$~13

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Decision delivered on: 31.10.2023*

\+ **W.P.(C) 9043/2021 & CM No.55881/2023**

BDR FINVEST PVT LTD ..... Petitioner

Through: Ms Kavita Jha, Mr Vaibhav Kulkarni and Mr Himanshu Aggarwal, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX & ORS. ..... Respondents

Through: Mr Zoheb Hossain, Sr Standing Counsel with Mr Sanjeev Menon, Standing Counsel.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA

[Physical Hearing/Hybrid Hearing (as per request)]

RAJIV SHAKDHER, J. (ORAL):

CM No.55881/2023 ***[Application filed on behalf of the petitioner seeking amendment to the writ petition]***

1. This is an application preferred by the petitioner pursuant to the order dated 21.09.2023 passed by this court.

2. This application has been filed to challenge the order dated 25.06.2020 passed by respondent no.4 under Section 154 of the Income Tax Act, 1961 [in short, "Act"].

3. The said order was passed pursuant to a rectification application filed by the petitioner concerning the Return of Income (ROI) dated 10.08.2019.

3.1. Via the rectification application, the petitioner sought to stake a claim with respect to the tax which had been deducted at source on the interest

paid by its borrower, namely, Ninex Developers Ltd. [hereafter referred to as "Ninex"]. 3.2. This application was dismissed via the aforesaid order.

4. The petitioner, however, did not carry the matter any further by way of an appeal and instead through the accompanying writ petition has sought a direction for being given credit Rs.29,16,674/- qua the tax deducted at source by Ninex.

4. Issue notice to the respondents/revenue.

4.1 Mr Zoheb Hossain, learned senior standing counsel, accepts notice on behalf of the respondents/revenue.

5. Mr Hossain says that since there is no debate concerning the factual aspects of the matter, he does not wish to file a reply.

6. We may also note that Ninex is, presently, undergoing a Corporate Insolvency Resolution Process ("CIRP").

6.1. It is also not in dispute that the Resolution Professional ("RP") has issued a certificate dated 05.01.2021 evidencing that Tax at Source (TAS) amounting to Rs.26,99,950/-, was, in fact, deducted against interest paid by Nenex *qua* the loan extended to it, although the petitioner, as noted, has sought credit of a slightly greater amount i.e., Rs.29,16,674/-.

6.2. This aspect of the matter is noticed in the order dated 27.08.2021. The certificate is appended as Annexure-E to the accompanying writ petition.

7. Accordingly, the prayer made in the application is allowed. Consequently, the amended writ petition is taken on record.

8. The application is disposed of, in the aforesaid terms.

W.P.(C) 9043/2021

9. *Via* order passed today in CM No.55881/2023, we have allowed the amendment to the prayer clause as found in the original writ petition. The

additional prayer, thus, stands embedded in the original writ petition, whereby challenge is laid to the order dated 25.06.2020 passed under Section 154 of the Act.

9.1. Since this is the only amendment that is made to the original writ petition, Mr Hossain says that he does not wish to file a fresh counter-affidavit in the matter.

10. We may note that although vis-à-vis the original writ petition, no counter-affidavit has been filed, written submissions have been submitted on behalf of the respondent/revenue.

11. Thus, the backdrop in which the petitioner has approached this court is briefly the following.

11.1 In Financial Year (FY) 2018-19 [relevant to the Assessment Year (AY) 2019-20], the petitioner had advanced a loan to Ninex at an agreed rate of interest, amounting to Rs.25,79,570/- per month.

11.2. Concededly, the interest was remitted to the petitioner, albeit, after deducting TAS amounting to Rs.2,57,957/- per month. Thus, cumulatively in the AY in issue [i.e., AY 2019-20], Ninex had deducted, as noticed above, TAS amounting to Rs.29,16,674/-.

12. Concededly, when the petitioner filed its ROI on 10.08.2019, it initially did not claim credit for the TAS deducted by Ninex.

12.1. It appears that the credit for TAS deducted by Ninex was claimed by the petitioner in its revised return filed on 12.12.2019.

12.2. The revised return was processed under Section 143(1) of the Act, whereby the credit for TAS was disallowed. This intimation was given to the petitioner on 18.05.2020.

12.2. It is in this context that an application under Section 154 of the Act was filed and as noticed above, the same was rejected on 25.06.2020.

13. As noted hereinabove, Ninex is undergoing CIRP and a Resolution Professional (RP) has been appointed by the concerned bench of the National Company Law Tribunal (NCLT).

14. We have also indicated hereinabove that the RP/respondent no.3 has issued a certificate dated 05.01.2021 which clearly indicates that TAS was deducted by Ninex.

15. In order to get credit of TAS deducted by Ninex, the petitioner had preferred a representation on 31.01.2021. The representation was, however, rejected on 13.07.2021 with the following observations:

> *"As reported, as per 26AS no credit Rs.29,16,674 is reflecting. AO have therefore restricted the TDS credits to provide only amount available in 26AS. Hence, no action is pending at AO end."*

16. It is against this backdrop that the instant writ action has been filed by the petitioner.

18. The record shows that, although Ninex deducted TAS amounting to Rs.29,16,674/-, it did not deposit the aforementioned amount with the revenue.

19. Given this position, the moot issues which arises for consideration are the following:

(i). Firstly, whether any recovery towards TAS can be made against the petitioner?

(ii). Secondly, whether the petitioner can obtain the credit of TAS?

20. Both the issues stand covered by the judgment rendered by this court in ***Sanjay Sudan v. Assistant Commissioner of Income Tax***, [2023] 148 taxmann.com 329 (Delhi). The relevant observations made in the said judgment are set forth hereafter:

> *"5.* ***Mr Sanjay Kumar, learned senior standing counsel, who appears on behalf of the respondents/revenue, says that the credit for withholding tax can only be given in terms of Section 199 of the Act, when the amount is received in the Central Government account.***
> *5.1 It is, therefore, his submission that while no coercive measure can be taken against the petitioner, the demand will remain outstanding and cannot, thus, be effaced.*
> *6. We have heard counsel for the parties.*
> *7.* ***According to us, Section 205 read with instruction dated 01.06.2015, clearly point in the direction that the deductee/assessee cannot be called upon to pay tax, which has been deducted at source from his income****. The plain language of Section 205 of the Act points in this direction. For the sake of convenience, Section 205 is extracted hereafter:*
>
> > ***"Section 205 Bar against direct demand on assessee.***
> > *Where tax is deductible at the source under the foregoing provisions of this Chapter, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income."*
>
> *8. The instruction dated 01.06.2015 is aligned with the aforesaid provision of Act inasmuch as it clearly provides in paragraph 2 that since the Act places a bar on a direct demand qua the deductee assessee, the same cannot be enforced coercively. For the sake of convenience, paragraph 2 of the said Instruction is extracted hereafter:*
>
> > *"…2. As per Section 199 of the Act credit of Tax Deducted at Source is given to the person only if it is paid to the Central Government Account. However, as per Section 205 of the Act the assessee shall not be called upon to pay the tax to the extent tax has been deducted from his income where the tax is deductible at source under the provisions of Chapter XVII. Thus the Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch cannot be enforced coercively…"*
>
> *9. The question, therefore, which comes to fore, is as to whether the respondents/revenue can do indirectly what they cannot do directly.*
> ***9.1 The adjustment of demand against future refund amounts to an***

indirect recovery of tax, which is barred under Section 205 of the Act.

9.2 The fact that the instruction merely provides that no coercive measure will be taken against the assessee, in our view, falls short of what is put in place by the legislature via Section 205 of the Act.

10. Therefore, in our view, the petitioner is right inasmuch as neither can the demand qua the tax withheld by the deductor/employer be recovered from him, nor can the same amount be adjusted against the future refund, if any, payable to him."

[Emphasis is ours]

21. Therefore, quite obviously, no recovery towards TAS can be made towards the petitioner i.e., the deductee, in view of the provisions of Section 205 of the Act.

21.1. Insofar as the second issue is concerned, the argument advanced on behalf of the respondent/revenue is that no credit for tax can be given having regard to the provisions of Section 199 of the Act. In other words, the submission is that unless the tax deducted at source is "paid" to the Central Government, no credit can be given to the deductee, i.e., the petitioner in this case. As would be evident upon perusing the extract culled out from the judgement rendered in ***Sanjay Sudan's*** case, this very submission was raised by the respondents/revenue, which, after being considered, was rejected. [See paragraph 5 of the judgement].

21.2. Since repeated arguments are raised by the respondents/revenue based on the provisions of Section 199 of the Act, we intend to elaborate on the rationale provided in ***Sanjay Sudan's*** case. It is required to be emphasized that deduction of taxes at source is one of the methods of collecting tax. The TAS deducted at source is part of the asssseee's income and therefore, the gross amount is included in the total income and offered to tax. It is on this premise that the tax deducted at source would have to be treated as tax paid on behalf of the assessee. The TAS is deducted prior to the assessment being

completed. Thus, it is only when the relevant previous year is over, can the assessee's total income from all sources be determined. Upon assessment of the total income, amongst others, credit for tax deducted at source is extended to an assessee. If the tax assessed is more than the tax deducted at source, the assessee is granted refund. However, if the tax assessed is less than the tax dedudcted at source, the assessee i.e., the deductee is liable to pay the deficit amount.

21.2. The argument that credit for TAS deducted in the present case by Ninex should not be given to the petitioner, fails to recognize the fact that the amount retained against remittance made by the payer is nothing but tax which the assessee/deductee has offered for tax by grossing up the remittance. If credit is not given, the respondents would end up doing indirectly what they cannot do directly i.e., that recover tax directly from the assessee i.e., the deductee. There is, in our view, another reason why the submission advanced on behalf of the respondents/revenue is untenable, that the deductee (i.e., the petitioner in this case) followed the regime put in place in the Act for collecting tax albeit, through an agent of the government. The agent for collecting the tax under the Act is the deductor i.e., Ninex in the present case. Since the agent/Ninex failed to deposit the tax with the government, recovery proceedings can only be initiated against the agent/Ninex.

21.3. We may once again emphasize that "payment of TAS to the government" can only be construed as payment in accordance with the law.

22. Thus, given the factual and legal position, the relief sought for by the petitioner would have to be granted.

23. Accordingly, the writ petition is disposed of with the following directions:

(i) The petitioner will be given credit for TAS amounting to Rs.29,16,674/-, notwithstanding the fact that it is not reflected in Form 26AS.

(ii) The order dated 25.06.2020 passed under Section 154 of the Act, given the relief granted above, cannot survive, as, according to learned counsel for the parties, the only rectification that was sought was with regard to the aforementioned TAS deducted by Ninex. The order is, accordingly, set aside.

24. We may make it clear that since the petitioner has evidently lodged a claim with the RP, if it were to receive any amount, it will deposit the amount not exceeding TAS deducted at source by Ninex with the revenue forthwith.

25. The petitioner will ensure that, for whatever its worth, its claim with regard to TAS deducted by Ninex is pressed before the RP.

26. The deductee, i.e., the petitioner followed the regime framed in the Act, for collecting TAS albeit through an agent of the government, i.e., the deductor. It was the agent, i.e., Ninex who was required to deposit the tax with the government.

27. In this case, the agent is, as noticed hereinabove, undergoing CIRP, therefore, possibly the ability of the Central Government to recover the amount from the agent may seem remote.

27.1. However, where the agent does not suffer from any such disability, it is always open to the Central Government to proceed against the agent, i.e.,

the deductor.

28. In our view, Section 199 of the Act cannot come in the way of granting the deductee being granted credit of TAS deducted by Ninex.

29. The writ petition is disposed of, in the aforesaid terms.

30. Parties will act based on the digitally signed copy of the order.

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

OCTOBER 31, 2023/aj