ORISSA HIGH COURT: CUTTACK

W.P(C) NO.12361 OF 2015

In the matter of an application under Articles 226 and 227 of the Constitution of India.

AFR Malay Kar ..... Petitioner

-Versus-

Union of India & Ors. ..... Opp. Parties

For petitioner : Mr. R.P. Kar, Sr. Advocate along with M/s. A.K. Dash and S.S. Mohapatra, Advocates

For opp. Parties : Mr. S.C. Mohanty, Sr. Standing Counsel, Income Tax Department [O.Ps. No.1-5]

P R E S E N T:

THE HONOURABLE DR. JUSTICE B.R.SARANGI
AND
THE HONOURABLE MR. JUSTICE G. SATAPATHY

DECIDED ON : 03.05.2024

DR. B.R. SARANGI,J. The petitioner, by means of this writ petition, challenges inaction of opposite party no.4 in granting credit of the tax deducted at source amounting to Rs.2,68,733/- under Section 143(1)(c) of the Income Tax Act, 1961 for the assessment year 2013-14.

2. The factual matrix of the case, in brief, is that the petitioner, being a salaried employee, is an assessee under the Income Tax Act, 1961 (for short "I.T. Act"). He had been filing his return of income with opposite party no.4 regularly. For the assessment year 2013-14, vide acknowledgement no. 682834840260713 dated 26.07.2013, he filed the return of income electronically. During the period April, 2012 till October, 2012, the petitioner was employed under opposite party no.6-M/s. Corporate Ispat alloys Ltd. and received gross salary of Rs.25,39,766/-, out of which a sum of Rs.5,90,112/- was deducted as tax at source under Section 192 of the I.T. Act. Upon repeated request, opposite party no.6 did not issue Form 16 for the assessment year 2013-14.

2.1. Form 26AS drawn from the Income Tax Department's website reflects a sum of Rs.3,21,379/- was deducted and deposited by opposite party no.6. There was a difference of Rs.2,68,733/- in between the tax deducted by opposite party no.6 and the amount reflected in Form 26AS. Upon processing of the return of income, opposite party no.4 issued intimation under

Section 143(1) of the I.T. Act on 26.07.2014 without taking into account TDS of Rs.2,68,733/- deducted by opposite party no.6 and while issuing such intimation, he also charged interest under Section 234B and 234C of the I.T. Act amounting to Rs.55,417/- for shortfall in payment of prepaid taxes.

2.2. Upon receipt of the intimation from opposite party no.4, the petitioner sent letter dated 05.08.2014 addressing to the Managing Director, M/s. Corporate Ispat Alloys Ltd.-opposite party no.6 for mis-match of tax deducted under Section 192 of the I.T. Act. Thereafter, he also sent letter dated 12.08.2014 to the Commissioner of Income Tax (TDS), Patna for initiation of appropriate action against the deductor/employer, i.e., opposite party no.6.

2.3. As per the provision contained in Section 143(1)(c) of the I.T. Act, opposite party no.4 is under legal obligation to take into account the tax deducted at source, tax collected at source, advance tax, etc. In spite of communication being made to the Commissioner of Income Tax (TDS), Patna on 12.08.2014, the petitioner

did not receive any communication with regard to the steps taken by the very same authority. Therefore, there was inaction by opposite party no.4 in granting credit of tax amounting to Rs.2,68,733/- deducted at source by the deductor/employer during the assessment year 2013-14 along with interest of Rs.55,417/- levied under Section 234B and 234C of the I.T. Act in total determined the amount of Rs.3,24,150/- under Section 143(1)(c) of the I.T. Act. Hence, this writ petition.

3. Mr. R.P. Kar, learned Senior Counsel appearing along with Mr. A.K. Dash, learned counsel for the petitioner vehemently contended that since the tax has been deducted at source by the deductor-opposite party no.6 under Section 192 of the I.T. Act during the assessment year 2013-14, so far as petitioner is concerned in PAN-AHNPK0207H for the period from April 2012 to October 2012, a total amount of Rs. 5,90,112/-, the petitioner is entitled to get credit of tax deducted at source of the entire amount. He has also made reference to the salary statement, wherein the income tax deduction has been shown at source

containing at page-12 to 18 of the brief. Therefore, the tax having been deducted at source by the deductor, obligation casts on the deductor to transmit the amount to the Income Tax authority as against gross salary of 25,39,766/-. It is further contended that on the basis of Form 26AS, drawn from the Income Tax Department website, it is seen that Rs.3,21,379/- was deducted and deposited by the deductor-opposite party no.6. Thereby, there is difference of Rs.2,68,733/- in between the tax deducted by opposite party no.6 and the amount reflected in Form 26AS. It is contended that even if tax has been deducted at source by the deductor and a part of the amount has not been transmitted to the Income Tax Department, the petitioner is not held responsible for that. For inaction of the deductor in transmitting the amount, the assessee has been put to difficulty by not giving credit of tax deducted amounting to Rs.2,68,733/- which also carries interest of Rs.55,417/- under Section 234B and 234C of the I.T. Act for shortfall of prepaid taxes. It is further contended that Section 205 of the I.T. Act specifically provides bar against direct demand on assessee and the same has been clarified by the Central

Board of Direct Taxes (CBDT), vide circular dated 01.06.2015, and in the office memorandum issued on 11.03.2015. Therefore, necessary compliance has to be made thereof and without doing so, demand raised under Annexure-4 amounting to Rs.3,24,149 for the assessment year 2013-14 cannot be sustained in the eye of law. To substantiate his contentions, he has relied upon ***Rakesh Kumar Gupta v. Union of India***, (2015) 276 CTR (All) 379 : (2014) 365 ITR 143 (All); ***Kartik Vijaysinh Sonavane v. Deputy Commissioner of Income Tax, Circle-8***, (2021) 132 taxmann.com 293 (Gujarat) : (2022) 440 ITR 11 (Gujarat) and ***Milan Arvindbhai Patel v. Assistant Commissioner of Income Tax***, (2023) 149 taxmann. Com 190 (Gujarat).

4. Mr. S.C. Mohanty, learned Senior Standing Counsel appearing for the Income Tax Department vehemently contended that the petitioner-assessee filed his return for the assessment year 2013-14 in ITR-1, vide acknowledgement number. 682834840260713 dated 26.07.2013 with total assessed income of Rs.59,75,009/- and total tax and interest payable of Rs.

16,57,158/-. The assessee has claimed TDS of Rs. 13,12,938/- and Self Assessment Tax of Rs.3,44,226/- as taxes paid in his return of income. The return of the assessee for the assessment year 2013-14 was processed under Section 143(1) of the I.T. Act on 26.07.2014 raising a demand of Rs.3,24,150/- which includes interest under Section 234B and 234C of the Act owing to TDS mismatch of Rs. 2,68,733/- from the deductor-M/s Corporate Ispat Alloys Limited (TAN-RCHCO1143C). On verification of the documents, it is found that the petitioner was employed under the deductor-M/s Corporate Ispat Alloys Limited during the Finance Year 2012-13. The assessee received gross salary of Rs.25,39,766/- from the deductor during the period under consideration, out of which a sum of Rs.5,90,112/- was deducted at source as income tax under Section 192 of the I.T. Act. However, only TDS of Rs.3,21,379/- is getting reflected in the Form 26AS of the assessee for assessment year 2013-14 out of total TDS claim of Rs.5,90,112/- in respect of the TAN-RCHC01143C of the deductor-M/s Corporate Ispat Alloys Limited. This has resulted in TDS mismatch of

Rs.2,68,733/- and the demand of Rs.3,24,150/- thereon. It is further contended that as per provisions contained in Section 200 of the I.T. Act, it is the duty of the person deducting tax to pay within the prescribed time period to the credit of the Central Government or as the Board directs. As such, the liability of depositing the tax deducted from the salary of the employee within prescribed time period squarely lies with the deductor (in the instant case, M/s Corporate Ispat Alloys Limited). Therefore, it is clearly evident that there is failure on the part of M/s Corporate Ispat Private Ltd. to deposit the entire TDS of Rs.5,90,112/- deducted from the salary of the petitioner for the Financial Year 2012-13. It is further contended that the deductor upon failure to pay to the credit of Central Government, the tax so deducted is the jurisdictional Assessing Officer (TDS). In the instant case, the deductor, who failed to pay to the Central Government the tax deducted amounting to Rs.2,68,733/- is M/s Corporate Ispat Alloys Limited. It is further contended that on verification from the database, the jurisdictional Assessing Officer (TDS) of the defaulting deductor is DCIT/ACIT, TDS Circle,

Ranchi. Therefore, the grievance made by the petitioner under Annexure-6 has to be taken into consideration by the very same authority at Ranchi and, more so, it is contended that the issue has been intimated to the DCIT/ACIT, TDS Circle, Ranchi with copy to the CIT (TDS), Patna, vide office letter no.5856 dated 15.02.2023, to take appropriate action in the instant case. It is further contended that though counter affidavit has been filed, what steps have been taken by the CIT (TDS), Patna, learned Senior Standing Counsel appearing for the Income Tax Department has not received any instructions, although in the meantime more than one year has elapsed.

5. This Court heard Mr. R.P. Kar, learned Senior Counsel along with Mr. A.K. Dash, learned counsel appearing for the petitioner and Mr. S.C. Mohanty, learned Senior Standing Counsel appearing for the Income Tax Department in hybrid mode. Pleadings have been exchanged between the parties and with the consent of learned counsel appearing for the parties, the

writ petition is being disposed of finally at the stage of admission.

6. On the basis of the factual matrix, as discussed above, the only consideration is left to be decided with regard to difficulty faced by the assessee (tax payer) relating to the credit of tax deducted at source (TDS) which has been paid by the deductor. But, a part of the same has been transmitted to the Central Government, whereas a part of the same has not been transmitted by the deductor. Therefore, the Court found that a less percentage of the cases where the asessee is entitled to be given to the credit of TDS which has been deducted by the deductor, but has not been given credit by income tax on account of the fact that TDS has not been reflected in Form 26AS for various reasons. Obviously, there are different grounds and one of such grounds is that where the deductor failed to upload the true particulars of TDS, which has been deducted, as a result of which, the assessee was not given credit of tax paid. It has also been brought to the notice of this Court that there are cases where the details uploaded by the

deductor and the details furnished by the assessee in income tax returns were mismatched, on that count credit was not given to the assessee. Due to such mismatch, the assessee is required to approach the Income Tax authority for rectification of their earlier intimation and based on the character entries and pray for refund of TDS, but the same is not attended to, which has happened in the present case. It has been brought to the notice of this Court by the Department that these problems are apparent, real and enormous and has escalated because of centralized computerization and problem associate with incorrect/wrong data which was uploaded by the tax deductor. Therefore, the issue of not giving credit of the TDS deducted by the deductor is one of the general governance, failure of administration, fairness and arbitrariness.

7. While entertaining this writ petition, this Court directed the learned counsel for the Income Tax Department to file affidavit as to what step has been initiated against the employer for non-depositing of the

tax collected and deducted at source from the salary of the petitioner. In compliance thereof, the Department has not filed affidavit. However, on 15.12.2022 this Court protected the interest of the petitioner by passing interim order to the following effect:

> *"Till the next date of hearing, no coercive steps shall be taken against the petitioner."*

8. Section 205 of the Income Tax Act reads as follows:-

> *"205. 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."*

In view of the aforementioned provision, it is made clear that the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income.

9. There is no dispute before this Court that tax has not been deducted by the deductor at source of the assessee. To mitigate such situation, the CBDT, vide clause-2 of its circular dated 01.06.2015, envisaged as follows:

> *"2. As per Section 199 of the Act credit of Tax Deducted at Source given to the person only if it is paid to the Central government Account. However, as 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 provision 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."*

10. Referring to such circular dated 01.06.2015, the CBDT also issued office memorandum on 11.03.2016, paragraph-3 whereof reads as follows:

> *"3. In view of the above, the Board hereby reiterated the instructions contained in its letter dated 1-6-2015 and directs the assessing officers not to enforce demands created on account of mismatch of credit due to non-payment of TDS amount to the credit of the Government by the deductor. These instructions may be brought to the notice of all assessing officers in your Region for compliance."*

Needless to say both the circular and the office memorandum have been issued in consonance with the provisions contained in Section 205 of the I.T. Act. In the office memorandum dated 11.03.2016, it has been mentioned that the Board had issued directions to the field officers that in case of an assessee whose tax has been deducted at source but not deposited to the Government's account by the deductor, the deductee

assessee shall not be called upon to pay the demand to the extent tax has been deducted from his income. It was further specified that Section 205 of the I.T. Act puts a bar on direct demand against the assessee in such cases and the demand on account of tax credit mismatch in such situations cannot be enforced coercively.

11. In ***Taylor v. Taylor***, (1876) 1 Ch D 426, it was laid down that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden. This doctrine has often been applied to Courts.

Lord Roche in ***Nazir Ahmad v. King Emperor***, AIR 1936 PC 253 followed the aforesaid principle. Subsequently, the said principle has been well recognized by the apex Court and is holding the field till today, as would be evident from ***State of Uttar Pradesh v. Singhara Singh***, AIR 1964 SC 358; ***Chandra Kishore Jha v. Mahabir Prasad***, AIR 1999 SC 3558, ***Babu Verghese v. Bar Council of Kerala***, (1999) 3 SCC

422; ***Dhananjay Reddy v. State of Karnataka***, AIR 2001 SC 1512; ***Gujurat Urja Vikas Nigam Ltd. v. Essar Power Ltd.,*** AIR 2008 SC 1921; ***Ram Deen Maurya v. State of U.P.,*** (2009) 6 SCC 735 and ***Zuari Cement Limited v. Regional Director, Employes' State Insurance Corporation, Hyderabad and others***, (2015) 7 SCC 690. The said principle has also been referred by this Court in the case of ***Subash Chandra Nayak v. Union of India***, 2016 (I) OLR 922; ***Rudra Prasad Sarangi v. State of Orissa***, 2021 (I) OLR 844; ***Bamadev Sahoo v. State of Orissa***, 132 (2021) CLT 927: 2021 (Supp.) OLR 674; and ***Raj Kishor Deo v. State of Odisha***, 2022 (II) OLR 415.

12. Section 205 of the I.T. Act read with CBDT circular, referred to above, being statutory one, the said provision has to be adhered to in letter and spirit and to give effect to such provision, CBDT circular was issued on 01.06.2015 and the office memorandum was issued on 11.03.2016. Therefore, for tax credit mismatch cannot be enforced coercively against the petitioner-assessee.

13. In ***Rakesh Kumar Gupta*** (supra), the High Court of Allahabad held in paragraphs-12, 14 and 15 as follows:

> *"12. The petitioner has suffered a tax deduction at source but has not been given due credit in spite of the fact that he has been issued a TDS certificate by a Government department. There is a presumption that the deductor has deposited the TDS amount in the Government account especially when the deductor is a Government department. By denying the benefit of TDS to the petitioner because of the fault of the deductor causes not only harassment and inconvenience but also makes the assessee feel cheated. There is no fault on the part of the petitioner. The fault, if any, lay with the deductor. In the instant case, nothing had been indicated that the fault lay with the petitioner in furnishing false details.*
>
> *Xxx xxx xxx*
>
> *14. Further, section 243 relates to payment of interest on delayed refund. For facility, the said provision is extracted hereunder:*
>
> *243(1) If the Assessing Officer does not grant the refund,--*
>
> *(a) In any case where the total income of the assessee does not consist solely of income from interest on securities or dividends, within three months from the end of the month in which the total income is determined under this Act, and*
>
> *(b) In any other case, within three months from the end of the month in which the claim for refund is made under this Chapter, the Central Government shall pay the assessee simple interest at fifteen percent per annum on the amount directed to be refunded from the date immediately following the expiry of*

the period of three month aforesaid to the date of the order granting the refund.

Explanation:-If the delay in granting the refund within the period of the three months aforesaid is attributed to the assessee, whether wholly or in part, the period of the delay attributable to him shall be excluded from the period for which interest is payable.

2) Where any question arises as to the period to be excluded for the purposes of calculation of interest under the provisions of this section, such question shall be determined by the Chief Commissioner or Commissioner whose decision shall be final.
3) The provisions of this section shall not apply in respect of any assessment for the assessment year commencing on the 1st day of April, 1989, or any subsequent assessment years.

15. In the light of the aforesaid, we find from the perusal of the counter-affidavit, the respondents have denied refunding the TDS on the ground that the refund that would only be granted when the TDS matches with the details mentioned in Form 26AS. Since the mismatching is not attributable to the assessee and the fault solely lay with the deductor, we find that a case has been made out for grant of a mandamus for refund of the TDS amount. The petitioner has also made out a case for payment of interest since we find that the delay in refunding the amount was attributable solely with the Income-Tax Department and there is no fault on the part of the assessee."

Thereby, writ of mandamus was issued commanding the opposite party to refund an amount of Rs.1,88,631/- along with interest as per the law within a period of three weeks from the date of the production of a certified copy of the order.

14. Similarly, in ***Kartik Vijaysinh Sonavane*** and ***Milan Arvindbhai Patel*** (Supra), Gujarat High Court came to a conclusion that the employer, which had deducted tax at source from the salary of its employee-assessee but had not deposited the amount to the Central Government's account, the assessing officer would not deny the benefit of tax deducted at source by the employer to assessee and shall give credit of TDS amount to him.

15. The facts and law, as discussed above, are directly applicable to the present case and in view of the provisions contained in Section 205 of the I.T. Act, which provides that where tax is deductible at the source the assessee shall not be called upon to pay the tax himself to the extent to which tax has been deducted from that income and its applicability is not depending upon the credit for tax being given under Section 199 of the I.T. Act. Thereby, the department shall not deny the benefit of tax deducted at source by the employer during the relevant financial years to the petitioner. The credit of the tax shall be given to the petitioner and if in the

interregnum, any recovery or adjustment is made by the department, the petitioner shall be entitled to the refund, with the statutory interest, within eight weeks from the date of receipt of the copy of this judgment.

16. In the result, therefore, the writ petition is allowed. But, however, in the facts and circumstances of the case, there shall be no order as to costs.

(DR. B.R. SARANGI)
JUDGE

G. SATAPATHY, J. I agree.

(G. SATAPATHY)
JUDGE

Orissa High Court, Cuttack
The 3rd May, 2024, Alok