
[2024] 158 taxmann.com 27 (Delhi)[29-11-2023]

INCOME TAX : Where employer paid salary to assessee after deduction of tax at source but employer did not deposit same with department, assessee could not be penalized for failure of employer to perform his duty to deposit deducted tax

[2024] 158 taxmann.com 27 (Delhi)

HIGH COURT OF DELHI

Chintan Bindra

v.

Deputy Commissioner of Income-tax*

RAJIV SHAKDHER

AND GIRISH KATHPALIA, JJ.

W.P.(C) NO. 2164 OF 2022

CM APPL. NO. 6192 OF 2022

NOVEMBER 29, 2023

Section [205](#), read with section [199](#), of the Income-tax Act, 1961 - Deduction of tax at source - Bar against direct demand on assessee (Scope of provision) - Assessment years 2009-10, 2011-12 and 2012-13 - Employer paid salary to assessee after deduction of tax at source but did not deposit same with department - Assessing Officer did not allow credit of tax deducted at source and raised demand against assessee towards tax and interest - Whether assessee having accepted salary after deduction of tax at source had no further control over it and it was duty of employer to pay deducted tax to department and employer having failed to perform his duty to deposit deducted tax, assessee could not be penalized - Held, yes - Whether section 199 could not operate as impediment to grant relief to assessee and, thus, impugned demand deserved to be set aside - Held, yes [Paras 8, 9 and 10] [In favour of assessee]

Circulars and Notifications : Instruction No. 275, dated 1-6-2015; Office Memorandum dated 11-3-2016 and Press Release, dated 11-3-2016

FACTS

Since 16-4-2008, the assessee was employed with Kingfisher Airlines Limited as an airlines pilot at the rank of Captain.

For the relevant assessment years the employer paid salary to the assessee after deduction of tax at source but did not deposit the same with the department.

The Assessing Officer processed under section 143(1) the return of income furnished by the assessee and did not allow the credit of tax deducted at source and raised demand against him towards tax and interest.

On writ petition :

HELD

The factual position pleaded by the assessee and admitted by the revenue is that the revenue raised multiple demands of outstanding income tax and interest pertaining to the relevant assessment years. It is also not in dispute that, as reflected from records, the assessee was being paid salary after deduction of tax at source but his employer did not deposit the same with the department. Despite repeated communications from assessee, the said demands were not withdrawn by the revenue. [Para 3]

The core issue to be considered by the Bench is as to whether any recovery towards the said outstanding tax demand can be effected against the assessee in view of the admitted position that the tax payable on salary of the assessee was being regularly deducted at source by his employer, who did not deposit the deducted tax with the department. [Para 4]

The Delhi High Court while deciding a similar issue in the case of *Sanjay Sudan v. Asstt. CIT* [2023] 148 taxmann.com 329/292 Taxman 138/452 ITR 107 observed that the assessee therein 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. [Para 5]

It is contended by the revenue that no credit for tax can be given to the assessee, since in view of the provisions under section 199 the credit can be given only when the tax which was deducted at source is paid to the Central Government and in the instant case admittedly the tax deducted from salary of the assessee has not been deposited by his employer. This contention was raised also in the case of *Sanjay Sudan (supra)* but not accepted by the court. [Para 6]

The assessee having accepted the salary after deduction of 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 department in accordance with law. The employer of the assessee having failed to perform his duty to deposit the deducted tax with the revenue, the assessee cannot be penalized. It would always be open for revenue to proceed against employer of the assessee for recovery of the deducted tax. [Para 8]

Section 199 cannot operate as impediment to grant relief to the assessee. [Para 9]

In view of the aforesaid, the demand of tax and interest raised against the assessee is set aside. The Assessing Officer is restrained from carrying out any recovery proceedings against the assessee. The Assessing Officer is further directed to refund the amount which was adjusted by him against the impugned demand. [Para 10]

CASE REVIEW

Sanjay Sudan v. Asstt. CIT [[2023](#)] [148 taxmann.com 329/292 Taxman 138/452 ITR 107 \(Delhi\)](#) (para 5); *BDR Finvest (P.) Ltd. v. Dy. CIT* [W. P. (C) No. 9043 of 2021, dated 31-10-2023] (para 7) and *Pr. CIT v. Jasjit Singh* [IT Appeal No. 295 of 2023, dated 2-11-2023] (para 9) *followed*.

CASES REFERRED TO

CIT, TDS v. Kingfisher Airlines Ltd. [IT Appeal No. 165 of 2012, dated 15-7-2014] (para 2.6), *Sanjay Sudan v. Asstt. CIT* [[2023](#)] [148 taxmann.com 329/292 Taxman 138/452 ITR 107 \(Delhi\)](#) (para 5), *BDR Finvest (P.) Ltd. v. Dy. CIT* [WP (C) No. 9043 of 2021, dated 31-10-2023] (para 7), *Pr. CIT v. Jasjit Singh* [IT Appeal No. 295 of 2023, dated 2-11-2023] (para 9) and *Chintan Bindra v. Dy. CIT* [CM Appeal No. 6192 of 2022, dated 29-11-2023] (para 10).

Puneet Agarwal, Yuvraj Singh and Chetan Kumar Shukla, *Advs. for the Petitioner.* **Ruchir Bhatia**, Sr. Standing Counsel and **Ms. Deeksha Gupta**, *Adv. for the Respondent.*

ORDER

Girish Kathpalia, J. - By way of this writ petition under Articles 226 and 227 of the Constitution of India, petitioner has sought the following reliefs:

- i.* To declare that the demand of tax and interest reflected on the income tax portal for the AYs 2009-10, 2011-12, 2012-13 on account of TDS admittedly deducted by the Company (Employer), do not lie against the Petitioner, and to direct the Respondents to delete the impugned demand from the Portal and their records; and/or
- ii.* To issue an appropriate writ, order, or direction to Respondents to release the refund amount Rs. 3,88,209/-, due for various AYs and which has been illegally adjusted against the illegal and erroneous demand; and/or
- iii.* Issue an appropriate writ, order, or direction to the Respondents to grant statutory interest on the illegally adjusted refund amount of Rs. 3,88,209/-; and/or
- iv.* Issue an appropriate writ, order, or direction to the Respondents to grant compensatory interest on the illegally adjusted refund amount of Rs. 3,88,209/-; and/or
- v.* To issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction, to quash the impugned intimation dated 3-3-2021 (Annexure P/41); and/or
- vi.* To issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction, to quash the impugned intimations dated 2-7-2016 & 12-8-2016(Annexure

P/21) for the AY 2016-17, and impugned intimation dated 19-10-2017 (Annexure P/26) for the AY 2017-18, issued under section 245 of the Act; and/or

- vii. To issue a writ of certiorari or a writ in the nature of certiorari or any other writ, order or direction, to quash the impugned intimations/orders dated 21-3-2011 (Annexure P/6); dated 23-10-2012 (Annexure P/10); dated 16-1-2014 (Annexure P/14); dated 24-9-2016 (Annexure P/22); dated 24-9-2018 (Annexure P/34); dated 18-9-2019 (Annexure P/36); and dated 23-1-2021 (Annexure P/39) under section 143(1) of the Act for the adjustments of refunds, and for raising of demand on account of "Unmatched Tax Deducted at Source"; and/or
- viii. To declare that the Respondents Authorities abide strictly by the instruction No. 275 dated 1-6-2015 and the further Office Memorandum dated 11-3-2016 and Press Release dated 11-3-2016 issued by the CBDT; and/or
- ix. Issue an appropriate writ, order, or direction to Respondents to act on the provisions of the statute, in a manner, that the express rights so conferred upon the assessee do not get frustrated for non-action on the part of the Respondents; and/or
- x. Issue an appropriate writ, order, or direction to Respondents to not to take any coercive action till the pendency of this Writ Petition; and/or
- xi. Issue any other writ, order or direction in favour of the Petitioner, as this Hon'ble Court may deem fit and proper in the present facts and circumstances of the case, so as to ensure the ends of justice, or else the Petitioner shall suffer irreparably; and/or
- xii. to grant costs of this Petition; ; and/or
- xiii. to award such further and other reliefs as the nature and circumstances of the case may require."

On issuance of notice, the respondents/revenue entered appearance through counsel and filed a counter affidavit which followed a rejoinder affidavit on behalf of petitioner. We heard learned counsel for both sides.

2. Briefly stated, facts relevant for present purposes are as follows.

2.1 Since 16-4-2008, the petitioner was employed with Kingfisher Airlines Limited as an airlines pilot at the rank of Captain.

2.2 For the Assessment Year 2009-10, the income tax payable against salary of the petitioner was deducted at source by his employer but the same was not reflected in his Form 26AS. On 31-3-2010, petitioner filed his return of income for AY 2009-10 declaring gross total income of Rs. 39,60,051/- and claimed TDS of Rs. 12,10,276/- and refund of Rs. 2,340/-. On 21-3-2011, the respondents issued intimation under section 143(1) of the Income-tax Act, whereby TDS credit claimed by the petitioner was declined and a demand of Rs. 15,36,020/- towards tax and interest was raised.

2.3 For the Assessment Year 2011-12 also, employer of the petitioner deducted TDS to the tune of Rs. 14,90,055/- from salary of petitioner. On 31-3-2012, petitioner filed his return of income for

AY 2011-12 declaring gross total income of Rs. 53,30,384/- and claimed TDS of Rs. 14,90,055/-. On 23-10-2012, the respondents issued intimation under section 143(1) of the Act, thereby again denying the TDS credit claim of petitioner and raising a demand of Rs. 19,15,807/- towards tax and interest and adjusting a refund of Rs. 24,248/-.

2.4 For AY 2012-13 pertaining to the period from 1-4-2011 to 14-2-2012, employer of the petitioner deducted TDS to the tune of Rs. 13,59,207/-. On 26-3-2013, petitioner filed his return of income for AY 2012-13 declaring gross total income of Rs. 66,11,970/- and declared tax and interest payable at Rs. 19,03,910/-. On 16-1-2014, respondents issued intimation under section 143(1) of the Act on the ground of unmatched tax deducted at source and raised demand of Rs. 18,16,870/- towards tax and interest.

2.5 The petitioner through his authorized representative filed a rectification application dated 25-2-2014 under section 154 of the Act seeking to *set aside* the demands raised for AYs 2009-10, 2011-12 and 2012-13 as well as to allow the credit of tax deducted at source in view of section 205 of the Act.

2.6 On 15-7-2014], Karnataka High Court in *CIT, TDS v. Kingfisher Airlines Ltd.* [IT Appeal No. 165 of 2012 directed the revenue authorities to recover TDS amounting to Rs. 302 crores from the employer of the petitioner. On 18-11-2016, the Kingfisher Airlines Limited (employer of the petitioner) was ordered to be wound up by the Karnataka High Court.

2.7 On 16-6-2016, petitioner filed his return of income for AY 2016-17 claiming a refund of Rs. 62,280/-. On 24-9-2016, the respondents issued intimation under section 143(1) of the Act, thereby making an adjustment of Rs. 63,569/- and raising a demand of Rs. 15,36,020/- for AY 2009-10.

2.8 On 27-9-2017, petitioner filed his return of income for AY 2017-18 claiming refund of Rs. 66,390/-. On 19-10-2017, respondents issued intimation under section 143(1) of the Act for AY 2017-18 thereby making an adjustment of Rs. 66,850/-.

2.9 In view of repeated adjustments of refunds, petitioner filed application dated 11-2-2018 seeking stay of the demands appearing on portal of Income-tax Department for AYs 2009-10, 2011-12 and 2012-13.

2.10 On 20-7-2018, petitioner filed his return of income for AY 2018-19 claiming refund of Rs. 72,570/-. On 24-9-2018, respondents issued intimation under section 143(1) of the Act for AY 2018-19, making an adjustment of refund of Rs. 74,070/- against the demand of Rs. 15,36,020/-.

2.11 On 8-7-2019, petitioner filed his return of income for AY 2019-20 claiming a refund of Rs. 76,440/-. On 18-9-2019, respondents issued intimation under section 143(1) of the Act for AY 2019-20, thereby making an adjustment of refund of Rs. 78,020/- against the demand of Rs. 15,36,020/-.

2.12 By way of letter dated 27-1-2020, petitioner agitated that respondents had not taken any action on his repeated requests and communications.

2.13 On 8-10-2020, petitioner filed his return of income for AY 2020-21, claiming refund of Rs. 76,482/-. On 23-1-2021, respondents issued intimation under section 143(1) of the Act for AY

2020-21, making adjustment of Rs. 79,110/- against the demand of Rs. 15,36,020/-.

2.14 On 24-2-2021, petitioner sent a reminder email. Finally on 3-3-2021, petitioner received the impugned intimation from respondents with reference to his letter dated 27-1-2020, and thereby the respondents refused to cancel the demand or give credit of TDS to him, though a stay on the recovery of outstanding demand was granted till finalization of proceedings.

2.15 Hence, the present petition.

3. The factual position pleaded by the petitioner and admitted by the respondents is that the respondents raised multiple demands of outstanding income tax and interest pertaining to Assessment Years 2009-10, 2011-12 and 2012-13. It is also not in dispute that as reflected from records, the petitioner was being paid salary after deduction of income tax at source but his employer namely Kingfisher Airlines Limited did not deposit the same with the revenue. Despite repeated communications from petitioner, the said demands were not withdrawn by the respondents, so the petitioner approached this court by way of writ action.

4. That being so, the core issue to be considered by us is as to whether any recovery towards the said outstanding tax demand can be effected against the petitioner in view of the admitted position that the tax payable on salary of the petitioner was being regularly deducted at source by his employer namely Kingfisher Airlines Ltd. who did not deposit the deducted tax with the revenue.

5. The said issue stands covered by the judgment of this court in the case of *Sanjay Sudan v. Asstt. CIT* [2023] 148 taxmann.com 329/292 Taxman 138/452 ITR 107 (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 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 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."

6. On behalf of revenue, it was contended that no credit for tax can be given to the petitioner, since in view of the provisions under section 199 of the Income-tax Act the credit can be given only when the tax which was deducted at source is paid to the Central Government and in the present case, admittedly the tax deducted from salary of the petitioner has not been deposited by his employer. This contention was raised also in the case of *Sanjay Sudan (supra)* but not accepted by this court.

7. Further, in the case of *BDR Finvest (P.) Ltd. v. Dy. CIT* [WP (C) No. 9043 of 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.

8. 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. 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.

9. Same view has been taken by this court in the case of *Pr. CIT v. Jasjit Singh* [IT Appeal No. 295 of 2023, dated 2-11-2023] (subsequent to the date when judgment in this case was reserved). Section 199 of the Act, in our view cannot operate as impediment to grant relief to the petitioner.

10. In view of the aforesaid, the petition as well as the interim relief application *Chintan Bindra v. Dy. CIT* [CM Appeal No. 6192 of 2022, dated 29-11-2023] are allowed, thereby setting aside the

intimations/communications dated 21-3-2011 pertaining to Assessment Year 2009-10; dated 23-10-2012 pertaining to Assessment Year 2011-12; and dated 16-1-2014 pertaining to Assessment Year 2012-13, all intimations/communications issued by respondent no. 3 under section 143 of the Act raising demands of tax and interest against the petitioner and consequently, restraining the respondents from carrying out any recovery proceedings pertaining to the said intimations/communications; and also directing the respondents to refund to the petitioner within four weeks from receipt of this order a sum of Rs. 3,88,209/- which was wrongly adjusted by the respondents against the impugned demands pertaining to the above mentioned Assessment Years. However, it is clarified that in case the petitioner is able to obtain any amount of money towards tax deducted from his income at source for the Assessment Years 2009-10, 2011-12 and 2012-13 from his employer, the same shall be deposited by him with the revenue forthwith.

S.K. JAIN

*In favour of assessee.