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

% **Date of decision: 03.10.2023**

+ **CM APPL. 50728/2023 & Review Pet. 26/2023 in**
W.P.(C) 7797/2023

INCREDIBLE UNIQUE BUILDCON PRIVATE LIMITED

..... Petitioner

Through: Mr Prakul Khurana and Ms Vrinda
Lakhotia, Advocates.

versus

**OFFICE OF THE INCOME TAX OFFICER WARD (12) (1) NEW
DELHI**

..... Respondent

Through: Mr Abhishek Maratha, Sr. Standing
Counsel with Mr Akshat Singh, Jr.
Standing Counsel.

CORAM:

HON'BLE MR JUSTICE RAJIV SHAKDHER

HON'BLE MR JUSTICE GIRISH KATHPALIA

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

GIRISH KATHPALIA, J.: (ORAL)

1. The revenue, respondent to the originally filed writ petition seeks review of order dated 31.05.2023 of this court whereby the writ petition was finally allowed, thereby directing the respondent/revenue to refund a sum of Rs. 11,39,870/- to the writ petitioner. Being hit by a delay of about 45 days, the review applicant has also filed an application under Section 151 CPC for condonation of delay.



2. On notice, the non-applicant writ petitioner entered appearance through counsel, who in the interest of expeditious disposal opted not to oppose the delay condonation application, which explains the delay in filing the review application broadly on the ground of administrative rigmaroles. As such, the application CM Appl. 50728/2023 is allowed and delay in filing the review application is condoned.

3. We have heard learned counsel for both sides on the review application. For convenience, the order dated 31.05.2023 sought to be reviewed is extracted below:

“W.P.(C) 7797/2023

2. *Issue notice.*

3. *Mr Abhishek Maratha, learned senior standing counsel, who appears on behalf of the respondent/revenue, accepts notice.*

4. *Mr Maratha cannot but accept that the issue raised in the present writ petition is covered by the judgment of this court dated 17.02.2023, passed in WP(C) 6610/2019, titled **Sanjay Sudan v. The Assistant Commissioner of Income Tax & Anr.***

4.1 *In this context, Mr Maratha says that a counter-affidavit is not required to be filed, as the instant writ petition concerns a pure question of law.*

5. *Broadly the facts obtaining the case are as follows:*

6. *This writ petition concerns Financial Year (FY) 2010-11 [Assessment Year (AY) 2011-12].*

7. *The petitioner had, as it appears, provided services to an entity going by the name Clutch Auto Ltd. (CAL). The value of the service provided amounted to Rs.8,50,26,199/-. The said entity, i.e., CAL, deducted tax at source amounting to Rs.24,96,199/-. It is the petitioner's stand that the tax at source deducted by CAL was not completely deposited with the respondent/revenue.*

8. *The petitioner also claims that the balance amount, after deducting tax at source, was also not remitted to it by CAL. Insofar as this aspect is concerned, the petitioner claims that it is an issue which is being agitated before the concerned bench of the National Company Law Tribunal (NCLT).*

9. *We may note that according to the petitioner, CAL only deposited Rs.69,897/- towards tax deducted at source, resulting in a deficit of*



Rs.24,26,302/-. This aspect is not disputed by the respondent/revenue.

9.1 Therefore, the grievance of the petitioner is that it has not been given credit for the tax deducted at source by CAL, which was not deposited with the respondent/revenue.

10.The petitioner thus avers that instead of being granted credit for the tax deducted at source by CAL, a demand amounting to Rs.15,24,840/- was raised against it.

11.In these circumstances, the petitioner has approached this court with the following substantive prayer:

“a) Issue writ in the nature of mandamus or any other appropriate writ/ order/ direction to the effect directing the Respondent to issue the refund amounting to Rs. 11,39,870 I- due to the Petitioner for AY 2011-12”

12.This very issue, as indicated above, arose for consideration in **Sanjay Sudan**’s case. It would, therefore, be appropriate to set forth the relevant paragraphs of the said judgment:

“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.

11. Thus, for the foregoing reasons, we are inclined to quash the notice dated 28.02.2018, and also hold that the respondents/revenue are not entitled in law to adjust the demand raised for AY 2012-13 against any other AY. It is ordered accordingly.

12. Notably, in paragraph 7 of the writ petition, the petitioner has adverted to the fact that he is entitled to refund of Rs.1,94,410/- in respect of AY 2015-16.

12.1 Mr Sanjay Kumar, learned Senior Standing Counsel, who appears for the respondent/revenue says the amount claimed towards refund is not in dispute.

12.2 Given this position, the petitioner's claim which is not in dispute will have to be refunded.

12.3 It is so directed.

13. The writ petition is disposed of in the aforesaid terms."

13. Clearly, what follows is that while respondent/revenue cannot recover the deficit tax at source from the petitioner, which was deducted and pocketed by CAL, and they cannot also refuse to grant credit for the same. The rationale being what the appellant/revenue cannot do directly, it is impermissible for it to reach the same end indirectly.

14. Given this position, the prayer made in the writ petition is allowed.

15. The respondent/revenue will refund Rs.11,39,870/- to the petitioner, as prayed.

16. The writ petition is disposed of in the aforesaid terms.

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

4. As noted in the order sought to be reviewed, at the time of disposal of the writ petition, the learned counsel for review applicant had not disputed that the issue raised in the present writ action stands covered by the judgment in the case of **Sanjay Sudan** (supra), for which reason the review applicant even opted not to file a counter affidavit. But it appears that subsequently the officers of revenue had a change of mind and opted to come up with this review application. Learned counsel for the review applicant contended before us that the case which led to the judgment of **Sanjay Sudan** (supra) stood on different footing insofar as in the said case,



the assessee had produced Form No. 16A to establish the tax deducted at source, whereas in the present case, the non-applicant/assessee did not produce Form No. 16A, therefore, the review applicant is not certain if the tax was actually deducted at source. No other contention was raised on behalf of the review applicant in support of their argument that the judgment in the case of *Sanjay Sudan* (supra) would not operate in the present case.

5. On the other hand, learned counsel for non-applicant submitted that the tax deductor Clutch Auto Ltd did not issue Form 16A, and it was not possible for the non-applicant/assessee to obtain the same. Learned counsel for non-applicant/assessee placed reliance on the judgment of Bombay High Court in the case of *Yashpal Sahni vs Rekha Hajarnavis, ACIT*, reported as 2007 SCC OnLine Bom 1315, and contended that the impugned order is based on cogent reasons, so not liable to be unsettled.

6. Thence, the only question before us is as to whether this court fell in error apparent on the face of record in placing reliance on the judgment in the case of *Sanjay Sudan* (supra).

7. There is no dispute that in the present case, it was mandatory duty of Clutch Auto Ltd to deduct tax at source qua the payments made to the non-applicant/assessee. Also not in dispute is the legal proposition that vide Section 205 of the Income Tax Act, where the tax is deductible at source, the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from his income.



8. No doubt, Form 16A is amongst others, a piece of evidence which can establish deduction of tax at source. That said, Form 16A is not the only piece of evidence in that regard. In a case where the assessee can show reliable material other than Form 16A and prima facie establish the deduction of tax at source, in our view the assessee cannot be denied benefit of the provisions of Section 205 of the Act. The assessee cannot be left at mercy of the tax deductor, who for multiple reasons may not issue Form No.16A and/or may not deposit the deducted tax.

9. In the present case, the non-applicant/assessee admittedly declared in his return of income the tax deducted at source by Clutch Auto Ltd and supported the same with his ledger account. We are not oblivious that ledger account is not the conclusive evidence. But at the same time, we find no reason for failure on the part of the review applicant to carryout any inquiry if they were not satisfied about truthfulness of claim of the non-applicant/assessee qua the tax deducted at source.

10. Not only this, the non-applicant/assessee even filed a complaint dated 25.01.2017 with the revenue authorities alleging that Clutch Auto Ltd had deducted but not deposited the tax deducted at source. But no action was taken on its complaint, so the non-applicant/assessee had to even seek information by way of his application dated 01.05.2017 under the Right to Information Act in that regard. In the order dated 18.05.2017 under Section 7 of the Right to Information Act 2005 (RTI Act), passed by the Public Information Officer of the review applicant, no substantial information was provided. Rather, order dated 18.05.2017 under Section 7 of the RTI Act



vaguely mentioned that the tax deductor was in the process of submitting its reply and after receiving the complete reply, appropriate action would be taken, if warranted; but after the said vague answer to the application, the Public Information Officer disposed of the RTI application itself. Most importantly, before the Public Information Officer of the review applicant, the Clutch Auto Ltd simply informed having approached the National Company Law Tribunal for initiation of insolvency process but did not raise even a whisper of challenge to the claim of the non-applicant/assessee qua the tax deducted at source.

11. Despite the aforesaid, concerned officers of the review applicant opted not to quench their baseless doubt by way of detailed inquiry qua deduction of tax at source and came up with this review application raising the unsustainable differentia of Form 16A. The review applicant being the State and the non-applicant/assessee being the citizen, the latter cannot be burdened with the responsibility to somehow procure Form 16A to secure benefit of the provision of Section 205 of the Act.

12. We are in respectful agreement with the view taken by the Bombay High Court in the case of *Yashpal Sahni* (supra) to the effect that from language of Section 205 of the Act, it is clear that the bar operates as soon as it is established that the tax had been deducted at source and it is wholly irrelevant as to whether the tax deducted at source is deposited or not and whether Form No. 16A has been issued or not.



13. In view of the aforesaid, we are unable to find any error, much less an error apparent on the face of record which would persuade us to engage in reviewing the impugned order dated 31.05.2023. The review application is, thus, dismissed.

(GIRISH KATHPALIA)
JUDGE

(RAJIV SHAKDHER)
JUDGE

OCTOBER 03, 2023/as