**IT : Where assessee, an autonomous research institute in dairy development was treated as an assessee in default under section 201(1) as it failed to deduct tax at source on perquisite value of rent free residential accommodation provided to its employees, in terms of rule 3 as applicable, where accommodation is provided by any employer other than Central Government or State Government, it was held that employees of society cannot be equated with employees of Central Government and, therefore, clause (ii) of sub rule (1)of rule 3 of Income Tax Rules was rightly applied and no relief could be granted for non deduction of tax**

**[2018] 94 taxmann.com 19 (Bengaluru – Trib)**

**IN THE ITAT BENGALURU BENCH 'C'**

**National Dairy Research Institute**

***v.***

**Assistant Commissioner of Income-tax (TDS), Circle 18 (1), Bengaluru**

SUNIL KUMAR YADAV, JUDICIAL MEMBER
AND INTURI RAMA RAO, ACCOUNTANT MEMBER
IT APPEAL NOS. 1759 TO 1761 (BANG.) OF 2017
[ASSESSMENT YEARS 2011-12 TO 2013-14]
MAY 31, 2018

**J. Jayatheertha**, CA *for the Appellant.* **Dr. P.V. Pradeep Kumar** *for the Respondent.*

**ORDER**

**Per Bench** - This is an appeal filed by the assessee directed against the order of the learned Commissioner of Income-tax (Appeals)-13, Bengaluru [CIT(A)] dated 21/06/2017 for the assessment years 2011-12 to 2013-14.

**2.** Briefly facts of the case are as under:

The assessee is a research institute in the dairy development and it is accorded status of deemed university. It is under administrative control of the Indian Council of Agricultural Research and Education, Ministry of Agriculture and Food Processing Industry. It is autonomous institution established as a society under the Societies Registration Act 1860. The ACIT(TDS), Circle 13(1) (hereinafter referred to as 'TDS officer') issued show cause notice to the assessee as to why it should not be treated as 'an assessee in default' under section 201(1) of the Income-tax Act (hereinafter referred to as 'the Act') as it failed to deduct tax at source on the perquisite value of rent free residential accommodation provided to its employees, in terms of rule 3 as applicable , where the accommodation is provided by any employer other than Central Government or State Government. In response to the same the assessee contended that the assessee-society falls under the definition of 'State' as defined under article 12 of the Constitution and the employees of the assessee-society are the employees of the Central Government. However the TDS officer had not accepted the contention and held that the employees of the assessee society cannot be treated as employees of the Central Government and therefore held that the assessee is under obligation to deduct tax on the perquisite value of the accommodation provided to its employees as applicable under clause(ii) of rule 3 of IT Rules. Accordingly TDS officer held the

assessee society as 'assessee in default' and demanded tax of Rs.2,6 2,740/- under section 201 (1)and interest of Rs.1,03,782/- under section 201 (1A) of the IT Act for the assessment year 2010-11 vide order dated 20/11/2013.

**3.** Being aggrieved, an appeal was preferred before the ld.CIT(A) who vide impugned order, following the decision of this Tribunal in the case of *Central Food Technological Research Institute* v. *ITO* in ITA Nos.1607 to 1611/Bang/2013 upheld the action of the TDS officer.

**4.** Being aggrieved, the assessee is before us in the present appeal. The assessee raised the following grounds of appeal for assessment year 2011-12.

1. *"The learned Commissioner of Income (Appeals) 13, Bangalore [hereinafter referred to as CIT (A)] has erred to appreciate facts and law while passing the impugned order the manner in which she did.*
2. *The CIT (A) has failed to appreciate all the averments/objections take by Appellant in its written submission dated 12/03/2015.*
3. *The CIT (A) ought to have appreciated that appellant under the umbrella of ICAR, Department of Agricultural Research and Education (DARE), Ministry of Agriculture, Government of India is very much part of Central Government and therefore the perquisite value of unfurnished accommodation provided to its employees shall be computed as provided under section 17(2) (ii) (a) and not as provided under17 (2) (ii) (c) of the Income tax Act, 1961.*
4. *The CIT(A) ought to have appreciated in P.K.Ramachandra Iyer's case reported AIR 1984 SC 541, it is only after detailed scrutiny of objects and process of establishment and after examining the Bye- Law of ICAR the Hon'ble Supreme Court has held that " ICAR is an instrumentality of the State having control of GOI, despite the fact that the ICAR is a society registered under Societies Registration Act but is wholly financed by Government of India, its budget was voted upon as part of expenses incurred by Ministry of Agriculture and even when its status underwent a change, it was declared as an attached office of the GOI.*
5. *The learned CIT(A) erred in holding that the appellant is not a part of Central Government because it is a society registered under Societies Registration Act, 1860 in spite of the fact that the Apex Court has held in PKR Iyer's case, supra, that "ICAR is almost inseparable adjunct of Government of India having an outward form of society. It could be styled as a society set up by the State and, therefore would be an instrumentality of State.*
6. *The Learned CIV (has) erred in not taking note of the Judgment of Rajasthan High Court in ICAR vs. State of Rajasthan (SB Civil WP No.733/2004 and 7053/2003) where it has been held that Property of ICAR as property of union of India and therefore it is exempt from payment of land and building tax in view of Article 285 of the Constitution. If the quarters of the appellant is the property of the Government question of computation of perquisite as provided under section 17 (2) (ii) (c) of the Income tax Act, 1.961 does not arise at all.*
7. *Reliance placed by CIT(A) on the judgment of Hon'ble Supreme Court in the case of Arun Ku mar v. UOI is not relevant to facts of the case. The appellant is neither claiming that there is violation article 14 of the constitution while calculating value -.if: RA of Government Employees vis-à-vis employees of*

*public sector undertakings, corporation etc nor it is appellant's case that alt the 'other authorities" falling within the word "State" under Article 12 shall be treated at par with Government Employees.*

8. *The appellant is not disputing that in view of the amendment to Rule 3 of Income-tax Rules 1962 that for the purpose of valuation of perquisite of accommodation, employees are divided into two categories (i) Central and State Government employees; and (ii) Others. Appellant's contention is that its employees do fall under first category. This aspect has not been examined in detail by the learned CIT (Appeal) in the background the Hon'ble Supreme Court judgment in P.K.Ramachandra Iyer's case. Thus the learned CIT(A) erred in dismissing the appeal by merely following the judgment of this Hon'ble Tribunal in the case of CIFTRI vs. ITO in ITA No.1607 to 1611/Bang/2013.*

9. *While passing the impugned order the CIT(A) has not considered the fact that the employees to whom quarter have been allotted have not drawn House Rent Allowance. HRA forgone is more than the perquisite value and therefore there is no concession at all.*

10. *The learned CIT(A) has erred in treating the appellant as assessee in default on the ground that it has failed to deduct tax at source on perquisite value of Residential Accommodation.*

11. *The learned CIT(A) ought to have appreciated that while deducting tax source on income from salary paid to its employee the appellant has made honest calculation of taxable income, TDS amount and remitted the same to Government Account. The appellant could not be expected to make interpretation of law as done by the learned ACIT while making TDS and therefore the CIT(A) ought to have set aside levy interest u/s, 201(1A) of the Act.*

*Relief Claimed*

*For these and other grounds that may be urged at the time of hearing the Appellant prays that:*

(i) *The appeal may please be allowed;*

(ii) *The demand of Rs 3,66,522 raised u/s 201(1) & 201(1A) of the Act is set aside and*

(iii) *Grant such other relief as the Hon'ble Tribunal deem fit in the interest of justice and equity."*

**5.** The learned AR of the assessee vehemently contended that the associate society is under the Department of Indian Council of Agricultural Research (ICAR), Ministry of Agriculture, Government of India and is only a instrumentality of the State under Article 12 of the Constitution of India. Therefore, the employees of the assessee-society should be treated as the employees of State or Central government. In this connection, he has relied on the decision of the Hon'ble Supreme Court in the case of *P.K.Ramachandra Iyer and others* v. *Union of India* AIR 1984 SC 541. It is further submitted that the judgment of the Hon'ble Supreme court in *ArunKumar* v. *UOI* (286 ITR 89) is not applicable to the facts of the present case. Therefore, the employees of the assessee-society should be treated as Central Government employees. Alternatively it was submitted that the default for non deduction of tax at source is only on account of difference of opinion as to taxability of an item and the employer cannot be treated as an assessee in default. Reliance in this regard is placed on the decision of the Hon'ble Andhra Pradesh High Court in the case of *P.V.Rajgopal* v. *Union of India* (233 ITR 678). It was further

contented that in the absence of finding that estimate of salary income was not fair and honest, no proceeding can be initiated against employer under section 201(1) of the Act and reliance in this regard was placed on the decision of the Hon'ble Madhya Pradesh High Court in the case of *Gwalior Rayon Silk Co. Ltd.* v. *CIT* (140 ITR 832). Reliance was also placed on the decision of the co-ordinate bench in the case of *Central Silk Board* v. *ITO* in ITA No.1077/Bang/2017 dated 23/10/2017.

**6.** On the other hand, the learned Departmental Representative submitted that the assessee society can be called an instrument of the State Government but its employees cannot be equated with Central Government employees. In this connection he relied on the decision of the Honorable Supreme Court in the case of *Arun Kumar* (*supra*).

**7.** We heard rival submissions and perused material on record. The only issue in the present case is, for the purpose of valuing perquisites of the accommodation, provided to employees of the assessee society should be done under clause (i) or clause (ii) of table 1 of rule 3 of the Income-Tax rules 1962. Clause (i) of sub rule (1)of rule 3 of Income Tax rules is applicable in case of employees of Central Government or State Government. Clause (ii) of sub rule (1) of rule 3 of Income Tax rules is applicable in case of other than Central and State Government employees. Therefore, the issue which requires to be adjudicated is whether the employees of assessee-society are employees of Central Government or not. Needless to say that once the employees of the society are treated as employees of the Central Government for the purpose of evaluating perquisites of rent free accommodation, rules prescribed under clause (i) of sub rule (1)of rule 3 of Income Tax rules are to be adopted. Otherwise clause (ii) of sub rule (1)of rule 3 of IT Rules is to be adopted. An identical issue had come before the co ordinate bench of this Tribunal in the case of Central Food Technology research versus TDS officer in ITA No. 1607 to 1611/Bang/2013 wherein this Tribunal took a view that the employees of the corporation fully controlled by the Central Government cannot be equated with Central Government employees though it is instrumentality of the State within the meaning of Article 12 of the Constitution of India.

> "10. We are of the view that the reliance placed by the learned counsel for the Assessee on the aforesaid decision is of any help to the present case. The question in the case of *Pradeep Kumar Biswal* (*supra*) was regarding as to whether CSIR is "State" within the meaning of Article 12 of the Constitution of India. As by the learned DR before us, the meaning of the word "State" has been defined in Article 12 of the Constitution of India and the decision has to be confined to those cases and cannot extent to interpretation of Rule 3 of the IT Rules, 1962. Public corporations are established by Government to achieve purpose of welfare state. Financial autonomy and functional autonomy are required for such purpose. These corporations are commercial corporations, development corporations, social services corporations or Financial corporations. Such corporations have all trappings of Government but their, employees cannot be equated with employees either holding office or post in connection with the affairs of the Union or of such State. Eminent Author Seervai in his book Constitutional Law of India, 1984 Vol II pp.2578-79 has deducted the following principles with regard to the status of employees of a statutory corporation-
>
> (*i*) a statutory corporation has a separate and independent existence and is a different entity from the Union or the State Government with its own property and its own fund and the employees of the corporation do not hold civil post under the Union or the State;
>
> (*ii*) makes little difference in this respect, whether the Union or the State holds the majority share of the Corporation and controls its administration by policy directives or otherwise;
>
> (*iii*) it also makes little difference if such a statutory corporation imitates or adopts the Fundamental Rules to govern the service conditions of its employees;

(*iv*) although the ownership, control and management of the stator corporation may be, in fact, vested in the Union or State, yet in the eye of law the corporation is its own master and is a separate entity and its employees do not hold any 'civil post under the Union or the State;

if, however, the State or the Union controls a post under a stator corporation in such a manner that it can create or abolish the post or can regulate the conditions subject to which the post is or will be held and if the Union or the State pays the holder the post out of its own funds, then although the post carries the name of an office of the statutory corporation, it may be a civil post under the State or the Union.

11. We are of the view that in the light of the law on Rule 3 of the IT Rules, 1962 as understood by the Hon"ble Supreme Court in the case of Arun Kumar (supra) and the background in which Rule 3 was enacted w.e.f. 1-4-2001 as explained in the CBDT Circular referred earlier, we are of the view that the applicable rule in the case of the assessee for the purpose of computing perquisite value would he SLNo.2 of Table- I of Rule 3 of the IT Rules, 1962. Accordingly, we uphold the order of the CIT(A) and dismiss appeals by the Assessee.

12. In view of the fact that the appeals are decided, the petitions seeking stay of recovery of outstanding demand have become infructuous. Accordingly the stay petitions are dismissed as infructuous.

7. However the issue has not been examined by the authorities below from the angle of bona fide estimate made by the assessee while valuing the perquisite. The Tribunal in the case of *uSC* v. *DCIT* dt.27.2.2015 (supra) has dealt with this issue in para 19 as under:

"19. We have considered the rival submissions. In our view, the plea of the assessee that it made a bona fide estimate of employees salary by valuing the perquisites in the form of residential accommodation provided to the employees by valuing the same as if employees were employees of Central Govt. has to be accepted In this regard. it is clear from the records that the position with regard to the assessee not being a Central Govt. was brought to its notice by the department only in the proceedings initiated in 2013. Even thereafter the assessee has been taking a stand that its employees are employees of Central Govt. As held in several decisions referred to by the ld. Counsel for the assessee, the obligation of the assessee is only to make a bona tide estimate of the salary. In our view, in the facts and circumstances of the present case, assessee has made such an estimate. The assessee's obligation u/s 192 is therefore properly discharged and hence proceedings 201(1) & 201(1A) of the Act have to be quashed and are hereby quashed."

This decision was again followed by the Tribunal in the case of ACIT Vs. IISC for the Assessment Year 2011-12 vide order dt.11.8.2016. We further note that it is not a fresh issue raised by the assessee but it is only a plea in respect of the same subject matter and issue of deduction of TDS in respect of the accommodation provided to the employees. Therefore in the facts and circumstances and in view of the decisions of the Tribunal, we set aside this issue to the record of the Assessing Officer to examine the matter in the light of the decisions as relied upon by the assessee as well as by the department."

**8.** This decision was followed by this Tribunal again in the case of *Central Silk Board* in ITA No.1077/Bang/2017 date 23/10/2017 to which one of the Members viz., the Honorable Accountant Member is a party. Thus having regard to the ratio laid down in the above decision, we hold that the employees of the society cannot be equated with the employees of the Central Government, therefore, we hold that the TDS officer is right in applying clause (ii) of sub rule (1)of rule 3 of Income Tax rules. Accordingly the grounds of appeal raised in this behalf are dismissed.

**9.** Now, we shall deal with the alternative contention of the appellant that tax was not deducted at source on the value of perquisite of accommodation in terms of clause (ii) of sub-rule (1) of Income-tax Rules on account of entertaining a *bona fide* belief that the employees of the trust are Central Government employees. The term '*bona fide belief*' has not been defined under the provisions of the Income-tax Act, 1961 but the provisions of sub-section (22) of section 3 of General Clauses Act, 1897 defines the term '*bona fide belief*' to mean that a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not. Thus, if the element of honesty is present, the requirement of good faith is satisfied. But this requires to be judged taking into consideration the factual situation prevailing in a particular situation. In the present case, no factual foundation is laid as to how the appellant has entertained a *bona fide* belief that its employees can be treated as Central Government employees. Therefore, no relief can be granted based on bald assertion without any actual foundation. We find that there is no merit in the argument of the appellant that the appellant had entertained the *bona fide* belief and therefore, no tax was deducted. This argument is also dismissed.

**10.** In the result, the appeals filed by the assessee are dismissed.

■■