INCOME TAX APPELLATE TRIBUNAL
MUMBAI 'I' BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President)
and Amit Shukla (Judicial Member)]

ITA No. 1511/Mum/2022
Assessment year 2015-16

ICICI Securities Limited …….. Appellant
ICICI Venture House, Appasaheb Marathe Marg
Prabhadevi, Mumbai 400 025 [PAN: AAACI0996E]

Vs.

Income Tax Officer
International Taxation Ward 2(2)(2), Mumbai ……..…….. Respondent

Appearances:
P J Pardiwala, Sr Advocate, along with Madhur Agarwal *for the appellant*
Surabhi Sharma, Commissioner (DR) *for the respondent*

Date of concluding the hearing : September 19, 2022
Date of pronouncement the order : November 09, 2022

O R D E R

Per Pramod Kumar, VP:-

1. By way of this appeal, the appellant has called into question the correctness of the order dated 19th April 2022, in the matter of tax withholding demands under section 201 read with section 195 of the Income Tax Act, 1961, for the assessment year 2015-16.

2. The short issue that, in our considered view, we need to adjudicate upon is this. Is an Indian custodian of shares required to deduct tax at source from the sale consideration of the shares so held by the custodian on behalf of the overseas depository, even though the overseas depository, on whose behalf shares were held, has already paid advance tax on the capital gains on the sale of these shares? That is the short question on which, with the consent of both parties, we have heard the appeal. For completeness, however, elaborate grounds of appeal taken by the assessee are reproduced below:

> **1. The Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (hereinafter referred to as the "CIT(A)" erred in passing the order without following the due process under the Faceless Appeal Scheme 2021 including non-granting of personal hearing requested by the appellant and accordingly, the order passed by the learned CIT(A) is illegal, null and void ab initio and hence ought to be quashed.**

2. The order passed by the learned CIT(A) is without jurisdiction in as much as the appeal is arising out of an order passed by the international tax jurisdiction and, accordingly, the National Faceless Appeal Centre would have no jurisdiction to hear and dispose off such appeal.

3. The learned CIT(A) erred in not adjudicating the ground of appeal raised by the appellant which states that the Income-tax Officer (International Tax) - Circle 2(2)(2), Mumbai (hereinafter referred to as the "AO") erred in passing the order under Section 201(1) / 201(1A) of the Income tax Act, 1961 (hereinafter referred to as "the Act") in haste without providing sufficient opportunity to the Appellant to put forth the submissions and without granting a personal hearing, thereby violating the principles of natural justice, even though detailed submissions in support thereof were filed.

4. The learned CIT(A) erred in upholding the action of AO by treating the appellant as an assessee in default under section 201(1) of the Act having failed to appreciate that the appellant is not the "person responsible for paying" as per section 204 of the Act, to Bank of New York Mellon ("BNY Mellon"), the consideration for the sale of shares, as it was merely a broker who carried out the instructions to sell the shares.

5. The learned CIT(A) erred in confirming the action of AO of treating the appellant as an assessee in default under section 201(1) of the Act notwithstanding that the payee had paid tax on the sale transaction and so the appellant as a payer cannot be called upon to pay the tax on the same transaction again.

6. The learned CIT(A) erred in confirming the action of AO by treating the appellant as an assessee in default under section 201 of the Act notwithstanding the fact that reassessment proceedings have been initiated to assess the payee for the AY 2015-16.

7. The learned CIT(A) erred in not adjudicating the ground of appeal raised by the appellant which states that the AO failed to appreciate that no tax was required to be withheld at source under section 195 as no income was chargeable to tax from the sale consideration arising to BY Mellon on sale of shares through the recognized stock exchange as short-term capital loss was incurred on the sale of said shares having regard to the provision of section 49(2ABB) and thereby, the appellant cannot be held to be an assessee in default under section 201(1) of the Act, even though detailed submissions in support thereof were filed.

8. The learned CIT(A) erred in not adjudicating the ground of appeal raised by the Appellant which states that the AO failed to appreciate that the appellant cannot be held to be an assessee in default under section 201(4) of the Act on the basis of alleged scores of subscribers of GDRs (non-residents) who are not able to get tax benefit due to non-deduction of tax, even though detailed submissions in support thereof were filed.

9. The learned CIT(A) erred in not adjudicating the ground of appeal raised by the Appellant which states that the A erred in not appreciating that the grossing up provisions under section 195A of the Act cannot be applied for computing the amount liable for TDS as there was no agreement between the appellant and BNY Mellon that the tax shall be borne by the appellant and in fact, the taxes due were paid by BNY Mellon directly, even though detailed submissions in support thereof were filed.

10. The learned CIT(A) erred in confirming the action of AO in levying interest of Rs.44,55,51,676 under section 201(1A) of the Act.

11. The learned CIT(A) failed to appreciate that interest under section 201(1A) of the Act cannot be calculated beyond the date of deposit of taxes by the recipient i.e., BNY Mellon.

3. To adjudicate on this issue, only a few material facts, as culled out from the material on record, need to be noted. The assessee before us is an Indian company and registered with the Securities & Exchange Board of India (SEBI), inter-alia, as a stock broker. Its in the course of his business activities as such, the assessee had a role to play in giving effect to the termination of GDRs (Global Depository Receipts) through which Ranbaxy Laboratories Ltd (Ranbaxy, in short) had raised funds. In this GDR issuance by Ranbaxy, the Bank of New York Mellon (BNY, in short) was the overseas depository, and ICICI Bank Ltd was the Indian custodian of underlying shares in Ranbaxy. BNY was thus holding the underlying shares in Ranbaxy through its Indian custodian, i.e. ICICI Bank, and, on the strength of these holdings, had issued the Global Depository Receipts for the subscription. On 20th October 2014, the Overseas Depository, i.e. BNY, issued notice to the GDR holders that the GDR arrangement is being terminated and all the GDR holders may convert their GDRs into underlying Ranbaxy shares. As for the GDR holders who would not convert the shares into underlying Ranbaxy shares, the BNY announced, that the underlying shares will be sold and the sale receipts, net of taxes and expenses, will be paid by the BNY to the GDR holders in the proportion of their holdings. It was in this backdrop that the assessee sold 15,39,100 shares of Ranbaxy, held by the ICICI Bank on behalf of BNY, and sent the remittances aggregating to Rs 94,61,35,488 to BNY Mellon, New York. This amount consisted of the aggregate of five different remittances, spread over the period of 22nd December 2014 to 8th January 2015, from the assessee to the BNY. It is also not in dispute, as evident from the observations of the Assessing Officer at page 18-19 of the impugned order, that a payment of Rs 40,92,98,212 was made towards the tax liability of the BNY on the sale of these shares of Rs 94,61,35,488 and by treating the cost of acquiring the shares as NIL. The Assessing Officer decline to take the above payment into account by observing that **".. it cannot be denied that the BNY Mellon has made payment of taxes as mentioned above on the net consideration of Rs 94,61,35,488.36 received by the ICICI Securities Ltd on sale of equity shares of Ranbaxy Lab during AY 2015-16, but this payment has been made as advance tax whereas such payment should have been paid as TDS by the payer**", that "**due to this** *(lapse),* **credit of tax payment is not available to those subscribers of GDRs whose GDRs were converted into shares and subsequently sold by BNY Mellon through the assessee**" and that "**as a result, a peculiar situation exists today where scores of subscribers of GDRs (non-residents) are not able to get the benefit for the taxes paid out of the sale proceeds distributed to them by BNY Mellon. This has happened due to the dereliction of legal responsibility entrusted upon by the assessee by the Income Tax Act, 1961**". The Assessing Office then proceeded to compute the tax liability on the non-deduction of tax at source, @43.26%, on the payments plus grossing up amount under section 195A, which aggregated to Rs 135,54,33,700 and computed the tax withholding liability of

Rs 58,63,60,619. The Assessing Office further computed interest liability for delayed payment of these taxes, and this amount worked out to Rs 44,55,51,676. Accordingly, a tax withholding demand, including interest for delay in payment thereof, was computed at Rs 103,19,12,294. Aggrieved, assessee carried the matter in appeal. Learned CIT(A), at pages 46-47 of the impugned order, *inter-alia* noted that "the dates of credit by ICICI Securities Ltd to the Bank of New York Mellon were 22.12.2014, 23.12.2014, 24.12.2014, 24.12.2014, 26.12.2014 and 8.1.2015" and "the date of payment of advance tax by the Bank of New York Mellom was 23.01.2015" and that "section 201 does not exempt TDS to be made on the payment made to non-residents, even if non-residents paid advance tax and filed the return of income taking into consideration the profit/income earned on transaction, such as sale of 15,39,190 underlying equity shares of Ranbaxy Lab". As for the Hon'ble Supreme Court's judgment in the case of Hindustan Coco Cola Beverages Pvt Ltd Vs CIT [(2007)293 ITR 226 (SC)], the learned CIT(A) observed that "In the case of the appellant-neither the subsidiary ICICI Securities, nor the holding company ICICI Bank Ltd, which were aware of the entire transaction did not make TDS on payment (profit on sale of shares which clearly attracted capital gains and the TDS) made to a non-resident BNY Mellon" and "As the facts of ICICI Securities are totally different from that of Hindustan Coca Cola Beverages Pvt Ltd Vs CIT, with due respect to the case law relied upon by the ICICI Securities, it is hereby held that the same is not applicable to the facts of this case". The learned CIT(A) also extensively reproduced from the written submissions and, brushing aside the pleas raised by the assessee, dismissed the appeal. The assessee's was in appeal before the CIT(A) but without any success. The assessee is not satisfied and is in further appeal before us.

4. We have heard the rival contentions, perused the material on record and duly considered facts of the case in the light of the applicable legal position.

5. We find that the learned Assessing Officer, as also learned CIT(A) have proceeded on the basis that the recipient has paid advance tax liability which is equivalent to the tax deducted at source. The Assessing Officer has even observed that as the payment is made on ITNS 280, which is appliable for taxes on income- unlike ITNS 281 which relates to the taxes deducted or collected at source, it is a payment of advance tax. Learned CIT(A) has not disputed this position either but added that "**section 201 does not exempt TDS to be made on the payment made to non-residents, even if non-residents paid advance tax and filed the return of income taking into consideration the profit/income earned on transaction**.". That legal proposition, however, is not correct. It is well settled in law that tax deduction at source liability under section 201 is a vicarious liability of the payer of an income, which cannot come into play only when the primary liability of the recipient of income is already discharged. In the case of **CIT Vs Eily Lilly & Co Pvt Ltd [(2007) 312 ITR 225 (SC)],** Hon'ble Supreme Court has observed that "**the liability of deducting tax at source is in the nature of a vicarious liability, which pre-supposes existence of primary liability. The said liability is a vicarious liability and the principal liability is of the person who is taxable**". Therefore, once the principal liability itself is adequately protected or discharged, it cannot be said the vicarious liability still survives. Whether the amount is

paid as tax deducted at source or as advance tax, all it does is that treated as payment by, or on behalf of the assessee, which obviously cannot be refunded unless the Assessing Officer is satisfied with the discharge of tax liability of the person to whose account is it credited; the interests of the revenue are thus adequately protected and that is the very *raison d'être* for the existence of tax withholding or tax deduction at source provisions. The provisions of Section 201 are only recovery provisions and compensatory in nature, and are, in that sense, not penal in nature, and that is what we must bear in mind while dealing with Section 201(1) and 201(1A). If it can be shown that no loss occurred to the revenue, there is no occasion to invoke these provisions of section 201(1) and 201(A). As observed by a coordinate bench, in the case of **ITO Vs Titagarh Steels Ltd [(2001) 79 ITD 532 (Kol)]** and speaking through one of us *(i.e. the Vice President),* "…. **a look at the consequences of such a short deduction of tax at source. Of course, the first and foremost consequence is that the tax deductor has to make good the shortfall in tax deduction and the tax deductor also has to compensate the revenue by way of interest for the period of late realization of this tax to the revenue authorities. These provisions, contained in section 201(1) and 201 (1A), are set out in Chapter XVIIB titled as 'Collection and Recovery of Tax'. The next set of consequences are contained in section 271C and section 276B, covered by Chapter XXI - 'Penalties Imposable' and Chapter XXII - 'Offences and Prosecutions', respectively. Section 276B, as it stands now, is not applicable on the facts of this case which comes to the play only when the assessee has deducted the tax at source but he does not pay, or does not pay in time, the taxes so deducted at source. …….. Section 271C deals with levy of penalty for total or partial failure to deduct tax at source i.e., for non-deduction and short-deduction of tax at source. This provision is clearly a penal provision which is applicable for the cases of tax deductor's not discharging, wholly or partially, statutory obligations of deducting taxes at source**". Clearly, thus, the provisions of Section 201 are not to punish or prosecute an assessee for his lapses in respect to tax deduction at source responsibilities; there is a separate set of provisions for that purpose, e.g. under section 271C and 276B, and the provisions of section 201 are merely compensatory in nature. What essentially follows is so far as the provisions of Section 201 are concerned, "the tax-deductor has to make good the shortfall in a tax deduction, and the tax-deductor also has to compensate the revenue by way of interest for the period of late realization of this tax to the revenue authorities". In this light, when we see the facts of this case, neither is there a shortfall in the collection of revenue on account of a lapse in a tax deduction, nor is there any delay in the realization of taxes, and the admitted facts on record clearly evidence that. The time gap between the date of the transaction and the payment of advance tax by BNY Mellon is well within the permitted time for depositing the tax at source There is thus no occasion to invoke the provisions of vicarious liability under section 201 on the facts of this case. For this short reason alone, the impugned demands under section 201 r.w.s 195 deserves to be quashed.

6. While we have proceeded on the basis, as is the position admitted by the authorities below, that BNY had paid the advance tax in respect of the transaction in question, the facts indicated by a copy of form 15CB may also be perceived to be slightly different in a way. On

page 18 of the impugned order passed by the Assessing Officer, the Assessing Officer has taken note of a certificate in respect of ICICI Bank, which shows the assessee as a remitter and the tax deduction of Rs 40,92,98,212 as having been made but it is only in the related challan, i.e. challan/ITNS 280 serial no. 00668 (advance tax) for the assessment year 2015-16 by BNY Mellon, that there is a mistake of paying it as an advance tax for BNY Mellon rather than as tax deducted at source from the remittance to BNY Mellon. The transaction is the same, and the amounts are the same, so clearly, this certificate has relevance in the present context. Thus, the assessee's tax withholding liability is accepted, but the amount is paid as advance tax on behalf of BNY Mellon. ITNS 281 is for the tax deductions and collections of tax at source, and ITNS is for income tax on companies and other than companies- whether advance tax, self-assessment tax or in other categories. At best, thus, it is a case of using the wrong challan for depositing the money with the income tax department- the use of ITNS 280 instead of ITNS 281. Whatever other implications it may or may not have, even if it is assumed that there is a use of the wrong challan for payment, which at worse the case could be, nothing really turns on the same. The fact remains that the taxes are paid as advance tax for BNY Mellon, and to that extent, the assessee tax-deductor cannot be saddled with a tax withholding demand under section 201(1) r.w.s. 195 of the Income Tax Act, 1961. In view of these discussions, as also bearing in mind the entirety of the case, we uphold the assessee's plea, and quash the impugned tax withholding demand under section 201 r.w.s. 195 of the Income Tax Act, 1961. Once the basic tax withholding liability under section 201(1) is quashed, the interest liability under section 201(1A), being consequential in nature, also stand quashed. The assessee gets the relief accordingly. All other contentions, except obviously the one adjudicated in this appeal, remain open.

7. In the result, the appeal is allowed in the terms indicated above. Pronounced in the open court today on the 9th day of November, 2022.

Sd/-	Sd/-
Amit Shukla	**Pramod Kumar**
(Judicial Member)	(Vice President)

Mumbai, dated the 9th day of November, 2022.

Copies to:	*(1)*	*The Applicant*	*(2)*	*The respondent*
	(3)	*CIT*	*(4)*	*CIT(A)*
	(5)	*DR*	*(6)*	*Guard File*

By order

Assistant Registrar
Income Tax Appellate Tribunal
Mumbai benches, Mumbai