

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "SMC", MUMBAI**

**BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER
AND
SHRI AMARJIT SINGH, JUDICIAL MEMBER**

**ITA No. 499/MUM/2021
Assessment Year: 2017-18**

Purusottam Lenka, C-603, Sanskrut Apartment, Raj Hans Cinema, Dumas Road, Surat - 395007 PAN: AAMPL1047J	Vs.	Dy. Commissioner of Income Tax, Central Circle 1(2), Aayakar Bhavan, M.K. Road, Mumbai - 400020
(Appellant)		(Respondent)

Assessee by : Suresh Kabra (AR)

Revenue by : Bhumika Patel (DR)

Date of Hearing : 29/11/2021
Date of Pronouncement: 02/12/2021

ORDER

PER OM PRAKASH KANT, AM

This appeal by the assessee is directed against order dated 25.01.2021 passed by Ld. Commissioner of Income-Tax (Appeals)-47, Mumbai (for short the Ld. CIT(A), for the assessment year 2017-18, raising following grounds.

1. *"The Ld. CIT(A) has erred on the facts of the case in law by not allowing credit of TDS deducted by the employer but not deposited to Government Account.*
- 2.1 *The Credit for TDS Rs. 98000/- may kindly be allowed.*
- 2.2 *Personal hearing may be granted.*
- 2.3 *Any other relief that your honours may deem fit may be granted.*
3. *The assessee craves leave to add, amend, modify alter or delete any of the grounds at the time of hearing."*

2. Briefly stated the facts of the case are that the return of income filed by the assessee was processed in terms of section 143(1) of the Income Tax Act, 1961 (in short the Act) by the Central Processing Centre (CPC), Bangalore. In the processing order, the assessee was denied credit of tax deducted at source (TDS) of Rs. 98,000/- on salary income. The employer of the assessee M/s ABG Shipyards Ltd. failed to deposit the TDS into the Government account and file relevant TDS returns and therefore, credit of said TDS has been denied by the CPC. The Ld. CIT(A) adjudicated the issue with directions as under:-

“7. As stated above, the assessee could not be given credit of TDS of 98000/- by CPC because his employer has failed to credit the TDS to the Government account and failed to file relevant TDS returns. Consequently, this amount had not been reflected in the Form no. 26AS and therefore, CPC was not in a position to give credit to the assessee, resulting into demand in the hands of the assessee. While the assessee is not responsible for this situation, which has been entirely created by his employer. However, the credit of TDS to him could not be given on the basis of salary slips alone. In the circumstances, the assessee is advised to approach the TDS Authorities i.e. [ITO(TDS) / CIT(TDS), Surat] for appropriate action against ABG Shipyards Ltd., the erring company. The Assessing Officer is also advised to write to the ITO(TDS) / CIT(TDS) for redressal of grievance of the assessee. Till such times this grievance is addressed, the Assessing Officer is advised not to press recovery of this demand, because from the details submitted by the assessee, TDS has apparently been done by the employer company.

7.1 In view of the above discussion, no relief could be granted to the assessee regarding allowing credit of the TDS amount at this stage. Both the assessee and the Assessing Officer are advised to take up necessary steps with the concerned ITO/CIT (TDS) for pressing upon the company to pay the TDS amount to the Government account and file TDS return for the same, by which this problem will get automatically solved.

7.2 As regards various case laws relied upon by the assessee, it may be mentioned that they relate to collection of the outstanding demand

on account of non credit of TDS and do not address the issue of non credit of TDS. As has been held in the forgoing paras, the Assessing Officer is advised not to press for collection of outstanding demand on account of non credit of TDS till the matter gets solved by the TDS authorities.

3. We have heard the rival submissions of the parties and perused the relevant materials on record. The Ld. CIT(A) has held that credit of TDS could not be given by the Assessing Officer (AO) merely on the basis of salary slips alone and therefore, he advised the assessee to approach the TDS authorities for appropriate action against ABG Shipyards Ltd. (the employer). Thus, according to the Ld.CIT(A) the fact of deposit of TDS cannot be verified on the basis of salary slips furnished by the assessee. However, in our opinion, the assessee has filed documents available with him to support that tax was deducted by the employer. The employer did not provide any other document including Form No. 16 prescribed under Income Tax Rules, 1962. The assessee could not be held at fault for non action on the part of employer and denied credit of said amount of TDS. We are of the view that once the assessee has filed the evidences available with him to substantiate deduction of tax at source, it was the onus of the Departmental Authorities to verify the claim of the assessee and allow the credit of TDS. The Ld. Counsel of the assessee has relied upon the decision of the Hon'ble Gujarat High Court in the case of Kartik Vijaysinh Sonavane vs. Deputy Commissioner of Income Tax, Civil Appeal No. 6193 of 2021 wherein Hon'ble High Court has held as under:-

"7. The factual matrix presented before this Court has not been disputed. It is also not being disputed that the case is no longer res integra and is covered by the decision of this very Court rendered in case of Devarsh Pravinbhai Patel vs. Assistant Commissioner of

Income Tax Circle 5(1)(1) [SCA No. 12965/2018 with SCA No. 12966/2018, decided on 24.09.2018] where too, the petitioner was an employee of the Kingfisher Airlines and worked as a pilot. In his case also the TDS on the salary made to the petitioner had not been deposited. It is only when the department raised the tax demand with interest and initiated the actions of the recovery that this Court was approached. Relying on the decision of the Bombay High Court rendered in case of Assistant Commissioner of Income Tax and Others vs. Om Prakash Gattani [(2000) 242 ITR 638], this Court allowed the same. Vital would be to reproduce the relevant findings and observations.

“4. The issue is no longer res integra. The Division Bench of this Court in case of Sumit Devendra Rajani (Supra) examined the statutory provisions and in particular Section 205 of the Income-tax Act, 1961. The Court concurred with the view of the Bombay High Court in case of Asst. CIT VS. Om Prakash Gattani, reported in (2000) 242 ITR 638 and observed as under –

“10. We are in complete agreement with the view taken by the Bombay High Court and Gauhati High Court. Applying the aforesaid two decisions of the Bombay High Court as well as Gauhati High Court, the facts of the case on hand and even considering Section 205 of the Act action of the respondent in not giving the credit of the tax deducted at source for which form no.16 A have been produced by the assessee – deductee and consequently impugned demand notice issued under Section 221(1) of the Act cannot be sustained. Concerned respondent therefore, is required to be directed to give credit of tax deducted at source to the assessee deductee of the amount for which form no.16 A have been produced.

11. In view of the above and for the reasons stated petition succeeds. It is held that the petitioner assessee deductee is entitled to credit of the tax deducted at source with respect to amount of TDS for which Form No.16A issued by the employer deductor – M/s. Amar Remedies Limited has been produced and consequently department is directed to give credit of tax deducted at source to the petitioner assessee – deductee to the extent form no.16 A issued by the deductor have been issued. Consequently, the impugned demand notice dated 6.1.2012 (Annexure D) is quashed and set aside. However, it is clarified and observed that if the department is of the opinion deductor has not deposited the said amount of tax deducted at source, it will always been open for the department to recover the same from the deductor. Rule is made absolutely to the aforesaid extent. In the facts and circumstances of the case, there shall be no order as to costs.”

5. Facts in both case are very similar. Under the circumstances, by allowing these petitions we hold that the Department cannot deny the

benefit of tax deducted at source by the employer of the petitioner during the relevant financial years. Credit of such tax would be given to the petitioner for the respective years. If there has been any recovery or adjustment out of the refunds of the later years, the same shall be returned to the petitioner with statutory interest.”

8. In **case of Om Prakash Gattani (supra)** Gauhati High Court was dealing with the TDS not deposited of prize money payable to the petitioner. It held and observed thus: –

“13. From a perusal of the provisions quoted above relating to the deduction of tax at source in the matters relating to prize money of lotteries, it is evident that the person responsible to make the payment to the assessee is under the statutory obligation to deduct the amount at source. After deduction of the amount he is required to deposit the same to the credit of the Central Government and to issue a certificate of deduction. So far as credit for the amount deducted is concerned, it is to be given on the deposit being made to the credit of the Central Government on production of a certificate furnished under Section 203 of the Income-tax Act. On payment of the amount to the credit of the Central Government, it would be treated as payment of tax.

14. So far the assessee is concerned, he is not supposed to do anything in the whole transaction except that he is to accept the payment of the reduced amount from which is deducted income-tax at source. The responsibility to deposit the amount deducted at source as tax is that of the person who is responsible to deduct the tax at source. On the amount being deducted the assessee only gets a certificate to that effect by the person responsible to deduct the tax. In a case where the amount has been deducted by the person responsible to deduct the amount under the statutory provisions, the assessee has no control over the matter. In case of default in making over the amount to the account of the Central Government, it is obviously the person responsible to deduct or the person who has made the deduction who is held responsible for the same. The responsibility of such person is to the extent that he has to be deemed to be an assessee in default in respect of the tax. He may be deemed to be an assessee in default not only in cases where after deduction he does not make over the amount to the Central Government but also in cases where there is failure on his part to deduct the amount at source. This responsibility has been fastened upon him under Section 201 of the Income-tax Act. It is, of course, without prejudice to any other consequences which he or it may incur. Presently we are not concerned with the case where the person responsible to make the deductions has not deducted the amount at all. It may or may not fall in a different category from one where the amount has been deducted and not made over to the Central Government. We are concerned with the latter category of cases. As indicated earlier, on the facts it is nobody's case that the

amount was actually not deducted at source by Chandra Agencies. What seems to be in dispute is the deposit of the said amount in the account of the Central Government. The Income-tax Department seems to have made enquiries about the exact date of payment to the Central Government which Chandra Agencies could not furnish on the ground that the papers were forwarded to the chairman of Vaibhavshali Bumper. In such a category of cases we feel that the amount of tax can be recovered by the Income-tax Department treating the person responsible to deduct tax at source as an assessee in default in respect of the tax. It would not be possible to proceed to recover the amount of tax from the assessee. The assessee cannot be doubly saddled with the tax liability. Deduction of tax at source is only one of the modes of recovery of tax.. Once this mode is adopted and by virtue of the statutory provisions the person responsible to deduct the tax at source deducts the amount, only that mode should be pursued for the purpose of recovery of tax liability and the assessee should not be subjected to other modes of recovery of tax by recovering the amount once again to satisfy the tax liability. It is, therefore, provided under Section 201 of the Income-tax Act that the person responsible to deduct the tax at source would be deemed to be an assessee in default in case he deducts the amount and fails to deposit it in the Government treasury. As observed earlier, the assessee has no control over such person who is responsible to deduct the income-tax at source, but fails to deposit the same in the Government treasury. In this light of the matter, in our view, the notices issued under Section 226(3) of the Income-tax Act to the bankers of the petitioner-respondent to satisfy the tax liability from the bank account of the petitioner-respondent are illegal. It is not that the Income-tax Department was helpless in the matter. The person responsible to deduct the tax at source would move into the shoes of the assessee and he would be deemed to be an assessee in default. Whatever process or coercive measures are permissible under the law would only be taken against such person and not the assessee.

15. However, the position as indicated above would not mean that mere deduction of the tax amount at source would amount to total discharge of the tax liability so long as the amount deducted is not deposited in the coffers of the Central Government. It is for this reason Section 199 of the Income-tax Act makes it clear that credit for tax deducted would be given when the amount is deducted and paid to the Central Government and a certificate of deduction is produced as furnished under Section 203 of the Income-tax Act. It is obvious that unless the amount is paid to the Central Government, the tax liability is not discharged, nor can it be said that the assessee has made the payment of the tax amount payable to the Government. We find no force in the submission made on behalf of the petitioner-respondent that on mere deduction of the amount at source, credit for tax deducted

must be given and it cannot be withheld even though the person responsible to deduct the tax at source has not made it over to the Central Government. In our view, if that contention is accepted that credit for tax deducted has to be given on mere deduction of the amount at source, in that event, perhaps, there would be no legal justification to treat the person responsible to deduct the amount at source as an assessee in default in respect of the tax. Once credit on account of payment of tax is given, the tax liability will stand discharged. Any step to recover the amount of tax can be taken only in case the tax liability is not discharged and it still subsists. In this view of the matter, Shri K. P. Sarma, learned counsel appearing for the Revenue, has rightly defended the note appended by the Assessing Officer in the order of assessment making it clear that credit for the amount deducted was not being given and that will be given only when evidence as to actual payment of the amount to the Central Government is furnished. But this position would not legally justify initiation of recovery proceedings against the assessee from whose income tax has been deducted at source, but the person responsible to deduct the tax fails to deposit the same in the Government treasury. The statutory scheme evolved to employ this mode of recovery of tax at source also points to the same position and in our view rightly. Otherwise a taxpayer from whose income tax is liable to be deducted at source would be exposed to a great vulnerable position. If some unscrupulous persons responsible to deduct the tax at source, after deducting the amount do not deposit the amount in the Government treasury, such persons should be saddled with the tax liability. Therefore, under Section 201 of the Income-tax Act it has been aptly provided that the person responsible to deduct the tax would be deemed to be an assessee in default so that he can be proceeded against for recovery of the amount instead of the assessee who has already parted with the amount, but due to some commission or omission on the part of the person responsible to deduct the amount at source over whose activity he has no control, he may not be subjected to double payment of tax and brunt of arduous recovery proceeding. The provisions as contained in Section 201 of the Act provide a kind of protection to the assessee where tax liability as standing against him is not yet discharged and credit for the amount deducted cannot be given in terms of Section 199 of the Income-tax Act.

16. A perusal of Section 205 of the Income-tax Act clarifies the position where it provides that where 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 that income. What is noticeable in this provision is that its applicability is not dependent upon the credit for tax deducted being given under Section 199 of the Income-tax Act. What is necessary for applicability of this provision is that the amount has been deducted from the income. In case where the amount has

been deducted but not paid to the Central Government that eventuality is taken care of by Section 201 of the Income-tax Act. Learned counsel for the appellant could not show that under the law it may be permissible to proceed against the assessee even after deduction of the tax at source, nor learned counsel for the petitioner-respondent could persuade us to hold that merely by deduction of tax at source, credit for deduction of tax at source has to be given even though the amount may not have been made over to the Government treasury. The reason for this has already been explained by us in the discussion held in the earlier part of this judgment as the mere deduction of tax at source would not close the chapter of tax liability unless it is deposited in the Government treasury.”

9. The facts being almost identical, no separate reasoning are desirable and the petition is being ALLOWED. The department is precluded from denying the benefit of the tax deducted at source by the employer during the relevant financial years to the petitioner.

10. It is given to understand by learned Senior Standing Counsel Mr. Varun Patel that the proceedings have been initiated against the employer.

11. The credit of the tax shall be given to the petitioner and if in the interregnum any recovery or adjustment is made by the respondent, the petitioner shall be entitled to the refund of the same, with the statutory interest, within eight (8) weeks from the date of receipt of copy of this order.”

4. In view of the decision of the Hon'ble High Court (supra), we feel it appropriate to restore this issue back to the file of jurisdictional AO for verification from the books of account and other records of the employer i.e. M/s ABG Shipyards Ltd. about the fact the tax at source was deducted on the salary paid to the assessee and after verification, if it is found that tax has been deducted by the employer, then the Ld. AO shall allow credit of said amount of TDS which has been deducted from the salary of the assessee irrespective of the fact whether it has been deposited in Govt. account or not.. The appeal of the assessee is accordingly allowed for statistical purposes.

5. In the result, appeal of the assessee is allowed for statistical purposes.

Order pronounced in the open court on 2nd December, 2021.

Sd/-

(AMARJIT SINGH)
JUDICIAL MEMBER

Sd/-

(OM PRAKASH KANT)
ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated: 02/12/2021

Alindra, PS

आदेश प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त (अपील) / The CIT(A)-
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

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आयकर अपीलीय अधिकरण, मुंबई / **ITAT, Mumbai**