Brief facts of the case are as under:</u>**

The assessee is a private limited company registered under companies Act, primarily engaged in the manufacture and sale of medical equipment, engineering related services and rendering of IT enabled services and accounting services to its group companies.

3. Ld.ACIT, TDS Circle 3(1) initiated proceedings under section 201(1) of the Act, requiring assessee to show cause as to why, it should not be treated as “assessee in default” for non-deduction of tax at source under the Act, for disallowance made under section 40(a)(ia) of the Act.

3.1. Assessee in response filed reply to the show cause notice wherein it was submitted that it has created year-end provision

for expenses amounting to Rs.22,74,37,646/- and the same has been reversed subsequently in the month of April, being the next financial year. Assessee submitted that, as on 31/03/2011, assessee was not in a position to quantify the sums payable to the parties and hence no tax was deducted at source. Assessee also submitted that assessee voluntarily disallowed the said sum under section 40(a)(ia) of the Act, on account of non-deduction of TDS and that the provision created was not credited to any parties or individuals account, since quantum of payment to the parties was not determinable as on the year-end. It was thus submitted that, there is a reasonable cause to believe that tax should not be deducted at source on the year-end provision.

4. Ld.AO however rejected the submissions of assessee and levied penalty under section 271C of the Act amounting to Rs.80,74,454/- being the amount of tax allegedly not deducted by assessee.

5. Aggrieved by the order passed by the Ld.AO, assessee preferred appeal before the Ld.CIT(A).

6. Before Ld.CIT(A) assessee contended that assessee had reasonable cause as per section 273B for non-deduction of tax at source due to inability to quantify the sum payable to the parties. It was also submitted that, such was a consistent approach followed by assessee from year to year basis. Assessee in support relied on the decision of *Hon'able Supreme Court* in case of *CIT vs Eli Lilly & Co. (India) (P.) Ltd.* reported in (*2009) 178 taxman 505*.

7. The Ld. CIT (A) after considering various decisions relied by the assessee decided the issue as under:

*"In view of the aforementioned arguments, judicial precedents and given that:*

- *the Company has suo moto disallowed the amount under section 40(a)(ia) in the return of income;*
- *the Company has also deducted and paid TDS in the next year; and*
- *The Company has also paid the interest under section 201(1A) of the Act demonstrates that the Company did not have any malafide intention and it has reasonable cause for non-deduction of tax. Hence, the Appellant submits that the levy of penalty under Section 271C is erroneous in law and liable to be dropped.*

10. *The submissions of Appellant has been considered. It is mainly emphasized that:*

*At the time provision was created in the books of account, the issue of deduction of taxes at source was not a settled issue. As submitted by the appellant, the provisions created with respect to dealers commission are to be paid to the dealers on the sales effected by them. Such commission is payable to the dealers as a percentage of sale only on actual realization of sale proceeds. Similarly with respect to provisions for payments to contractors on which TDS was required to be deducted, wherein the provisions are created on the basis of agreements entered into with the contractors where gross amount payable to the vendor is not fixed. Also, it would be pertinent to note that various tribunals and courts have divergent views on this issue, as can be seen from the above discussion and this fact in itself is a reasonable cause for the Appellant for non-deduction of tax on yearend provisions.*

*The Appellant also states that it has suo moto disallowed the amount under section 40(a)(ia) in the return of income. Further, it has also deducted and paid TDS in the next year and has also paid the interest under section 201(1A) of the Act and it demonstrates that the Appellant did not have any malafide intention and it has reasonable cause for non-deduction of tax.*

*The Appellant has relied on its own case i.e. Wipro GE Medical Systems Ltd. (supra) where the Bangalore ITAT has allowed relief to the Appellant where the amount of tax was already paid to the department and the interest under section 201(1A) of the Act for the period of non-deduction was also paid. Hence, there was no amount*

*due to the government under section 201(1) of the Act and also there as reasonable cause for non-deduction of tax at source at the time of creating of provision.*

*10.1 The Grounds of appeal, submissions made by the appellant and the order u/s 271C passed by the Jt. Commissioner of Income Tax (TDS), Rage-3 have been carefully considered. In this regard with respect to the Reasonable cause' advanced by the appellant it is noticed from the submissions of the appellant above and especially in the light of the decision of Bangalore ITAT. in the appellant's case in Wipro GE Medical systems Ltd. (supra), there is sufficient force in the argument of the appellant. Considering the facts involved as discussed above and respectfully following the various judicial decisions (supra) relied upon by appellant, penalty imposed by the AO is found to be not sustainable hence deleted. Thus, the grounds of appeal raised in this appeal with regard to levy of penalty u/s 271C is allowed and the Penalty levied u/s 271C is deleted."*

8. Further the Ld.Counsel placed reliance on decision of *Hon'ble Karnataka High Court* in case of *Karnataka Power Transmission Corporation Ltd. vs DCIT* reported in *(2016) 383 ITR 59,* wherein it has been held that the for purpose of deducting tax at source the income which finally partakes character alone is allowable for deduction under the Act. If the amount is not considered to be income in the hands of the deductee, the provision of tax deducted at source would not be made applicable.

9. Section 271C states that, if any person fails to deduct the whole or any part of the tax is required by the provisions, then such person shall be liable to pay by way of penalty a sum equal to the amount of tax which such person failed to deduct. Section 273B states that notwithstanding anything contained in section

271C, no penalty shall be imposed on the person or the assessee for failure to deduct tax at source if such person proves that there was a reasonable cause for the said failure. Thus the liability to levy penalty can be fastened only where the person/assessee do not have good/ sufficient reason for not deducting tax at source.

10. In the present facts of the case, the provision created at the end of the accounting year has not been credited to the relevant parties to whom the payments has to be made for the reason that it was unquantifiable. Further, assessee has *suo moto* disallowed the said sum under section 40(a)(ia) for non-deduction of TDS. Therefore there is a sufficient and reasonable cause for not deducting TDS on the year-end provision. It is also observed that assessee consistently follows this kind of accounting system for year-end provisions which is subsequently reversed in the subsequent year in the month of April, as and when the bills are received, and the payment is made to the payee by deducting TDS. Further, admittedly, assessee has paid interest under section 201(1A) which further demonstrates there was no malafide intention. We also note that under similar circumstances in assessee's own case reported in *(2005) 3 SOT 627*, coordinate bench of this *Tribunal* on similar facts deleted penalty as it was unsustainable. Further the decisions relied by the Ld.Sr.DR are distinguishable on facts, and therefore not applicable to the present facts of the case. Based on the above observations we do not find any infirmity in the view taken by the Ld.CIT(A) to delete the penalty levied under section 271C read

with 273B of the Act due to existence of reasonable cause for non-deduction of TDS, and therefore, assessee cannot be held to be "assessee in default".

**11. Accordingly, grounds raised by revenue stands dismissed.**

**12. In the result appeal filed by revenue stands dismissed.**

Order pronounced in open court on 07.04.2021.

| Sd/- | Sd/- |
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| **(CHANDRA POOJARI)** | **(BEENA PILLAI)** |
| **Accountant Member** | **Judicial Member** |

Bangalore,
Dated : 07.04.2021.

Copy to:

1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar,
ITAT, Bangalore.