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

% *Judgment reserved on: 18.12.2023*
Judgment pronounced on: 04.01.2024

\+ **W.P.(C) 10828/2019**

HARSHDIP SINGH DHILLON ..... Petitioner

Through: Mr Sandeep D. Das, Ms Anandini Kumari Rathore and Ms Anurima Sood, Advocates.

versus

UNION OF INDIA THROUGH THE COMMISSIONER OF INCOME TAX TDS ..... Respondent

Through: Mr Gaurav Gupta, Senior Standing Counsel with Mr Shivendra Singh, Mr Puneet Singhal, Ms Mahima Garg and Ms Deepika Goel, Advocates.

CORAM:
HON'BLE MR. JUSTICE RAJIV SHAKDHER
HON'BLE MR. JUSTICE GIRISH KATHPALIA
[Physical Hearing/Hybrid Hearing (as per request)]

GIRISH KATHPALIA, J.:

1. By way of this petition brought under Article 226 of the Constitution of India, the petitioner has prayed for setting aside demand letter dated 04.02.2019 qua outstanding tax liability pertaining to the Assessment Year 2013-14 and for allowing credit to the petitioner against the Tax Deducted at Source (TDS) for the assessment year 2013-14 by his employer. On notice of the petition, respondent entered appearance through counsel and filed counter affidavit. We heard learned counsel for both sides.

2. Briefly stated, circumstances relevant for present purposes are as follows. The petitioner was employed with Tulip Telecom Ltd. (hereinafter referred to as "*the employer*") as Associate Vice-President during the period from November 2011 to May 2013 and resigned from service on 07.05.2013 with effect from 09.05.2013. For assessment years 2011-12 and 2012-13, the employer of the petitioner deducted Tax at Source (TAS) on the salaries paid to petitioner but the deducted tax pertaining to the assessment year 2012-13 was not deposited by the employer with the Income Tax authorities. The employer of petitioner also failed to issue the requisite TDS certificate, so the petitioner informed the concerned Income Tax Officials about the default, but no action was taken. The petitioner filed a petition seeking winding up of the employer company by way of Company Petition No. 192/2014 under Section 433(e)&(f) read with Section 434 of the Companies Act, in which liquidator was appointed. Instead of granting credit of the TDS pertaining to the assessment year 2012-13, the respondent/revenue issued intimation dated 03.12.2015, thereby raising demand of Rs.15,77,240/- against the petitioner towards outstanding tax liability. In response, the petitioner made various representations to the respondent/revenue informing them about the defaults on the part of his employer. Ultimately, the respondent/revenue issued the impugned demand notice dated 04.02.2019, thereby again raising a tax demand of Rs.15,36,220/- against the petitioner. Since the respondent/revenue did not clarify the situation despite being approached by the petitioner, the present petition was filed.

3. The respondent/revenue in its counter affidavit did not dispute that the petitioner had received salary after deduction of tax. But the stand taken by the respondent/revenue in the counter affidavit is that the amount due to the petitioner towards salary for the months of December 2012, January 2013 and March 2013 was not actually paid to the petitioner by his employer, so the employer had no obligation to deduct tax at source and consequently the respondent/revenue is under no obligation to allow credit of the same.

4. During arguments, both sides took us through their respective stand as mentioned above. However, in view of Annexure P2 and Annexure P6(colly), it was not disputed on behalf of the respondent/revenue that the salary for the month of December 2012 and the full and final settlement amount which included salaries for the months of March 2013 to May 2013 was paid to the petitioner after deduction of tax at source.

5. The core issue to be considered by us is as to whether any recovery towards the outstanding tax demand can be effected against the petitioner in view of the admitted position that the tax payable on his salary was being regularly deducted at source by his employer who did not deposit the same with the authorities.

6. The said issue stands covered by the judgment of this court in the case of ***Sanjay Sudan vs 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."

7. On behalf of revenue, it was also contended that petitioner cannot be allowed credit of tax because the credit has to be given in view of Section 199 of the Act only when the tax deducted at source is paid to the Central Government, which admittedly was not so paid in this case. This contention was raised also in the case of ***Sanjay Sudan*** (supra) but not accepted by this court.

8. Further, in the case of ***BDR Finvest Pvt. Ltd. vs DCIT,*** WP(C) 9043/2021 decided by this court on 31.10.2023, it was clarified that payment of the tax deducted at source to the Central Government has to be understood as the payment in accordance with law.

9. As held by this court in the case of ***Shri Chintan Bindra vs DCIT***, 2023:DHC:8483-DB, the petitioner, having accepted the salary after deduction of income tax at source, had no further control over it in the sense that thereafter it was the duty of his employer, acting as tax collecting agent of the revenue under Chapter XVII of the Act, to pay the deducted tax amount to the Central Government in accordance with law; and for the employer of the petitioner having failed to perform his duty to deposit the deducted tax with the revenue, petitioner cannot be penalized. It would always be open for revenue to proceed against employer of the petitioner for recovery of the deducted tax in accordance with law.

10. The issue pertaining to Section 199 of the Act was also elaborately

examined in the case of ***PCIT vs Jasjit Singh,*** 2023:DHC:8522-DB thus:

> "*7. In this context, it is important to note that sub-section (3) of Section 199 of the Act alludes to the power invested in the Central Board of Direct Taxes (CBDT) to frame rules as to how credit in respect of tax deducted or tax paid in terms of Chapter XVII is to be given. [See Rule 37BA]. Significantly, the CBDT is empowered to frame rules that may be necessary to give credit to a person "other than those referred to in sub-section (1) and sub-section (2)…" of Section 199. Therefore, Section 199, read in its entirety, does not limit credit only to those deductees whose deductors have deposited the amount with the Central government.*
> *7.1 Moreover, the expression "and paid" to the Central Government found in Section 199(1) must be contextualized in the setting in which it is placed, i.e., Chapter XVII, whereby, the sanctions for failing to deposit tax with the Central government are laid on the payor/deductor.*
> *7.2 Section 199, which is contained in Chapter XVII and, inter alia, includes provisions for collection and recovery of tax. Chapter XVII of the Act is divided into eight (8) parts.*
> *7.3 Part A, which is general, includes Sections 190 and 191. Part B concerns Deduction [of tax] at source. Part BB relates to the Collection [of tax] at source. Part C pertains to Advance payment of tax. Part D concerns Collection and recovery of tax.*
> *7.4 Part E concerns „tax payable under provisional assessment" and includes Sections 233 and 234 of the Act as omitted by the Taxation Laws (Amendment) Act, 1970 [w.e.f. 1-4-1971], and the Direct Tax Laws (Amendment) Act, 1987 [w.e.f. 1-4-1989], respectively.*
> *7.5 Part F concerns Interest chargeable in certain cases. Lastly, Part G provides for provisions for the levy of fees in certain cases.*
> *8. As would be evident, Chapter XVII of the Act puts in place a legislative scheme for the collection of taxes by various modes, which includes direct levy [See Section 191], deduction of tax at source, or collection at source.*
> *8.1 Sections 192 to 195 and 196A to 196D provide for the deduction of tax at source for payments made under various heads. For instance, payments made by way of salary, interest on securities, dividends, and interest (other than interest on securities), winnings from lotteries or crossword puzzle, and winnings from horse race are amenable to deduction of tax at source under Sections 192, 193, 194, 194A, 194B and 194BB, respectively.*
> *8.2 Likewise, payments made to contractors and insurance commission, payments made in respect of life insurance policy, and*

payments made to the non-resident sportsmen or sports associations are liable for deduction to tax at source under Sections 194C, 194D, 194DA, and 194E, respectively.

8.3 As far as payments made to non-residents [not being a company], or to a foreign company are concerned, any interest (not being interest referred to in section 194LB or section 194LC or section 194LD) or any other sum chargeable under the provisions of this Act (not being income chargeable under the head "Salaries") payable to such non-resident is made amenable to deduction of tax at source under Section 195 of the Act.

8.4 Specifically, the grossing up principle finds statutory recognition in Section 198 of the Act. This is a principle, whereby, income which is payable, say, under any agreement/arrangement [in a case not referred to in Section 192(IA), and the tax chargeable on that income is required to be deducted by the payor, then the income is increased by the payor/deductor and offered to tax inclusive of the tax deducted at source.

8.5 Chapter XVII also contains provisions where, if tax is not deducted at source, it can be recovered from the payee. This is contained in Sections 191 and 202 of the Act.

8.6. Significantly, Chapter XVII contains provisions for penalizing the payor/deductor when he fails to deposit the tax deducted at source with the Central Government. For instance, the Act provides for consequences qua the person who is obliged to deduct tax at source but fails to do so or, after deducting fails to deposit the same. Under Section 201, such a person is deemed to be an „assessee-in-default" and would, upon this eventuality occurring, be liable to pay interest [See sub-section (1A) of Section 201].

8.7 Furthermore, the „assessee-in-default" is also liable for imposition of penalty under Section 221 of the Act. Besides this, outside Chapter XVII, penalty can also be levied under Section 271C.

8.8 In addition, thereto, a person who fails to deposit tax deducted at source, under the provisions of Chapter VII-B, is liable for punishment with rigorous imprisonment under Section 276B.

8.9 That said, both impositions of penalty and prosecution are subject to the defence of „reasonable cause" as provided in Sections 273B and 278AA of the Act respectively.

9. Importantly, Section 201(2), provides that where a person who, although required to, does not deduct tax or does not pay the tax deducted at source or after deducting fails to pay wholly or part of the tax as required under the Act, would have a statutory charge created on his assets concerning both the tax as well as the interest payable under sub-section (1A) of the said provision.

10. Thus, in our opinion, the Act does not seem to cast a burden on the deductee/payee with regard to the deposit of money, which is

retained as tax, by the payer i.e., the deductor. Therefore, insofar as the deductee/payee is concerned, once the payer/deductor, who acts as an agent of the Central Government, has retained money towards tax, credit for the same cannot be denied, having regard to the consequences and the modes available for recovering the said amount from the payer/deductor.

11. In this particular case, the deductors are individuals who, concededly, after retaining the tax deducted at source did not fully deposit the same, as noted above, with the Central Government.

12. Upon the respondent/assessee becoming aware of this fact, a police complaint was lodged, which was brought to the notice of the appellant/revenue. Despite this aspect being brought to the notice of the appellant/revenue, no steps were taken either under the provisions of the Act or under the common law for recovery or even under the extant statute(s) for bringing deductors to book in accordance with the law.

13. In our opinion, the argument advanced by Mr Bhatia that the amount deducted towards tax at source will not be given credit because the deductor has chosen not to deposit the amount with the Central Government is erroneous for another reason, which is that the nature of the amount retained by the deductor continues to remain as „tax".

13.1 This aspect clearly emerges upon perusal of the contents of the information provided in the Tax Payers Information Series-28 booklet titled "Tax Deduction at Source (TDS) Other Than Salaries" published by the Income Tax Department. The booklet notes that tax deducted at source will be treated as payment of „tax" on the assessee"s behalf. For convenience, the relevant part of the booklet is extracted hereafter:

> *"4.2 Credit of TDS Where taxes have been deducted at source from any payment of income receivable by an assessee, the amount of tax deducted at source would be included in the income of the assessee while computing the income of the assessee and would be deemed to be the income received (S.198). Further credit will be given to the assessee while calculating the net tax payable by him and the tax deducted at source will be treated **as a payment of tax** on his behalf (i.e. to the Central Government by the payer who has deducted the tax at source (S.199))."*
>
> *[Emphasis is ours]*

14. The Act has, thus, provided a regime as to how tax is required to be collected against certain payments. Once the deductee adheres to the statutory regime and allows the deductor to retain money towards tax, the nature of the amount cannot change and, therefore, the deductee, in our view, would be entitled to the credit of the amount

retained by the deductor towards tax. Any other view would result in a situation where even though the assessee would have grossed up his income [by including the tax deducted at source] and offered the same for taxation, he would be denied the benefit of having the resultant tax demand adjusted against tax deducted at source by the payer. This handicap the assessee/deductee [i.e., the respondent/assessee] would suffer only because the deductor, who acts as the agent of the Central Government, chooses not to deposit the amount retained towards tax."

10. The irresistible conclusion in view of the aforesaid is that since the petitioner accepted salary after deduction of income tax at source, it is his employer who is liable to deposit the same with the revenue authorities and on this count, the petitioner cannot be burdened. We find no substantial question of law to be considered by us in this appeal. Therefore, the petition is allowed and consequently the impugned demand notice dated 04.02.2019 is set aside and the respondent/revenue is directed to allow credit of TDS deducted by his employer for the Assessment Year 2013-14 to the petitioner.

GIRISH KATHPALIA
(JUDGE)

RAJIV SHAKDHER
(JUDGE)

JANUARY 04, 2024/as