(2001) 076 ITD 0237 :(2001) 071 TTJ 0269

Royal Calcutta Turf Club v. Deputy Commissioner of Income Tax ()

INCOME TAX

--Tax deduction at source----UNDER SECTION 194BB*Whether the punter should be given credit in respect of basic exemption limit of Rs. 5,000 once in a financial year or in respect of each race--*

Catch Note:

The question of allowing floor limit of Rs. 5,000 is required to be applied to each case of payment, as is provided in section 194BB and that there is no scope for making any assumption that section 194BB takes within its campus, the entire winnings made by a punter throughout a year.

Held:

The departmental contention in this regard is that inasmuch as the expression "winnings" is used herein, it means the total winnings of the punter over the year. Tribunal is, however, unable to agree with this contention of the department. Herein also, it may be noted that the expression "winnings" has been followed by the further expression "from any horse race" in an amount exceeding Rs. 5,000. Section 194BB itself is clear enough in favour of the contentions of the assessee that, firstly, it is the net income (after allowing for the entire investment made by way of purchasing tickets for a particular horse race) that should alone be taken into consideration and, secondly, that the question of allowing the floor limit of Rs. 5,000 is required to be applied to each case of payment, as is provided in section 194BB and that there is no scope for making any assumption that section 194BB takes within its campus, the entire winnings made by a punter throughout a year. Accordingly, the assessee cannot be held to be in default in respect of the two amounts of Rs. 3,06,808 and Rs. 4,93,120. The levies of tax under section 201(1) in respect of these two amounts are thus being deleted. Similarly, the levies of corresponding interest amounts of Rs. 97,497 and Rs. 1,58,439 under section 201(1A) are also being deleted.

Application:

Also to current assessment year.

Decision:

In favour of assessee.

Date of Judgment:

14 January 2000

Assessment Year:

1990-91

Cases Referred:

C.A. Abraham v. CIT (1961) 41 ITR 425 (SC) and *G.S. Dall & Flour Mills (1991) 187 ITR 471 (SC)*.

Income Tax Act 1961 s.194BB

INCOME TAX

--Tax deduction at source----UNDER SECTION 194BB*Winning from horse races--TDS whether deductible on gross receipt or net receipt--*

Catch Note:

The assessee is a club engaged in conducting horse races--From the annual return filed by the assessee under section 206 in respect of the financial year 1990-91, as filed by the assessee showing the amounts of tax deducted at source, the Income Tax Officer (TDS) noticed that there was short deduction of TDS by the assessee consisting of the following three amounts: (i) Rs. 3,06,808 on account of wrong allowance of investment from winnings from horse races for the purpose of TDS; (ii) Rs. 4,93,120 on account of allowing of Rs. 5,000 as exempt under section 10(3) on second and subsequent payments to the punters; (iii) Rs. 81,435 on account of applying low rate of surcharge even after increase in the rate of surcharge--The contention of the assessee was that it was not at all liable to deduct tax at source in respect of the first two amounts, as mentioned above--So far as, however, the third amount was concerned, the assessee admitted its liability but stated that the mistake of applying the old rate of surcharge in the matter of deduction of tax at source had occurred most probably due to the negligence of the earlier Financial Controller who had to resign under pressure from stewards of the assessee-club--The Income Tax Officer, however, did not accept the contention of the assessee and considered it to be in default in respect of payments of tax deductible at source--Thus, the Income Tax Officer passed an order under section 201(1)/201(1A) holding the assessee to be liable in respect of total short deduction of tax under section 201(1) --The Income Tax Officer also held the assessee to be liable for interest under section 201(1A) in

respect of a total amount of Rs. 2,78,820 comprising of three amounts of Rs. 97,497, Rs. 1,58,439 and Rs. 22,884 corresponding to the above-mentioned three amounts--In the first appeals, the Commissioner (Appeals), without making much discussions, upheld the order of the Income Tax Officer in toto--Not proper--Under section 194BB tax is required to be deducted only from net income arising out of the horse race to punter from any particular race after deducting investments made by punter in purchasing all tickets relating to such horse race.

Held:

It is firstly required to be noted in this connection that the expression used in section 194BB is "income by way of winnings". The connotation of "income" necessarily implies the net income after deducting the expense incurred for earning the gross income. There cannot to any doubt about the fact that the cost of purchasing tickets for race which fetches the prize money, must necessarily be deducted to arrive at the net income. Further more, the legislation has also used the expression "from any horse race" and not "horse races" in plural. It thus means that the income by way of winnings from any particular horse race is required to be taken into consideration. So, one horse race is required to be taken as a unit and the entire money received by way of winnings from the said horse race is first to be considered as the gross income from that horse race, therefrom is required to be deducted the investment made by the punter towards acquiring the tickets, may be more than one, but pertaining to the same horse race. In principle, therefore, Tribunal does not find hesitation in directing that tax is required to be deducted only from the net income arising out of the horse race to the punter from any particular race after deducting the investments made by the punter in purchasing all the tickets relating to such horse race. The Central Board of Direct Taxes also accepted the said proposition mostly in its *Circular No. 240*. The Central Board of Direct Taxes, however, directed that investment in such tickets alone which fetched the winnings money should be deducted, Tribunal is, however, of the opinion that if all the tickets purchased by a punter in a particular horse race can be linked up together and if there be regular machinery with the Turf Club authorities to take into consideration all the tickets purchased in connection with one horse race, then the entire amount of investment on all the horses irrespective of whether the horse won or lost in that race, should be treated as investment made by the punter in that horse race. However, a note of caution is being recorded in this connection. A claim made by the punter that he had purchased a large number of tickets separately in respect of the same horse race should not be accepted unless such claim can be verified by a process existing in the procedural mechanism of the Turf Club.

Application:

Also to current assessment year.

Decision:

In favour of assessee.

Date of Judgment:

14 January 2000

Assessment Year:

1990-91

Income Tax Act 1961 s.194BB

INCOME TAX

--Penalty under s. 271C----FAILURE TO DEDUCT TAX AT SOURCE UNDER SECTION 194BB*Validity*--

Catch Note:

By treating the assessee to be in default in respect of short deduction of tax, the Income Tax Officer passed a penalty order under section 271C levying a total penalty of Rs. 8,81,363 being equal to the amount of short deduction of tax<197In the first appeal, the Commissioner (Appeals), confirmed the order of the Income Tax Officer--Not justified--In view of fact that assessee is liable to pay amount of tax deductible at source in respect of short levy of surcharge (in spite of the fact that said amount might have already been recovered by government from punter) and also interest thereon, no further penalty need be levied on assessee.

Held:

So far as the question of levy of penalty, under section 271C is concerned, since the original amounts, on which the penalty, is required to be computed, stand deleted there cannot be any doubt about the fact that the penalty, amounts, corresponding to the two main amounts, are also required to be deleted. The Tribunal has already held that penalty would not lie with regard to the two main items. So far as the third item is concerned, the contention of the assessee that short levy was due to the negligence of its erstwhile Financial Controller cannot be fully accepted. Even then, in view of the fact that the assessee is liable to pay the amount of tax deductible at source in respect of the short levy of surcharge (in spite of the fact that the said amount might have already been recovered by the government from the punter) and also interest thereon, no further penalty need be levied on the assessee. Hence, the levy of penalty under section 271C on the third item is also being deleted.

Application:

Also to current assessment year.

Decision:

In favour of assessee.

Date of Judgment:

14 January 2000

Assessment Year:

1990-91

Cases Referred:

Hindustan Steel Ltd. v. State of Orissa (1972) 83 ITR 26 *(SC)* and *CIT v. Smt. Sova Bajroria (1998)* 232 ITR 202 *(Cal).*

Income Tax Act 1961 s.271C

Income Tax Act 1961 s.194BB

INCOME TAX

--Penalty under s. 221----FAILURE TO DEDUCT TAX AT SOURCE UNDER SECTION 194BB*Validity*--

Catch Note:

Once order under section 201(1) was passed by Income Tax Officer and if thereafter also assessee continued to remain in default, in such cases alone, the question of levying penalty under section 221 could have arisen and as assessee's default is in respect of deduction of tax at source and deposit of same, hence no penalty is leviable

Held:

The assessee has been treated to be in default in respect of the same items over and again and penalty under section 221 has also been levied in respect of the same default in addition to penalty under section 271C. Firstly, the basis for levy of penalty in respect of the first two items already stands quashed away by this decision. Secondly, Tribunal fails to understand how the assessee can be considered to be in default in respect of making payment of tax deducted at source like this, so far as the provisions of section 221 are concerned. The Income Tax Officer as well as the Commissioner (Appeals) has stated in this connection that there is nothing in the Income Tax Act to show that the provisions of

sections 271C and 221 are mutually exclusive. It is required to be stated in this connection that section 221 will apply to such cases only where the default is in respect of making a payment of tax. In the instant case, the default is in respect of deduction of tax at source and deposit of the same. The provisions of section 221 would apply only when a tax is levied on the assessee and thereafter he remains in default in paying the tax. So far as the instant case is concerned, once the order under section 201(1) was passed by the Income Tax Officer and if thereafter also the assessee continued to remain in default, in such cases alone, the question of levying penalty under section 221 could have arisen. Hence, the levy of penalty under section 221, in the instant case, has been totally illegal. From this angle also, the penalty order passed under section 221 is cancelled.

Application:

Also to current assessment year.

Decision:

In favour of assessee.

Date of Judgment:

14 January 2000

Assessment Year:

1990-91

Income Tax Act 1961 s.221

Income Tax Act 1961 s.194BD

Royal Calcutta Turf Club v. Deputy Commissioner of Income Tax

In the ITAT Calcutta E Bench S. Bandyopadhyay, A.M. & S.Chandra, J.M.

IT Appeal Nos. 1725, 1726 and 2426 of 1995 14 January 2000 F.Y. 1990-91

Counsel: R.K. Mitra *for the Appellant* N.C. Mobanty, *for the Respondent*

ORDER

S. Bandyopadhyay A.M.

All these three appeals have been filed by the assessee and they relate to the same issue pertaining to the same year. Hence, for the sake of convenience, the appeals have been consolidated and a common order is being passed.

2. The assessee is a club engaged in conducting horse races at Calcutta. In accordance with the provisions of section 194BB of the Income Tax Act, 1961 the assessee is required to deduct tax at source from the amounts of income by way of winnings from any horse race exceeding certain limit, which was Rs. 5,000 during the relevant year. From the annual return filed by the assessee under section 206 in respect of the financial year 1990-91, as filed by the assessee showing the amounts of tax deducted at source, the Income Tax Officer (TDS), Ward 21(2), Calcutta, noticed that there was short deduction of TDS by the assessee consisting of the following three amounts:

(i) Rs. 3,06,808 on account of wrong allowance of investment from winnings from horse races for the purpose of TDS;

(ii) Rs. 4,93,120 on account of allowing of Rs. 5,000 as exempt under section 10(3) on second and subsequent payments to the punters;

(iii) Rs. 81,435 on account of applying low rate of surcharge even after increase in the rate of surcharge having been made effective from 15-1-1991 in respect of payments made after that date.

3. The assessee took various grounds before the Income Tax Officer, to which we shall advert at appropriate places, against treating it to be in default in respect of the amounts of tax considered by the Income Tax Officer to be deductible at source. The contention of the assessee was that it was not at all liable to deduct tax at source in respect of the first two amounts, as mentioned above. So far as, however, the third amount was concerned, the assessee admitted its liability but stated that the mistake of applying the old rate of surcharge in the matter of deduction of tax at source had occurred most probably due to the negligence of the earlier Financial Controller who had to resign under pressure from stewards of the assessee-club on 31-3-1991.

4. The Income Tax Officer, however, did not accept the contention of the assessee and considered it to be in default in respect of payments of tax deductible at source. Thus, the Income Tax Officer passed an order under section 201(1)/201(1A) holding the assessee to be liable in respect of total short deduction of tax under section 201 (1) for Rs. 8,81,363 comprising of the three amounts of Rs. 3,06,808, Rs. 4,93,120 and Rs. 81,435, as mentioned above. In addition to the same, in the same order again, the Income Tax Officer also held the assessee to be liable for interest under section 201(1 A) in respect of a total amount of Rs. 2,78,820 comprising of three amounts of Rs. 97,497, Rs. 1,58,439 and Rs. 22,884 corresponding to the above-mentioned three amounts. The Income Tax Officer furthermore levied interest under section 201(1A) in respect of another amount of Rs. 1,87,388 also on account of non-payment of taxes deductible at source.

5. In the first appeals, the Commissioner (Appeals), without making much discussions, upheld the order of the Income Tax Officer in toto.

Appeal in *ITA No. 2426/Cal/95* has been taken up by the assessee against this order of the Commissioner (Appeals) confirming the order passed by the Income Tax Officer on 28-1-1993 under section 201(1)/201(1A), as mentioned above.

6. For the same reasons and by treating the assessee to be in default in respect of short deduction of tax, as mentioned above, the Income Tax Officer also passed a penalty order under section 271C on 19-3-1993 levying a total penalty of Rs. 8,8 1,363 being equal to the amount of short deduction of tax.

In the first appeal, the Commissioner (Appeals), as usual, confirmed the order of the Income Tax Officer.

The assessee has come up in appeal in *ITA No. 1725/Cal/95* against the said order of the Commissioner (Appeals).

7. In respect of the same default again, the Income Tax Officer also treated the assessee to be an assessee in default in terms of the provisions of section 221 and levied penalty of Rs. 6,92,000 under that section also by his order dated 31-3-1991. The Commissioner (Appeals) upheld the same and the assessee has come up in appeal before us against the said order in *ITA No. 1726/Cal/95.*

8. The assessee took up an additional ground challenging the jurisdiction of the Income Tax Officer to deal with tax deduction matters of the assessee and to make levies of taxes, interest and penalties, as above. At the stage of hearing of the appeals before us, however, the learned Counsel for the assessee did not press this additional ground. Hence, we are ignoring this additional ground.

9. So far as the main levies under sections 201(1) and 201(1A) are concerned, the assessee challenges the levies in respect of first mentioned two items of Rs. 3,06,808 and Rs. 4,93,120 as well as interest corresponding to the said items. It is thus evident that the assessee neither challenges the levy of tax under section 201(1) in respect of the amount of Rs. 8 1,435 on account of low rate of surcharge in the matter of deduction of tax at source after 15-1-1991. Similarly, the levy of interest under section 201(1A) corresponding to this amount has also not been challenged by the assessee.

10. So far as the first amount is concerned, the departmental contention seems to be that tax is deductible at source from the winnings from horse. races in accordance with the provisions of section 194BB by taking into consideration the gross amount of winnings. In this connection, le learned Counsel for the assessee draws our attention to Circular No. 240 issued by the Central Board of Direct Taxes on 17-5-1978 supplying Explanatory Notes on the provisions of the Finance Act, 1971 reported at *117 ITR (St.) 17. Para 25.1, sub-para (c) (at page 39* of the Statute portion of the same ITR) states as follows :

"(c) The term 'winnings', in common parlance, means the amount received by the punter in excess of the bet laid by him on the horse of horses which have won in the particular race. Where a punter places bets on more than one horse in a particular race, the expression winnings' will connote the amount won by the punter in that horse nice as reduced by the amount invested by way of bet on the particular horse or horses which won the race, and not by the amount invested on the horse or horses which lost in that race. Hence, where a punier invests Rs. 100 each on two horses - horse W and horse 'B' - in a particular horse race, and lie wins Rs. 500 on the bet placed on horse 'A' but loses the bet on horse 'B' the winnings of the punter from this horse race would be Rs. 400 (Rs. 500 - Rs. 100) and not Rs. 300 (Rs. -500 - Rs. 200)."

By referring to the above Circular, the learned Counsel for the assessee strongly contends that the Central Board of Direct Taxes has acknowledged the principle that tax is required to be deducted at source only from the net income i.e., after deducting the amount of investment on the purchase of tickets and not on the gross amount of prize money. The Income Tax Officer, on the other hand, speaks about another Circular No. 478 dated 14-1-1987 issued by the Central Board of Direct Taxes in which it is stated that where such winning exceeds Rs. 5,000, tax is to be deducted at source at the rate of 40% on the gross winning, after treating Rs. 5 000 as exempt under the provision of section 10(3), if such payment is made on or after 1-6-1986. This section furthermore states that the term 11 gross winnings" means the payment received by the prize winner after deduction of the amount to be paid to the commission agents. Although the assessee tried to argue before the Income Tax Officer that when deduction of commission amount is allowed, the investment made in purchasing the tickets must be considered to be deductible, the Income Tax Officer, however, does not agree with this view on behalf of the assessee by arguing that the Central Board of Direct Taxes Circular does not specifically mention the deduction of the invested amount.

The assessee also pleaded before the Income Tax Officer that the Chief Commissioner of Income-tax, Calcutta, in his instructions given to Commissioner, WB-VII, Calcutta, had accepted the standpoint of the assessee. The Income Tax Officer, however, countenances the said argument by contending that the clarification issued by the Chief Commissioner is contrary to the instructions of the Board as given in *Circular No. 478 dated 14-1-1987* (supra). Hence, the Income Tax Officer has disregarded the instructions imparted by the Chief Commissioner to the Commissioner on this issue. In this connection we have got to say that if a very high authority of the Income-tax department like Chief Commissioner comes cut with an open commitment on any particular angle relating to administration of the Income Tax Act and if his instructions be not clearly contrary to the provisions of law, enough respect is required to be given to such clarification issued by the Chief Commissioner and the lower authorities should not disregard and disobey such public assurances given by the Chief Commissioner.

11. The matter requires examination from legal angle also. For this put-pose, we shall extract the provisions of section 194BB as below :

"194BB. Any person, being a bookmaker or a person to whom a licence has been granted by the Government under any law for the time being in force for horse racing in any race course or for arranging for wagering or betting in any race course, who is responsible for paying to any person any income by way of winnings from any horse race in an amount exceeding five thousand rupees shall, at the time of payment thereof, deduct income-tax thereon at the rates in force :"

It is firstly required to be noted in this connection that the expression used in this section is "income by way of winnings". The connotation of "income" necessarily implies the net income after deducting the expense incurred for earning the gross income. There cannot to any doubt about the fact that the cost of purchasing tickets for race which fetches the prize money, must necessarily be deducted to arrive at the net income, Further more, the legislation has also used the expression "from any horse race" and not "horse races" in plural. It thus means that the income by wax, of winnings from any particular horse race is required to be taken into consideration. So, one horse race is required to be taken as a unit and the entire money received by way of winnings from the said horse race is first to be considered as the gross income from that horse race, therefrom is required to be deducted the investment made by the punter towards acquiring the tickets, may be more than one, but pertaining to the same horse race. In principle, we, therefore, do not find any hesitation in directing that tax is required to be deducted only from the net income arising out of the horse race to the punter from any particular race after deducting the investments made by the punter in purchasing all the tickets relating to such horse race. The Central Board of Direct Taxes also accepted the said proposition mostly in its Circular No. 240 as mentioned above. The Central Board of Direct Taxes, however, directed that investment in such tickets alone which fetched the winnings money should be deducted, we are, however, of the opinion that if all the tickets purchased by a punter in a particular horse race can be linked up together and if there be regular machinery with the Turf Club authorities to take into consideration all the tickets purchased in connection with one horse race, then the entire amount of investment on all the horses irrespective of whether the horse won or lost in that race, should be treated as investment made by the punter in that horse race. However, a note of caution is being recorded in this connection. A claim made by he punter that he had purchased a large number of tickets separately in respect of the same horse race should not be accepted unless such claim can be verified by a process existing in the procedural mechanism of the Turf Club.

12. The next issue relates to whether the punter should the given credit in respect of basic exemption limit of Rs. 5,000 once in a financial year or in respect of each race. The departmental contention in this regard is that inasmuch as the expression "winnings" is used herein, it means the total winnings of the punter over the year. We are, however, unable to agree with this contention of the department. Herein also, it may be rioted that the expression "winnings" has been followed by the further expression "from any horse race" in an amount exceeding Rs. 5,000."

Thus, it is clear that the winnings must relate to a particular horse race and the floor limit of Rs. 5,000 should apply to that particular horse race alone.

In this connection, it may not be out of place to mention that the departmental contention seems to have arisen out of a consideration of the provisions of section 10(3) in accordance with which, in the income-tax assessment of the punter, he will be allowed the basic exemption of Rs. 5,000 only once during the year. Be that the position with regard to the assessment of the punter. But so far as the provisions of deduction of tax at source are concerned, we are required to be guided by section 194BB alone.

The learned Counsel for the assessee has relied on a judgment of the Supreme Court in the case of *C.A. Abrahani v. CIT (1961) 41 ITR 425*, at page 431 In that particular case, the Supreme Court observed as under:

" .... In interpreting a fiscal statute, the court cannot proceed to make good deficiencies if there be any; the court must interpret the statute as it stands and in case of doubt in a manner favourable to the taxpayer ....

13. Insofar as section 194BB is concerned, there is nothing to infer that the lit-nit of Rs. 5,000, as mentioned therein, should be referred to the entire winnings of the punter from horse races throughout the year. Hence, the gap, even if any in this regard cannot be filled up by making a reference to the provisions of section 10(3) as enunciated by the Supreme Court in the aforesaid case.

Learned counsel has also relied on another judgment of the Supreme Court in the case of *G.S. Dall & Flour Mills (1991) 187 ITR 471,498*. The Supreme Court held, in that case, that executive instructions can only supplement the statute and cannot curtail the statute or whittle down its effect. Basing on the principle as enunciated by the Supreme Court, as above, we are of the opinion that in interpreting the issue, neither of the Circular No. 240 or 478 as mentioned above can be used against the assessee, if the legal provisions be otherwise.

The learned Counsel for the assessee also strongly contended that the principle of *contemporanea expositio* should be taken into consideration in this connection, In support of this contention, he has relied on a judgment of the Calcutta High Court in the case of *CIT v. India Exchange Traders' Association (1992) 197 ITR 356, at page 382*.

The learned departmental Representative on the other hand, strongly argues that the tax deducting authority is riot there to determine the position of income of the payee and that he must deduct tax at source when the same is provided in the Act.

14. On an overall view of the matter, we are of the opinion that section 194BB itself is clear enough in favour of the contentions of the assessee that, firstly, it is the net income (after allowing for the entire investment made by way of purchasing tickets for a particular horse race) that should alone be taken into consideration and, secondly, that the question of allowing the floor limit of Rs. 5,000 is required to be applied to each case of payment, as is provided in section 194BB and that there is no scope for making any assumption that section 194BB takes within its campus, the entire winnings made by a punter throughout a year. Accordingly, we are of the opinion that the assessee cannot be

held to be in default in respect of the two amounts of Rs. 3,06,808 and Rs. 4,93,120. The levies of tax under section 201(1) in respect of these two amounts are thus being deleted. Similarly, the levies of corresponding interest amounts of Rs. 97,497 and Rs. 1,58,439 under section 201 ()A) are also being deleted.

15. So far as the question of levy of penalty, under section 271C is concerned, since the original amounts, on which the penalty, is required to be computed, stand deleted by us, as above, there cannot be any doubt about the fact that the penalty, amounts, corresponding to the above mentioned two main amounts, are also required to be deleted. The learned Counsel for the assessee furthermore argues in this connection that levy of penalty is not mandatory but merely discretionary in nature and while levying a penalty of quasi-criminal nature with regard to matters like this, the *mens rea* of the assessee as well as the consideration of bona fide is to be taken into consideration. In this connection, reliance has been placed oil the following two judgments :

(1) *Hindustan Steel Ltd. v. Stale of Orissa (1972) 83 ITR 26 (SC).*

(2) *Income Tax Officer v. Burmah Shell Oils Storage & Distributing Co. of India Ltd. (1986) 163 ITR 496/12 Taxman 196 (Cal).*

In reply to the same, the learned Departmental Representative relies on a judgment of the Calcutta High Court m the case of *CIT v. Smt. Sova Bajoria (1998) 232 ITR 202*. In this particular case, it was decided, on the facts of that case, that it was required to conclude that failure to disclose the capital gains by that assessee was not due to omission or oversight and also that the same was neither a technical nor venial breach of law.

16. We have already held that penalty would not he with regard to the two main items. So far as the third item is concerned, the contention of the assessee that short levy was due to the negligence of its erstwhile Financial Controller can not be fully accepted. Even then, in view of the fact that the assessee is liable to pay the amount of tax deductible at source in of the short levy of surcharge (in spite of the fact that the said amount might have already been recovered by the Government from the punter) and also interest thereon, we are of the opinion that no further penalty need be levied on the assessee. Hence, the levy of penalty under section 271C on the third item is also being deleted by us.

17. We find that the assessee has been treated to be in default in respect of the same items over and again and penalty under section 221 has also been levied in respect of the same default in addition to penalty under section 271C. Firstly, the basis for levy of penalty in respect of the first two items already stands quashed away by our decision as above. Secondly, we fail to understand how the assessee can be considered to be in default in respect of making payment of tax deducted at source like this, so far as the provisions of section 221 are concerned. The Income Tax Officer as well as the Commissioner (Appeals) has stated in this connection that there is nothing in the Income Tax Act to show that the provisions of sections 271C and 221 are mutually exclusive. It is required to be stated in this connection that section 221 will apply to such cases only where the default is in respect of making a payment of tax. In the instant case, the default is in

respect of deduction of tax at soul-cc and deposit of the same. In our view, the provisions of section 221 would apply only when a tax is levied on the assessee and thereafter he remains in default in paving the tax. So far as the instant case is concerned, once the order under section 201(1) was passed by the Income Tax Officer and if thereafter also the assessee continued to remain in default, in such cases alone, the question of levying penalty under section 221 could have arisen. Hence, we feel that the levy of penalty under section 221, in the instant case, has been totally illegal. From this angle also, we cancel the penalty order passed under section 221.

18. In the result, the appeals filed by the assessee are allowed.

OPEN