IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

INCOME TAX REFERENCE NO. 13 OF 2000
WITH
INCOME TAX APPEAL NO. 1021 OF 2000
WITH
INCOME TAX APPEAL NO. 1022 OF 2000

Reliance Industries Ltd. ..Applicant/Appellant

Vs.

Commissioner of Income Tax, Mumbai
and Ors. ..Respondents

....

Mr. J. D. Mistri, Senior Advocate a/w Nitesh Joshi and P.C. Tripathi i/b Raj Darak, Advocates for Applicant/Appellant.
Mr. Suresh Kumar, Advocate for Respondents.

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CORAM : M.S. SANKLECHA &
N.M. JAMDAR, JJ.
RESERVED ON : 29 JUNE 2015
PRONOUNCED ON : 20 JULY 2015

JUDGMENT (PER: M.S. SANKLECHA) :

This Court by an order dated 22 January 2002 had directed the above reference at the instance of applicant and two appeals at the instance of the appellant be heard together. Accordingly, all the three matters were heard together for final disposal and are being disposed of by this common order.

2. The Reference Application under Section 256(1) of the Income Tax Act, 1961 (the 'Act') arises out of two orders dated 14 September 2014 of the Income Tax Appellate Tribunal (the 'Tribunal') for the Assessment Year 1985-86 and 1987-88 seeking our opinion on the following question of law:

> "Whether on the facts and circumstances of the case, the Tribunal was right in law in upholding the levy of penalty u/s. 221 of the I.T. Act, 1961, for failure to pay tax deducted at source within the prescribed time?"

3. The two appeals under Section 260A of the Act arise from common order dated 16 March 2000 of the Tribunal for the Assessment Years 1987-88 and 1988-89. Both appeals were admitted on 22 January 2002 on the following substantial questions of law:

> "1. Whether the interpretation placed by the Tribunal upon Sections 221 and 201 of the Income Tax is correct?
>
> 2. Whether the Tribunal, in any event acted unreasonably and perversely in confirming the levy of penalty upon the appellant to the extent of 5% of the TDS?"

4. It is agreed position between the Counsel that the issue in all the three matters is with regard to imposition of penalty under Section 221 of the Act for failure to deposit tax deducted at source in accordance with Section 201 of the Act. It is further stated that the question of law as admitted arise from facts which are substantially similar.

5. In the above view, for the purposes of considering the question arising for our consideration, we will refer to the facts as set out in Income Tax Appeal No. 1021/2000 for the Assessment Year 1987-88.

6. At all times relevant, the applicant/appellant (appellant) had Manufacturing facilities and offices situated at different/diverse places in India. It employed almost 9,000 persons and also served 18 Lacs shareholders, debenture holders and fixed deposit holders spread all over India. Besides having several contractors who executed work for the appellant at various places in India. In terms of Chapter XVII of the Act, the appellant is required to deduct tax on payments made by it of salaries, dividends and interests besides on

payments made to contractors. The tax so deducted by the appellant in terms of Rule 30 of Income Tax Rules had at the relevant time to be paid into the treasury with one week of deduction.

7. During the financial year ending 31 December 1986 i.e. previous year relevant to Assessment Year 1987-88, the appellant while making payment to its shareholders, debenture holders, contractors and employees did deduct the tax out of amounts payable to them. However there was a delay on the part of the appellant in paying over the deducted tax in accordance with the Act to the revenue. Although there was a delay, the appellant on its own paid to the revenue the tax deducted alongwith interest thereon on the delayed payment. This was done voluntarily by the appellant before any proceedings were initiated against it under Section 201 of the Act to declare the appellant in default or demand any interest on the delayed payment.

8. On 24 July 1990, the Deputy Commissioner of Income Tax issued a show cause notice for Assessment Year 1987-88 to the

appellant calling upon it to show cause why penalty under Section 221 of the Act should not be imposed. The basis of the notice was that though tax at source had been deducted on payment of salaries, dividend, interest, etc. the same was not deposited with the revenue in the prescribed time. Consequently the appellant was liable for penalty under Section 221 of the Act.

9. By letter dated 27 August 1990, the appellant responded to the show cause notice. The appellant pointed out that the delay in depositing the tax was essentially on account of financial difficulties and also in view of the sheer volume, size and spread of its operations. This was as the requisite information from offices situated all over India had to be collected before depositing the amounts deducted as tax at source. In any case, it was submitted that no penalty can be imposed under Section 221 of the Act, when failure to deduct and deposit is for good and sufficient reasons. In this case, it was submitted by the appellant that there were good and sufficient reasons for delay in depositing the tax with the revenue. Thus it was submitted that no penalty under Section 221 of the Act be imposed.

10. The Deputy Commissioner of Income Tax by an order dated 31 August 1990, tittled as an order under Section 221 read with Section 201 of the Act disposed of the show cause notice dated 24 July 1990. By the above order the Deputy Commissioner of Income Tax condoned the delay in certain cases, while imposing a penalty Rs.76.79 Lacs on the appellant under Section 221 of the Act. This was about 10% of the quantum of delayed deposit of tax deducted at source. The aforesaid order was a common order passed under Section 221 r/w 201 of the Act.

11. Being aggrieved by the order dated 31 August 1990, the appellant preferred an appeal before the Commissioner of Income Tax (Appeals) (the 'CIT (A)'). The appellant's appeal was allowed by an order dated 17 December 1991 of the CIT(A) by following his order passed in appeal for the Assessment Years 1985-86 and 1986-87 wherein on identical fact situation, on interpretation of Section 221 of the Act, it was held that no penalty is imposable. The CIT(A) held that for imposition of penalty, it is necessary that an assessee should be continuously in default i.e. even on the date the proceedings for imposition of penalty is commenced/initiated. This

on the basis of the opening words in Section 221 of the Act viz. "when an assessee is in default or is deemed to be in default". The CIT(A) in his order held that though the Explanation to Section 221(1) of the Act does attempt to cover even such cases, yet on consideration of the entire scheme of the Act, the imposition of penalty can only be justified when an assessee is in default at the commencement of penalty proceedings.

12. Being aggrieved by the order dated 17 December 1991 of the CIT(A), the revenue preferred an appeal to the Tribunal. By a common order dated 16 March 2000, the Tribunal allowed the revenue's appeal. The Tribunal held that once an assessee becomes a defaulter, penalty is imposable by placing reliance upon the decision of the Patana High Court in ***CIT Vs. Sriram Agarwal***[1]. Thus negating the stand of the CIT(A) that one has to be defaulter at the time of initiation of penalty proceeding. It also records that for the earlier two Assessment Years also the appellant was a defaulter but lenient view was taken and nominal penalty was imposed. Thus keeping in mind the repeat breach, the penalty

1. (1976) 161 ITR 302

imposed by the Assessing Officer of Rs.76.79 lacs i.e. 10% of the tax amount involved was reduced to 5% thereof i.e. to Rs.38.38 lacs. It may be relevant to note the quantum of penalty levied by the Assessing Officer as well as the penalty payable after the impugned order of the Tribunal for the two years under reference and two years under appeals are as under:

Assessment Year	Penalty as per AO (Rs)	Penalty as per Tribunal (Rs)
1985-86	20,36,911	1,00,000
1986-87	28,35,524	1,00,000+1,50,000
1987-88	76,79,118	38,38,059
1988-89	84,63,403	42,31,701

13. Mr. Mistry, the learned Senior Counsel for the appellant in the reference and in two appeals in support submits as under:

(a) Impugned order and proceedings leading to penalty under Section 221 of the Act are without jurisdiction as the condition precedent for the exercise of the same is that an assessee is in default or is deemed to be in default in making a payment of tax is not satisfied. This being in default or being deemed to be in default can only arise when an appealable order is passed under Section 201(1) of the Act prior to initiation of penalty proceedings.

This admittedly is not done in all the three cases under consideration;

(b) An order under Section 201 of the Act has to be speaking order preceded by notice, determining the question of tax to which the assessee is a defaulter before proceedings under Section 221 of the Act can commence. This requisite of a speaking order under Section 201 of the Act is evident from the fact that it is an appellable order under Section 246 of the Act. Further reliance is placed upon the decision of the Madras High Court in ***Mettur Chemicals Vs. IAC***[2]. Consolidated order under Sections 201 and 221 of the Act as is this case is bad in law;

(c) Section 221 of the Act is invokable only when there were arrears of tax deducted at source to be paid after a notice of demand is raised. This is evident from the use of the words "in addition to the amount of the arrears" in Section 221 of the Act. In this case, the appellant has deposited tax deducted at source alongwith interest with the revenue much before any notice of demand is issued. Thus there being no "amount in arrears" reason to impose any penalty cannot arise;

2. 150 ITR 341

(d) In view of the proviso to Section 201(1) of the Act which provides for invocation of Section 221 of the Act only where the assessee has failed to deduct and pay tax to the revenue without being qualified by the words "in accordance with the Act" as found in Section 201(1) and (1A) of the Act is with a purpose. This distinction was deliberately made by parliament to provide that in case of the class of assessees who are obliged to deduct tax on behalf of others, penalty is imposable only if there failure to deduct and pay the tax to the revenue without any time limit. Therefore once paid even beyond the prescribed time provided under the Act, no penalty under Section 221 of the Act is imposable. Any other interpretation would render the words "in accordance with the Act" in Section 201(1) and (1A) of the Act, superfluous;

(e) The explanation below Section 221(1) of the Act which clarifies that a person will not be liable to pay penalty merely because he has paid the tax before imposition of penalty would have no application in the present case. This for the reason that by virtue of proviso under Section 201(1) of the Act, the Assessing Officer has no authority to initiate proceedings under

Section 221 of the Act where the amount of tax deducted has already been paid to the revenue. In the alternative, it is submitted that the explanation below Section 221(1) of the Act would apply only in cases where demand is raised for payment of tax remaining unpaid at the time of initiation of penalty proceedings. In the present case, the applicant/appellant has paid the tax alongwith interest thereon much before notice to impose penalty under Section 221 of the Act was issued;

(f) Section 201(1) of the Act was amended by Finance Act, 2002 with retrospective effect from 1 April 1962 to cover cases where there has been a failure to deduct whole or any part of the tax. At the relevant time, when these proceedings commenced and orders passed, no penalty was imposable in case there was part payment of the tax deducted at source to the revenue;

(g) In any case, no penalty ought to have been levied upon the appellant in view of proviso to Section 221 of the Act which provides in case of default for good and sufficient reasons, no penalty can be imposed. It is the appellant's submission

that delay in payment of the tax deducted at source into the revenue was due to its diverse locations, lack of computerization and financial stringency. These were all good and sufficient reasons warranting non imposition of penalty; and

(h) If two interpretations are possible and one view in favour of the assessee has been adopted by the CIT(A) in his order, then even if another interpretation is possible, the same should not be distrubed in appeal. This is particularly so while interpreting a penal provision.

14. As against the above, Mr. Suresh Kumar, the learned Counsel in support of the impugned order for the revenue submits that-

(a) Question of issuing a notice and declaring the appellant a defaulter and/or a deemed defaulter under Section 201 of the Act does not arise in the facts of the present case. The appellant has admitted to being a defaulter in not having deposited the tax in time. In these circumstances, issuing notice and passing a separate order under Section 201 of the Act was not necessary. In fact the common order passed under Section 201 and 221 of the Act

serves the purpose as the order under Section 201 of the Act proceeded on an admitted position and was merely a formality. So far as the right to file an appeal under Section 246 of the Act is concerned, it was always open to the Assessee to file appeals from this order under both sections viz. 201 and 221 of the Act;

(b) The issue of no penalty being imposed upon the appellant as held by the CIT(A) in view of the interpretation of Section 221 of the Act namely continuing in default was contrary to the settled position of law as declared by the Patana High Court in Shriram Agrawal (supra). Thus the interpretation put on Section 221 of the Act by the CIT(A) is an erroneous interpretation. There is no issue of there being two possible interpretation while interpreting Section 221 of the Act. The interpretation put on Section 221 of the Act by the Revenue also stands settled in its favour in view of the explanation thereto;

(c) The proviso to Section 201(1) of the Act has no application in the present facts. This is so as the proviso applies only in case of a person who has failed to deduct and pay tax i.e. both the conditions must be satisfied. In the present case, the

appellant has undisputedly deducted the tax and deposited the same with the revenue beyond the period provided under the Act. Thus the procedure adopted for imposition of penalty under Section 221 of the Act cannot be faulted with;

(d) It is submitted that above view stands fortified by the fact that under Section 205 of the Act, where tax has been deducted and not deposited, the revenue cannot proceed against the person from whose income, tax has been deducted. Thus the proviso to Section 201(1) of the Act has no application where tax is deducted but not deposited;

(e) The penalty for the Assessment Years 1985-86, 1986-87, 1987-88 and 1988-89 is reasonable. For the first two years it was Rs.1 lakh and 1.50 lakh while for subsequent two years it was higher bearing in mind that appellant is a persistent defaulter having defaulted in Assessment Years 1985-86 and 1986-87; and

(f) The various contentions raised by the applicant/appellant before this Court should not be considered s they had not filed any cross objection from the order of CIT(A) to the Tribunal.

15. Before considering the rival submissions, it would be useful to reproduce Sections 2(7), 201 and 221 of the Act as existing at the time when penalty was imposed upon the appellant by the Assessing Officer which are as under:

> *"2(7) "assessee" means a person by whom [any tax] or any other sum of money is payable under this Act, and includes-*
> *(a) every person in respect of whom any proceeding under this Act has been taken for the assessment of his income [or assessment of fringe benefits] or of the income of any other person in respect of which he is assessable, or of the loss sustained by him or by such other person, or of the amount of refund due to him or to such other person;*
> *(b) every person who is deemed to be an assessee under any provision of this Act;*
> *(c) every person who is deemed to be an assessee in default under any provision of this Act;"*
>
> *"Consequences of failure to deduct or pay.*
> *201. (1) If any such person and in the cases referred to in section 194, the principal officer and the company of which he is the principal officer does not deduct or after deducting fails to pay the tax as required by or under this Act he or it shall, without prejudice to any other consequences which he or it may incur, be deemed to be an assessee in default in respect of the tax:*
>
> *Provided that no penalty shall be charged under section 221 from such person, principal officer or company unless the [Assissing] Officer is satisfied that such person or principal officer or company, as the case may be, has [without good and sufficient reasons] failed to deduct and pay the tax.*

[(1A) Without prejudice to the provisions of sub-section (1), if any such person, principal officer or company as is referred to in that sub-section dose not deduct or after deducting fails to pay the tax as required by or under this Act, he or it shall be liable to pay simple interest at [fifteen] per cent per annum on the amount of such tax from the date on which such tax was deductible to the date on which such tax is actually paid.]

(2) Where the tax has not been paid as aforesaid after it is deducted, [the amount of the tax together with the amount of simple interest thereon referred to in sub-section (1A)] shall be a charge upon all the assets of the person, or the company, as the case may be, referred to in sub-section (1).]"

"Penalty payable when tax in default.

221. [(1) When an assessee is in default or is deemed to be in default in making a payment of tax, he shall, in addition to the amount of the arrears and the amount of interest payable under sub-section (2) of section 220, be liable, by way of penalty, to pay such amount as the [Assessing] Officer may direct, and in the case of a continuing default, such further amount or amounts as the [Assessing] Officer may, from time to time, direct, so, however, that the total amount of penalty does not exceed the amount of tax in arrears:

Provided that before levying any such penalty, the assessee shall be given a reasonable opportunity of being heard:

[Provided further that where the assessee proves to the satisfaction of the [Assessing] Officer that the default was for good and sufficient reasons, no penalty shall be levied under this section.

[Explanation: For the removal of doubt, it is hereby declared that an assessee shall not cease to be liable to any penalty under this sub-section merely by reason of the fact that before the levy of such penalty he has paid the tax.]

(2) Where as a result of any final order the amount of tax, with respect to the default in the payment of which the penalty was levied, has been wholly reduced, the penalty levied shall be cancelled and the amount of penalty paid shall be refunded."

16. We have considered the rival submissions. The undisputed position between the parties for all the assessment years under consideration are as under:

(a) The appellant has deducted the tax at the time of making the payment of salaries, dividend, interest as also on payment made to contractors.

(b) The appellant has delayed in depositing the amounts of tax deducted in (a) above with the revenue.

(c) There is no dispute about the quantum of tax deducted which has been deposited late with the revenue; and

(d) The quantum of tax deducted has been deposited with the revenue alongwith the interest by the appellant on its own before any notice determining the amount or declaring the assessee to be in default was made by the revenue.

We also find that in terms of Section 2(7) of the Act, the appellant

would be an assessee for the purposes of this Act as it was liable to pay tax/sum of money under the Act.

17. The primary submission on behalf of the appellant is that the proceedings for penalty under Section 221 of the Act for all the assessment years under consideration are without jurisdiction. It is contended that before any notice can be issued under Section 221 of the Act for imposition of penalty, the condition precedent is that the assessee should be in default or deemed to be in default. Being in default or being deemed to be in default, can only take place when the assessee has been so declared under Section 201 of the Act. It is contended that a declaration under Section 201 of the Act has to be by way of a speaking order and in support thereof placed reliance upon the decision of the Madras High Court in Mettur Chemicals (supra) and Section 246 of the Act which provides for filing of appeal separately from orders under Section 201 and 221 of the Act.

18. As against the above, it is contended by the revenue that in the present facts, the requirement of either a notice or a speaking

order under Section 201 of the Act would not arise. Therefore an order passed under Section 221 of the Act would not be bad in law. The entire exercise of issuing a notice and passing an order, first under Section 201 and thereafter by a separate order under Section 221 of the Act would only be academic in these facts. This is so as it is an admitted position that the Assessing Officer has passed an order which is tittled as an order under Section 201 and 221 of the Act. The impugned order imposing penalty is after having accepted the assessee to be in default. In normal cases, where there is some dispute with regard to the amount of tax deducted and amount of tax deposited and/or delay in deposit and/or the interest payable thereon then the passing of an order under Section 201 of the Act before initiating penalty proceedings may be necessary. This is because there is a dispute on the factual determination whether or not the assessee is in default or deemed to be in default and the extent of default.

19. The appellant before us is not disputing the position that they were late in depositing the tax deducted at source with the

revenue. Therefore they were assessess in default. In these facts, giving of a notice and/or passing an order for determining that the assessee is in default or deemed to be in default would not arise. The fact that an appeal is provided under Section 246(i) of the Act from an order passed under Section 201 of the Act would not by itself require the passing of separate order under Section 201 of the Act prior to passing of an order under Section 221 of the Act. There is no bar in passing an order under Section 201 read with 221 of the Act simultaneously. The appellant's right of appeal is not affected by reason of the Assessing Officer passing a common order under Section 201 read with Section 221 of the Act. The appellant is still entitled to file appeal from orders passed under Sections 201 and 221 of the Act under Section 246(i) and (l) of the Act respectively. The grievance of the petitioner is that in view of there being a common order under Section 201 and 221 of the Act, an opportunity to raise fresh plea in penalty proceedings which may not be raised during quantum proceedings is lost. In support reliance is placed upon the decision of Allahabad High Court in ***Jaidayal Pyarelal Vs. CIT***[3]. We are unable to understand how the

3. 1973 Tax LR 880

aforesaid decision assist the petitioners in view of the fact that admittedly the petitioners were given a hearing before imposing of penalty where all contentions could be raised.

20. Similarly, the requirement of a written order treating a person to be an assessee in default may not be necessary when it is admitted position between the parties that the assessee is in default. The decision in Muttur Chemicals (supra) was on a different factual background in as much as appellant therein was disputing adjustment of refund due to it against payment by its various collaborators on account of the statement made by them i.e. collaborators. In the present case there is no dispute that the assessee is in default. Moreover in terms of Section 221 of the Act, the only condition precedent to impose of penalty upon the assessee is that it should be in default or deemed to be in default. In the present facts this position is not disputed. Dehors, the above, one more feature to be noticed is that Section 201(1) of the Act itself provides that where there is failure of an assessee to deduct tax and pay to the revenue, such an assessee is deemed to be in default. The failure to deposit in time is accepted/admitted position. There

is no dispute about the questions. Thus the appellant is deemed to be in default. Therefore, it cannot be said that the penalty proceedings are without jurisdiction under Section 221 of the Act. In view of the above, the decisions of Delhi High Court in ***Modi Cement Vs. UOI***[4] and of Rajasthan High Court in ***Rajasthan State Electricity Board Vs. DCIT***[5] relied upon by the petitioner can have no application. Both the above decision were rendered in the context of Section 143(1A) of the Act.

21. It was next submitted on behalf of the appellant that penalty under Section 221 of the Act would be payable only when the same is in addition to the arrears of payment of tax deducted. This according to them is the plain reading of the words. We do not find so. The Parliament has specifically provided for the words "in addition to the amount of arrears alongwith the amount of interest payable be liable for penalty" only with a view of qualifying that payment of the amount of arrears and the interest payable would by itself not wipe away the liability to penalty under Section 221 of the Act. The aforesaid submission on behalf of the appellant also stands

4. 193 ITR 91
5. 200 ITR 434

negatived by the Explanation added to Section 221(1) of the Act. This Explanation clarifies that an assessee shall continue to be liable to penalty even if the tax has been paid before levy of penalty.

22. It was next contended that in view of the proviso to Section 201(1) of the Act, invocation of Section 221 of the Act is barred where the Assessing Officer is satisfied that failure to deduct and pay tax was without good and sufficient reasons. The words "failed to deduct and pay tax" of the proviso is contrasted with the words "fails to pay the tax as required by or under this Act" found in Section 201(1) as well as 201(1A) of the Act. In view of this difference in language, it is submitted that the proviso would have no application where an assessee has paid the tax even if the same is paid beyond the period provided under the Act. This is contested by the revenue on the ground that the proviso applies only in case of a person who has failed to satisfy both the condition therein i.e. fails to deduct and also fails to pay the tax. This interpretation is also supported by the words found in sub-section (1) of Section 201 of the Act which provides ".... principal officer of the company does not deduct or after deducting fails to pay the tax as required by or

under this Act". In this case, the tax has been deducted but there is a failure in depositing the tax with the revenue. The Parliament treats a person who has deducted the tax and fails to pay it to revenue as a class different from a person who has not deducted the tax and also not deposited the tax with revenue. This is for the reason that in the first class of cases the assessee concerned after deducting the tax, keep the money so deducted which belongs to another person for its own use. In the second class of cases, the assessee concerned does not take any advantage as he pays the entire amount to the payee without deducting any tax and does not enrich itself at the cost of the government. Therefore, although penalty is also imposable in the second class of cases, yet in view of the proviso to Section 201(1) of the Act, it is open to such assessee to satisfy the Assessing Officer that as they have good and sufficient reasons no penalty is imposable. It is in the above view that in the first class of assessees the Parliament has provided for prosecution under Section 276B of the Act for failing the pay the tax deducted at source. Therefore the first class of assessee to which the appellant belongs would be liable for prosecution. Thus the proviso would

only apply in respect of the second class of assessee i.e. such class of assessee who have not deducted the tax and consequently failed to pay the tax.

23. Therefore in our view, the proviso under Section 201 would have no application to the facts of the present case. The legislature did not provide for the words "by or under this Act" in the proviso as in the absence of deducting tax, the occasion to deposit it within time as provided in the Rules would not apply. This is so as the time begins to run from the date of the deducting of tax as is evident also from Section 200 of the Act which provides that any person deducting any sum shall pay it within the prescribed time, the sum so deducted to the Central Government.

24. It was next submitted on behalf of the appellant that the Explanation below Section 221 of the Act which clarifies that penalty will continue to be imposable even if the assessee has paid the tax before the levy of penalty would not apply to the present facts. This for the reason it is submitted the penalty would be imposable under Section 221 of the Act only if the assessee is in

default at the time of initiation of penalty proceedings. In the present case it is submitted that the amounts deducted have been deposited long before the notice for penalty under Section 221 of the Act was issued. This stand was also taken by the CIT(A) while allowing the appellant's appeal. The construction sought to be put on Section 221(1) of the Act commencing with the words “where an assessee is in default or is deemed to be in default” cannot stand in the face of the explanation which clarifies that merely because the tax has been paid/deposited before the levy of penalty, would also take in all acts, from the imposition of the charge upto/till the entire process of raising demand and collecting the same. The construction sought to be put on the explanation does not allow full amplitude to the words 'levy'. Besides purposive interpretation also supports the above view as otherwise the construction as suggested by the appellant would enable an assessee to deduct tax at source from the payment being made and not deposit it with the revenue within time prescribed. Therefore utilize the amount in effect till such time just before the notice under Section 221 of the Act is issued.

25. It must be borne in mind that the assessee continues to be in default in case the tax has not been deposited with revenue within the time prescribed under the Act. Tax deposited thereafter but before penalty proceedings are initiated would not cleanse the assessee from being in default. The penalty is imposed upon the assesee under Section 221 of the Act for the default in not having paid the tax deducted at source within the time provided under the Act. This default is not wiped away by the assessee depositing the tax after the prescribed time. It is in the above circumstances, that the reliance of the petitioners upon the decision of the Apex Court in ***Sri Hohan Wahi Vs. CIT***[6] seems inappropriate. In the present facts we are concerned with imposition of penalty and the above decision of the Apex Court in Sri Hohan Wahi (supra) dealt with recovery of tax for failure to issue a mandatory notice under Section 156 of the Act. Reliance placed upon the decision of the Gauhati High Court in ***Pranavi Ram Bahuva Vs. Asst. Controller of Estate Duty***[7] rendered under the Estate Duty Act. The notice of demand, in the above case to the accountable person being bad and so held, penalty proceedings were also set aside. This decision also does not

6. 248 ITR 799
7. 102 ITR 580

in our view support the petitioner's contention. Thus we find no merit in the appellant's above submission that no penalty can be imposed as there was no default at the time when penalty proceedings were initiated.

26. It was next urged on behalf of the appellant that Section 201(1) of the Act was amended by the Finance Act, 2002 with the retrospective effect from 1962. This amendment was brought in to include an assessee to be in default, on failure to deduct or failure to pay the whole or any part of the tax as required by or under this Act. Prior to the amendment, the words “the whole or any part of the tax” were not there. The consequences of failure to pay were attached/attracted only where the tax was not deducted and paid in whole. It was submitted that prior to amendment, if a part of the tax was deducted and paid to the revenue, then Section 201 of the Act would not be triggered. We do not find any merit in this submission. The amendment by the Finance Act, 2002 with the retrospective effect was clarificatory in nature. The words “does not deduct or after deducting fails to pay tax” in the preamended

Section 201 of the Act would in its plain reading also cover a failure to part deducting and/or failure to make a part payment of the already deducted tax to the revenue. The amendment being only clarificatory in nature does not for the first time extends/enlarges the scope of the Section. Thus the above submission on behalf of the appellant is also not accepted. Therefore even where the assessee contends that he has paid part the tax after deducting the same from the payee, the provisions of Section 201(1) of the Act would continue to apply. In any event, the retrospective amendment with effect from 1 April 1962 besides being clarificatory would also take into account a partial deposit with revenue of the tax deducted at source within the ambit of Section 201(1) of the Act. The Calcutta High Court's decision in ***CIT Vs. S.K. Tekriwal***[8] being relied upon by the petitioner does not in our view assist the petitioner as it holds that although an assessee would be defaulter for nonpayment of tax deducted at source, yet payments made cannot be disallowed under Section 40(a)(1a) of the Act. This is where partial payment of tax deducted has been made to the revenue.

8. 361 ITR 432

27. It was next submitted that in the facts of the case, no penalty ought to have been imposed upon the appellant as there was good and sufficient reasons viz. financial hardship, diverse locations and lack of computerization. The obligation to deduct and pay tax upon the assessee is unconditional under the Act. It is the responsibility of the assessee to deduct taxes and to pay to the revenue within the period provided under the Act. Financial stringency would not justify deducting tax from the amount paid to the payee and not paying it to the revenue. Otherwise it would amount to using somebody else's money for the purposes of one's business. In such circumstances, the question of financial stringency, to our mind, hardly gives rise to a good and sufficient reason for not depositing tax which was an amount otherwise payable to the payee or on behalf of the payee to the revenue. Moreover, the impugned order dated 16 March 2000 records the fact that the appellant has not produced any evidence to show that it was in financial difficulty. Similarly diverse locations and lack of computerization are hardly any reasons to justify the failure to pay under the Act. The assessee is entitled to do business in as many

locations as it desires but that would not by itself justify not paying taxes which are due to the revenue. The obligation to pay taxes is absolute. The reliance was placed by the appellant on the decision of this Court in ***Commissioner of Wealth Tax Vs. S.L. Hendra***[9] where penalty was set aside under the Wealth Tax Act on payment of self assessment tax due to final stringency caused by the acquisition of property. This was found by the Tribunal to be a reasonable cause and on this fact the Court refused to interfere. In the present facts also the Tribunal has rendered a finding of fact that the reason set out by the appellant for failure to deposit the tax within time is not a good and sufficient cause. At the hearing, the appellant had not been able to show that the above finding of the Tribunal is in any manner perverse and/or arbitrary.

28. It was lastly submitted by the appellant that no penalty ought to have been imposed upon it in all the assessment years under consideration, in view of the fact that the CIT(A) had held while interpreting Section 221 of the Act that no penalty is imposable. It was submitted that the interpretation by CIT(A) is a

9. 191 ITR 565

plausible one. In such circumstances, there is no justification to impose any penalty upon the appellant. On the other hand it was contended by the revenue that the interpretation put by the CIT(A) on Section 221 of the Act is in face of the explanation which provides that penalty would be imposable even if the tax has been paid before the levy of penalty. The explanation was ignored on the ground that it is confusing. The CIT(A) further construed the word "is" present in Section 221 of the Act which provides that when assessee is in default or deemed to be in default would only mean that the default should be continuous and also continuing when the penalty proceedings are initiated. It ignores the explanation completely and ignores a binding a decision of the Patana High Court in the matter of Shriram Agrawal (supra) which covered an issue of non payment of advance tax in the context of the explanation found in Section 221 of the Act. In the above case it was held that the explanation to Section 221 of the Act puts it beyond doubt that even where an assessee pays the tax before proceedings for penalty are initiated, yet penalty is imposable.

29. Consequently the above submission canvased by the appellant is not acceptable as it is not a case where there were two possible views of interpreting Section 221 of the Act. This is particularly so in view of explanation provided thereto. Accordingly, the imposition of penalty and setting aside the order of CIT(A) by the impugned order, cannot be found fault with. For all the reasons indicated above, we shall now answer the questions framed for our opinion.

30. The question framed for our opinion under Section 256(1) of the Act reads as under:

Question: "Whether on the facts and circumstances of the case, the Tribunal was right in law in upholding the levy of penalty u/s. 221 of the I.T. Act, 1961, for failure to pay tax deducted at source within the prescribed time?"

Answer: In the affirmative i.e. against the appellant-assessee and in favour of the respondent-revenue.

31. So far as appeals arising from order dated 16 March 2000 are concerned, the appeals were admitted on the following questions:

Question: "Whether the interpretation placed by the Tribunal upon Sections 221 and 201 of the Income Tax is correct?"

Answer: In the affirmative i.e. against the appellant-assessee and in favour of the respondent-revenue.

Question: "Whether the Tribunal, in any event acted unreasonably and perversely in confirming the levy of penalty upon the appellant to the extent of 5% of the TDS?"

Answer: In the negative i.e. in favour of the respondent-revenue and against the appellant-assessee.

32. In the above terms the reference is answered and both the appeals stand dismissed. No order as to costs.

[N.M. JAMDAR, J] **[M.S. SANKLECHA, J.]**