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

% *Date of Decision: 02.11.2023*

\+ **ITA 295/2023**

THE PR COMMISSIONER OF INCOME TAX - 15..... Appellant

Through: Mr Ruchir Bhatia, Sr Standing Counsel with Ms Deeksha Gupta and Mr Vikram Chand, Advs.

versus

JASJIT SINGH ..... Respondent

Through: Mr S. Krishnan and Mr Sachin Jain, Advs.

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

RAJIV SHAKDHER, J. (ORAL):

1. We had heard the matter at some length on 15.09.2023. On that day, the broad contours of the case at hand were etched out. The relevant parts of the order dated 15.09.2023 are set forth hereafter:

> "*6. We may note that the only issue which arises for consideration is whether the assessee is entitled to credit concerning the tax which had been deducted with respect to the transaction entered into by him with Koutons Group.*
>
> *7. The record shows that the respondent/assessee held 25% equity shares in a private limited company going by the name, S.R. Resorts Pvt. Ltd.*
>
> *7.1 The total consideration fixed for this transaction was Rs.19,89,96,655/-.*
>
> *7.2 The respondent/assessee, after deduction of Tax at Source (TAS) at the rate of 10.3%, received Rs.17,85,00,000/-.*

7.3 The tax in absolute terms, which was deducted by the buyer of the shares held by the respondent/assessee was Rs.2,04,96,655/-.

8. The record also discloses that to begin with, the respondent/assessee was treated as assessee-in-default.

8.1 In an appeal preferred by the respondent/assessee, the Commissioner of Income Tax (Appeals) [in short, "CIT(A)"], in consonance with the provisions of Section 205 of the Income Tax Act, 1961 [in short, "Act"] had granted relief to the respondent/assessee in this behalf.

8.2 However, insofar as credit for tax which was deducted is concerned, that part of the relief was not granted to the respondent/assessee.

9. It is in this context that the respondent/assessee preferred an appeal with the Income Tax Appellate Tribunal [in short, "Tribunal"].

9.1 The Tribunal, via the impugned order dated 03.03.2021, has ruled in favour of the respondent/assessee.

9.2 In other words, the Tribunal, in sum, ruled that the respondent/assessee is entitled to tax credit for the tax at source [TAS] deducted by the buyer of the shares and the fact that the buyer of the shares has not deducted TDS will not come in the way of the respondent/assessee getting tax credit.

10. Mr Krishanan points out that this issue is covered by the judgment of this Court rendered in ***Sanjay Sudan vs. Assistant Commissioner of Income Tax & Anr.*** *(2023) 148 Taxmann.com 329.*"

2. Mr Ruchir Bhatia, learned senior standing counsel, who appears on behalf of the appellant/revenue, while conceding that no direct recovery could be made against the respondent/assessee concerning the tax at source deducted by the Koutons Group amounting to Rs.2,04,96,655/-, says that credit for the said amount, sought by the respondent/assessee, could not be given since the deductor, i.e., Koutons Group had not deposited the said amount with the appellant/revenue.

2.1 In support of this plea, Mr Bhatia sought to place reliance on Section 199 of the Income-tax Act, 1961 [in short, "Act"].

3. According to us, this aspect of the matter stands covered by the judgment rendered by a coordinate bench of this court comprising one of us (Rajiv Shakdher, J.) in ***Sanjay Sudan v. Assistant Commissioner of Income Tax***, (2023) 148 taxmann.com 329 (Delhi), wherein, a similar assertion was sought to be made on behalf of the appellant/revenue. 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 1-6-2015, 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 1-6-2015 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 [the] 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 28-2-2018, 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."

[Emphasis is ours]

4. This view was also taken by this court *via* decisions dated 31.10.2023 rendered in W.P.(C) No. 9308/2022, titled ***Vishesh Khanna v. DCIT*** 2023:DHC:8267-DB and W.P.(C) No. 9043/2021, titled ***BDR Finvest Pvt. Ltd. v. DCIT*** 2023:DHC:8284-DB.

5. We may also add to the reasoning that is already embedded in the

aforementioned judgments, in view of the renewed emphasis, *albeit* with greater vigour, laid by the appellant/revenue.

6. The submission of Mr Bhatia [based on Section 199 of the Act] simply boils down to this: the expression "and paid" found in sub-section (1) of the said provision mandates that credit for tax deducted at source can only be extended when the deductor deposits the amount with the Central Government.

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.

15. Therefore, for the foregoing reasons, according to us, no substantial question of law arises for consideration in the instant appeal.

16. The appeal is disposed of in the aforesaid terms.

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

RAJIV SHAKDHER, J

GIRISH KATHPALIA, J

NOVEMBER 2, 2023
aj

Click here to check corrigendum, if any